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Stigma Damages: Defining the Appropriate Balance Between Full Compensation and Reasonable Certainty

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STIGMA DAMAGES: DEFINING THE APPROPRIATE BALANCE BETWEEN FULL COMPENSATION AND REASONABLE CERTAINTY

I. INTRODUCTION

Consider the following scenario: You own property situated near a gas station. Some of the gas station's underground storage tanks leak, dispersing gasoline on and around your property. The gas station owner begins remediation efforts, and eventually all of the gasoline is removed from your property. However, despite full remediation, you and your neighbors have experienced a diminution in property value. Buyers are afraid to purchase your formerly contaminated property, and this fear has reduced the value of your property. Your property has been stigmatized.

In the past fifteen years, plaintiffs have increasingly sought to recover damages for the diminution in their property value caused by stigma.[1] While the vast majority of stigma damage claims arise from contamination cases based on common law trespass or nuisance theories, courts have addressed the issue of stigma damages in cases regarding CERCLA,[2] defective construction,[3] termite damage,[4] and deceptive trade practices.[5] The variety of claims, along

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1. *See* Alex Geisinger, *Nothing but Fear Itself: A Social-Psychological Model of Stigma Harm and Its Legal Implications*, 76 NEB. L. REV. 452, 457 (1997).

2. Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9675 (1994); *see* Scribner v. Summers, 138 F.3d 471, 473 (2d Cir. 1998) (noting uncertainty of New York law on stigma damage and expressing desire to certify question to state court); *In re* Paoli R.R. Yard PCB Litig., 35 F.3d 717, 798 (3d Cir. 1994) (formulating three-part test for recovery of stigma damages); Berry v. Armstrong Rubber Co., 989 F.2d 822, 829 (5th Cir. 1993) (denying recovery of stigma damages in the absence of physical harm to the property); Rhodes v. County of Darlington, 833 F. Supp. 1163, 1180 (D.S.C. 1992) (holding that property damage is not a "response cost" under CERCLA).

3. *See* Aas v. Superior Court, 75 Cal. Rptr. 2d 581, 604-05 (Ct. App. 1998) (holding petitioner's claim for stigma damages generic and speculative where petitioner offered evidence that homes with construction defects generally suffer a 2.8% decrease in value); McAlonan v. United States Home Corp., 724 P.2d 78, 79 (Colo. Ct. App. 1986) (affirming lower court's jury instruction to award damages for "the reasonable cost of repairing the property, together with the decrease in market value, if any, . . . as repaired"); Pelletier v. Pelletier Dev. Co., No. CV 940463671S, 1996 WL 166675, at *5 (Conn. Super. Ct. Mar. 14, 1996) ("[T]he proper measure of damages is cost of repair plus the 'stigma' factor."); Anderson v. Bauer, 681 P.2d 1316, 1324 (Wyo. 1984) (awarding damages for diminution in value caused by public awareness of water damage of the property).

4. *See* Horsch v. Terminix Int'l Co., 865 P.2d 1044, 1049 (Kan. Ct. App. 1993) (affirming lower court's award of damages for diminution in property value based on stigma of termite damage); Tudor Chateau Creole Apts. P'ship v. D.A. Exterminating Co., 691 So. 2d 1259, 1265 (La. Ct. App. 1997) (affirming trial court's award of damages for both cost of repairs and diminution in value and acknowledging that "the total structural damage to the property is unknown" and "must, by law, be passed on to any purchaser"); Terminix Int'l, Inc. v. Lucci, 670 S.W.2d 657, 663-64 (Tex. Ct. App. 1984) (affirming lower court's award of damages for cost of repair and diminution in value based on evidence proving "the difficulty of ascertaining the

with the often uncertain nature of stigma damage, has led to diverse and often confusing jurisprudence. Struggling with the desire to make the plaintiff whole[6] while awarding only those damages that are proven with reasonable certainty,[7] different jurisdictions have fashioned a variety of rules on which to base the award of stigma damages. While most jurisdictions agree that plaintiffs must experience some physical injury to their property before they may recover stigma damages,[8] jurisdictions are divided on whether the injury must be temporary or permanent. South Carolina only recently addressed the issue of permanency in *Yadkin Brick Co. v. Materials Recovery Co.*[9]

Critics argue that stigma damages should not be awarded because they are based on public perceptions, which can change at any time.[10] However, stigmatized property suffers a diminution in value for which the owner should be compensated. The ideal rule for stigma damages must address both of these concerns. This Comment explores the courts' treatment of stigma damages in different jurisdictions, paying particular attention to the conflicting goals of

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extent of the termite damage, the tendency of termites to revive and return to their scene of harm and the general bad reputation of termites to survive and eat more").

5. *See Pelletier*, 1996 WL 166675, at *7 (rejecting deceptive trade practices claim but awarding cost of repair plus "'stigma' factor" for breach of construction contract); Smith v. Levine, 911 S.W.2d 427, 434 (Tex. Ct. App. 1995) (affirming the lower court's award of damages for the stigma attached to a defective foundation in a claim based on the Texas Deceptive Trade Practices Act).

6. *See* RESTATEMENT (SECOND) OF TORTS § 901 cmt. a (1979) ("[T]he law of torts attempts primarily to put an injured person in a position as nearly as possible equivalent to his position prior to the tort.").

7. *See id.* § 912 (providing that an injured party is entitled to damages only if "he establishes by proof the extent of the harm and the amount of money representing adequate compensation with as much certainty as the nature of the tort and the circumstances permit"). The *Second Restatement* further states that "[i]t is desirable . . . that there be definiteness of proof of the amount of damage as far as is reasonably possible." *Id.* at cmt. a.

8. *But see In re* Tutu Wells Contamination Litig., 909 F. Supp. 991, 996-97 (D.V.I. 1995) (holding that Virgin Islands law does not require physical harm to real property in order to recover damages based on nuisance); Acadian Heritage Realty, Inc. v. City of Lafayette, 446 So. 2d 375, 379 (La. Ct. App. 1984) (allowing stigma damage recovery for the mere existence of a landfill operated adjacent to property plaintiffs intended to develop as a subdivision).

9. 339 S.C. 640, 647-48, 529 S.E.2d 764, 768 (Ct. App. 2000).

10. *See* E. Jean Johnson, *Environmental Stigma Damages: Speculative Damages in Environmental Tort Cases*, 15 UCLA J. ENVTL. L. & POL'Y 185, 193-95 (1997) (noting that "a defendant's liability for stigma damages depends solely upon what the public perceives, no matter how inaccurate or unreasonable the perceptions" and attributing public misperception to media coverage and lack of education on environmental matters); *see also* Anthony Vale & Joanna Cline, *Stigma and Property Contamination—Damnum Absque Injuria*, 33 TORT & INS. L.J. 835, 836 (1998) (listing multiple factors that affect the value of stigmatized property such as "the level of fear generated among the public; the prognosis for the site; public perception of the person or entity responsible for [the damage]; the visibility of the problem; and the actual degree of danger . . . implicated by significant contract with a particular parcel"); Eric S. Schlichter, Comment, *Stigma Damages in Environmental Contamination Cases: A Possible Windfall for Plaintiffs?*, 34 HOUS. L. REV. 1125, 1152 (1997) ("The impact of stigma on property values changes 'over time as publicity levels and information flows' shape the public perception of the problem." (citation omitted)).

fully compensating the plaintiff for her injury while only awarding those damages that can be proven with reasonable certainty. Part II examines the two dominant trends the courts have followed in awarding stigma damages. Part III examines the limited treatment of stigma damages in South Carolina. Part IV recommends a rule that South Carolina courts should follow as the growth in stigma damage claims necessitates a more refined holding to manage the opposing goals of full compensation and reasonable certainty.

II. DEFINING THE BOUNDARIES FOR RECOVERY

A. Santa Fe Partnership*: No Recovery in the Absence of Permanent Damage*

Several jurisdictions have addressed the issues of certainty and causation by requiring proof of permanent physical injury before a landowner can recover stigma damages.[11] These jurisdictions have held fast to the traditional damage rule allowing recovery for diminution in value for permanent injury to property and repair costs for temporary injury to property. Unfortunately, stigma damage is difficult to categorize as permanent or temporary. Often, the physical injury to the property is temporary, but the stigma remains even after full remediation. In such a situation, the traditional rule is inflexible and undercompensating.

The California Court of Appeals faced this situation in *Santa Fe Partnership v. ARCO Products Co.*[12] In this case, the property owner, Santa Fe Partnership, appealed the lower court's judgment in favor of ARCO, an oil

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11. *See* Bradley v. Armstrong Rubber Co., 130 F.3d 168, 176 (5th Cir. 1997) ("The requirements of permanent and physical injury to property ensure that this remedy does not open the floodgates of litigation by every property owner who believes that a neighbor's use will injure his property."); Bartleson v. United States, 96 F.3d 1270, 1275 (9th Cir. 1996) ("Damages for diminution in property value due to stigma have been recognized by the California courts in cases of permanent nuisance."); Mehlenbacher v. Akzo Nobel Salt, Inc., 71 F. Supp. 2d 179, 188 (W.D.N.Y. 1999) ("In order to recover damages for diminution in value, . . . property owners must show . . . that their property has been physically damaged, or that their use and enjoyment of their property has been unreasonably interfered with . . . and . . . either that the trespass or nuisance thus created cannot be fully remediated, or that the cost of remediation would exceed the amount by which the value of the property has been diminished."); Rudd v. Electrolux Corp., 982 F. Supp. 355, 372 (M.D.N.C. 1997) (holding that "stigma damages are not permitted unless the nuisance is classified as permanent . . ."); Santa Fe P'ship v. ARCO Prods. Co., 54 Cal. Rptr. 2d 214, 214 (Cal. Ct. App. 1996) (denying recovery for diminution in value based on theory of continuing nuisance); Stevinson v. Deffenbaugh Indus., Inc., 870 S.W.2d 851, 856 (Mo. Ct. App. 1993) (holding that landowner's action for temporary nuisance barred claim for stigma damages, which are available only in an action for permanent nuisance); Yadkin Brick Co. v. Materials Recovery Co., 339 S.C. 640, 647, 529 S.E.2d 764, 768 (Ct. App. 2000) (affirming a directed verdict denying stigma damages because of a failure to show permanent injury to the property).

12. 54 Cal. Rptr. 2d 214, 217 (Ct. App. 1996), *review denied*, 1996 Cal. LEXIS 5727, at *1 (Cal. Oct. 2, 1996).

company.[13] ARCO's underground storage tanks, located adjacent to Santa Fe Partnership's property, leaked gasoline into the soil and groundwater.[14] Testing showed that the leak contaminated Santa Fe Partnership's property.[15] Santa Fe Partnership contracted to sell the contaminated property, but the buyer, upon learning of the contamination, rescinded the contract.[16] Santa Fe Partnership brought suit against ARCO based on theories of continuing trespass and continuing nuisance.[17] "Rather than proceed to trial, the parties stipulated to entry of judgment in ARCO's favor in order to immediately seek review in [the appellate] court to request an extension of the law which would entitle [Santa Fe Partnership] to recover damages for diminution in value on a theory of continuing trespass or nuisance."[18]

In reviewing the case, the appellate court followed the rule expounded by the California Supreme Court holding that "a plaintiff-landowner cannot recover damages for . . . diminution in value, in a case where the nuisance is deemed to be continuing and abatable."[19] The court relied on the California Supreme Court's holding in *Spaulding v. Cameron*[20] that a plaintiff could not recover for depreciation in value for an abatable nuisance, because the "[p]laintiff would obtain a double recovery if she could recover for the depreciation in value and also have the cause of that depreciation removed."[21] The court acknowledged Santa Fe Partnership's argument that while their injury was not permanent, its effects would be realized for a long time.[22] Furthermore, the court agreed that the current state of the law did not adequately address Santa Fe Partnership's condition:

> Appellants acknowledge the current state of California law. However they claim the concept [that] property reverts to its pre-contamination value once the contamination is remediated does not conform to market realities. They claim remediation may take as long as 20 years, or more in some cases. In these situations it is difficult, if not impossible, to sell or secure a loan against the land due to the stigma which attaches to previously contaminated property. They argue this prevents a land speculator or investor from realizing his or

13. *Id.*
14. *Id.* at 214.
15. *Id.* at 216.
16. *Id.*
17. *Id.* Santa Fe Partnership's claims for permanent nuisance and permanent trespass were barred by the statute of limitations. *Id.* at 224. The statute of limitations also barred Santa Fe Partnership's claims for negligence and strict liability. *Id.* at 216.
18. *Santa Fe P'ship*, 54 Cal. Rptr. 2d at 217.
19. *Id.* at 218.
20. 239 P.2d 625 (Cal. 1952).
21. *Id.* at 629.
22. *Santa Fe P'ship*, 54 Cal. Rptr. 2d at 220.

> her profit, and, because investment moneys are locked up in the contaminated property, prevents such persons from using that investment money for other projects. Appellants therefore request this court to "overrule" existing law and allow "stigma" damages as a proper remedy for a continuing nuisance caused by chemical pollution of the land.
>
> We acknowledge the logic and general appeal of this argument.... However, this court does not write on a clean slate.... [W]e are bound to follow and apply the decisions of our highest court, which expressly disallow prospective damages in cases of continuing nuisance.[23]

In the case of an abatable nuisance, the injured party is expected to "bring successive actions for damages until the nuisance has been abated."[24] The California Court of Appeals noted that "[i]t is cumbersome, inefficient and contrary to the goal of efficient legal remedies to bring numerous and successive suits during the period [of contamination]."[25] In denying Santa Fe Partnership's claim for stigma damages, the court admitted that its decision "may appear to be a harsh result."[26] However, the court noted that it was bound by the precedent set by the California Supreme Court.[27] The California Supreme Court denied review.[28]

Had Santa Fe Partnership been able to bring claims for permanent nuisance and permanent trespass, the court most likely would have awarded damages for diminution in value, and the stigma would have been factored in when calculating the amount of damages.[29] While California's decision not to award stigma damages absent permanent physical injury is rigid, the California courts do allow injured landowners some flexibility by allowing them to opt for a permanent nuisance action in the instance that the nuisance, while abatable, will last for an indefinite period.[30] This option was unavailable to Santa Fe Partnership because of the statute of limitations.[31]

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23. *Id.* (footnote omitted).

24. *Id.* at 219 (quoting Phillips v. City of Pasadena, 162 P.2d 625, 626-27 (Cal. 1945)).

25. *Id.* at 223.

26. *Id.* at 224.

27. *Id.*

28. Santa Fe P'ship v. ARCO Prods. Co., 1996 Cal. LEXIS 5727, at *1 (Cal. Oct. 2, 1996).

29. *See* Bartleson v. United States, 96 F.3d 1270, 1276 (9th Cir. 1996) (allowing landowners to opt for a permanent nuisance action where a continuing possibility existed that shells from adjacent military base would land on landowner's property).

30. *See* Spaulding v. Cameron, 239 P.2d 625, 627-28 (Cal. 1952). The *Spaulding* court noted that in some situations, such as with a public utility, the nuisance or trespass is necessary and indefinite. "Accordingly, it was recognized that some types of nuisances should be considered permanent, and in such cases recovery of past and anticipated future damages were [sic] allowed in one action." *Id.* at 627.

31. *Santa Fe P'ship*, 54 Cal. Rptr. 2d at 224.

Several jurisdictions follow California's rule.[32] However, Pennsylvania applies a much more flexible rule, allowing the landowner to recover stigma damages for temporary physical injury to property when there is an ongoing threat of future injury.[33]

B. Paoli: *Stigma Damage Recovery for Temporary Physical Injury and Ongoing Threat of Future Injury*

In re Paoli Railroad Yard PCB Litigation[34] involved suits brought by thirty-eight persons[35] living adjacent to the Paoli Railyard, "a railcar maintenance facility at which polychlorinated biphenyls (PCBs) were used in profusion for over a quarter century."[36] PCBs gradually accumulated in the railyard soil and eventually leaked into the groundwater and soil of nearby residences.[37] The plaintiffs in the case were those identified by the Environmental Protection Agency as having experienced the most severe contamination.[38] "Many of the plaintiffs played in the soil at their homes while growing up, gardened in it, and ate vegetables grown from it. Many also regularly traversed the Yard on foot as a short cut to their destinations."[39] The plaintiffs sought recovery for their physical injuries allegedly caused by exposure to PCBs.[40] Additionally,

> [s]ome plaintiffs . . . brought claims for emotional distress caused by fear of future injury, and for medical monitoring to decrease the likelihood of the future development of serious diseases. Finally, some of the plaintiffs . . . brought claims for the decrease in value to their property caused by the presence of PCBs on the land.[41]

Because of the complexity of the *Paoli* litigation, this Comment will focus only on the plaintiffs' claims for property damage caused by the presence of PCBs on their property.

In the *Paoli* litigation, the plaintiffs' claims for stigma damages were first addressed by the United States District Court for the Eastern District of

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32. *See supra* note 11.

33. *See In re* Paoli R.R. Yard PCB Litig., 35 F.3d 717, 798 (3d Cir. 1994) (formulating three-part test for recovery of stigma damages).

34. 35 F.3d 717 (3d Cir. 1994).

35. *Id.* at 735.

36. *Id.* at 732.

37. *Id.* at 734.

38. *Id.* at 735.

39. *Id.*

40. *In re Paoli R.R. Yard*, 35 F.3d at 735.

41. *Id.*

Pennsylvania, which granted summary judgment for the defendants.[42] The court abided by the traditional rule, holding that "[u]nder Pennsylvania law, the cost of remediating harm to property is the exclusive measure of damages where the harm is temporary and remediable."[43] The court noted that damages for decreased market value are available only when the injury to the property is permanent.[44] Furthermore, the court noted that under Pennsylvania law, "[t]here is a presumption . . . that harm to property is temporary and remediable.... Permanent damage has been found by the Pennsylvania courts in only the most extraordinary situations."[45]

Relying on *Wade v. S.J. Groves & Sons Co.*,[46] the plaintiffs argued that the threat of future harm should be considered a "permanent harm" that would allow recovery for the diminution in market value of their property.[47] While not rejecting *Wade*, the district court held that the plaintiffs "presented no evidence outside the pleadings that any harm has ever been caused to [p]laintiffs' properties from the alleged groundwater contamination or that it poses a future threat of harm."[48] The court rejected the plaintiffs' evidence of stigma damage, holding that "[p]laintiffs have failed to cite any authority which determines that decreases in property values due to mere proximity to a site containing perceived hazardous chemicals is compensable in Pennsylvania."[49] The district court granted summary judgment for the defendants.[50]

The landowners appealed, and the Third Circuit Court of Appeals reversed the lower court's ruling.[51] In its decision, the court of appeals departed from the traditional rule awarding damages only in the face of permanent injury, noting that the "appropriate measure of damages is generally defined as what is necessary to compensate fully the plaintiff."[52]

The court noted that the evidence indicated that even after remediation, a human health hazard would still remain.[53] Thus, the landowners would

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42. *In re* Paoli R.R. Yard PCB Litig., 811 F. Supp. 1071, 1077 (E.D. Pa. 1992), *rev'd*, 35 F.3d 717 (3d Cir. 1994).

43. *Id.* at 1074.

44. *Id.*

45. *Id.* at 1075 (internal citation omitted).

46. 424 A.2d 902, 912 (Pa. Super. Ct. 1981) (affirming trial court's decision to award damages for diminution in value based on permanent change in drainage field on adjoining landowner's property).

47. *In re Paoli R.R. Yard*, 811 F. Supp. at 1076.

48. *Id.*

49. *Id.* at 1076-77.

50. *Id.* at 1077.

51. *In re* Paoli R.R. Yard PCB Litig., 35 F.3d 717, 798 (3d Cir. 1994).

52. *Id.* at 797 (citing Wade v. S.J. Groves & Sons Co., 424 A.2d 902, 911-12 (Pa. Super. Ct. 1981)).

53. *Id.* at 796 ("[T]he EPA's own normal practice of cleaning up property to the point where the risk is 1 in 1,000,000 creates a genuine issue of material fact as to whether a cancer risk of 1 in 100,000 constitutes permanent damage . . . .").

experience an ongoing threat of future injury. In criticizing the traditional rule, the court stated:

> This approach is normally consistent with the view that, when physical damage is temporary, only repair costs are recoverable, because in a perfectly functioning market, fully repaired property will return to its former value. Thus, an award of repair costs will be fully compensatory.... Hence, normally, it is only when property cannot be repaired that courts must award damages for diminution in value in order to fully compensate plaintiffs. However, *the market sometimes fails and repair costs are not fully compensatory.* In such cases . . . plaintiffs should be compensated for their remaining loss. Absent such an approach, plaintiffs are permanently deprived of significant value without any compensation.[54]

The court condensed this analysis into a three-prong test to evaluate whether plaintiffs can recover diminution in property value absent permanent physical injury to their property. The court determined that plaintiffs may recover diminution in value "where (1) defendants have caused some (temporary) physical damage to plaintiffs' property; (2) plaintiffs demonstrate that repair of this damage will not restore the value of the property to its prior level; and (3) plaintiffs show that there is some ongoing risk to their land."[55] The three-prong test addressed the concerns of defendants' amicus, the American Insurance Association, which argued the following:

> [A]llowing a tort for diminution in value would allow thousands of insubstantial and peripheral claims, would often grant recoveries for routine fluctuations in market prices thus generating windfalls, and would increase insurance costs, reduce the availability of insurance, and reduce the availability of funds to compensate those who were actually injured.[56]

The court responded by stating that the newly articulated rule would limit claims by allowing recovery only when some physical harm to the owner's land has occurred.[57] It went on to explain that the requirement of physical harm would preclude recovery in "cases such as the establishment of a group home

54. *Id.* at 797-98 (citing *Wade*, 424 A.2d at 911-12) (emphasis added).
55. *Id.* at 798.
56. *Id.* at 798 n.64.
57. *In re Paoli R.R. Yard*, 35 F.3d at 798.

for the disabled."[58] The court also rejected the floodgate argument noting that "[a]ny risk of an avalanche of litigation . . . will be prevented by the need of plaintiffs to establish causation and to prove that the stigma associated with their land will remain in place after any physical damage . . . has been repaired."[59] With this new damage formulation, the appellate court reversed the district court's grant of summary judgment for the defendants on the stigma damage claims.[60]

The *Paoli* formulation addresses the concerns mentioned by the court in *Santa Fe Partnership*.[61] The *Paoli* court fashioned a rule by synthesizing the traditional awards for permanent and temporary injury. In the case of temporary injury, the landowner must prove that two elements of permanent damage exist.[62] The landowner must prove both that remediation will not restore the property to its prior value and that some ongoing risk to the property exists.[63] The last requirement prevents recovery for misguided public perceptions.[64] That is, the court will award stigma damages only when the stigma is warranted by an ongoing threat.

Paoli's three-pronged rule nicely addresses the contrasting goals of full compensation and reasonable certainty of damages. Furthermore, the rule is more efficient than the traditional rule, which requires that landowners suffering temporary injury must bring successive suits for damages.[65] The *Paoli* approach also conforms to the measure of damages expounded by the *Restatement (Second) of Torts*.[66]

III. SOUTH CAROLINA: ADHERING TO TRADITION

A. The Court's Early Treatment of Stigma Damage Claims

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58. *Id.*

59. *Id.*

60. *Id.* at 798. On remand to the district court, the jury returned a verdict for the defendants on all claims. *In re* Paoli R.R. Yard PCP Litig., 113 F.3d 444, 447 (3d Cir. 1997). The plaintiffs appealed contending that the district court improperly instructed the jurors regarding the stigma damage claims. *Id.* at 462. Specifically, the plaintiffs claimed that the district judge erred in instructing the jurors that they must find "actual damage" to plaintiffs' property before the court could award stigma damages. *Id.* Plaintiffs argued that "actual damages" meant permanent damages. *Id.* at 462-63. The appellate court affirmed the district court, holding that the jury instructions were proper, and that "after two weeks of trial, the jury remained unconvinced of the most basic of plaintiffs' claims." *Id.* at 462-64.

61. 54 Cal. Rptr. 2d 214, 220 (Ct. App. 1996).

62. *In re Paoli R.R. Yard*, 35 F.3d at 798.

63. *Id.*

64. *Id.* at 798 n.64.

65. *See supra* note 24 and accompanying text.

66. RESTATEMENT (SECOND) OF TORTS § 929 cmt. a (1979) ("In some cases the measure of recovery may include an amount for depreciation in market value although there has been no substantial physical harm . . . .").

Stigma damages have received only limited attention from the South Carolina courts. However, the few South Carolina stigma damage cases involving real property follow the traditional approach, awarding diminution in value only when there is permanent physical injury to the property.[67] Interestingly, the South Carolina courts first dealt with stigma damages in cases involving automobile damage.[68] The South Carolina courts were much more willing to award damages for the diminution in value of a wrecked car than for injured real property.

In *Coleman v. Levkoff*[69] the South Carolina Supreme Court was faced with determining the proper amount of damages to award the plaintiff, whose car was damaged due to the defendant's negligence. After stating the traditional measure of damages, the court held that if the repairs do not restore the market value of the property before the injury then the proper amount of damages includes "the difference in the market value of the property immediately before the injury and its market value immediately thereafter, in its condition of partial restoration, together with the reasonable cost of the repairs made and the value of the use of which the owner was deprived . . . ."[70] Thus, the court acknowledged in its formulation of the proper measure of damages that a car loses value after an accident even after the car has been repaired.

In *Newman v. Brown*[71] the court faced another automobile collision case in which stigma damage was the main issue. The automobile owner's appraiser testified about the stigma that attaches to an automobile once it has been in an accident:

> 'A wrecked car is always a wrecked car, regardless of where you carry it or try to trade it in, or anything else, it's a wrecked car.' He further said that he did not want a wrecked car of any kind and if it were his he would trade it [in] unrepaired, as it was worth only the salvage value.[72]

The court cited *Coleman v. Levkoff*[73] as a "well considered case upon the measure of damages to an automobile" and held that the proper measure of

67. *See* Yadkin Brick Co. v. Materials Recovery Co., 339 S.C. 640, 647, 529 S.E.2d 764, 768 (Ct. App. 2000) (rejecting claim for diminution in value because of plaintiff's failure to prove permanent injury to property).

68. *See* Coleman v. Levkoff, 128 S.C. 487, 491, 122 S.E. 875, 876 (1924) (acknowledging that repairs may not restore a car to its pre-accident value); Newman v. Brown, 228 S.C. 472, 477, 90 S.E.2d 649, 652 (1955) (allowing for recovery of repair costs plus any remaining diminution in value); Campbell v. Calvert Fire Ins. Co., 234 S.C. 572, 577, 109 S.E.2d 572, 577 (1959) (holding that where repairs do not fully restore car to its pre-accident value, the owner is entitled to recover the diminution in value).

69. 128 S.C. 487, 122 S.E. 875 (1924).

70. *Id.* at 491, 122 S.E. at 876.

71. 228 S.C. 472, 90 S.E.2d 649 (1955).

72. *Id.* at 475, 90 S.E.2d at 650.

73. 128 S.C. 487, 122 S.E. 875 (1924).

damages was the cost of repairs plus any remaining diminution in value.[74] The court noted that "'[a] new car may be badly damaged and be repaired so as to put it in a sound or good state, and yet be worth much less than before the collision.'"[75]

Similarly, in *Campbell v. Calvert Fire Insurance Co.*,[76] a case involving a collision policy, the court noted that "'repair or replacement of broken or damaged parts'" does not necessarily restore a car to its former condition unless the value of the car after repair is not diminished.[77]

B. The Court Addresses Stigma Damage with Respect to Real Property

In *Gray v. Southern Facilities, Inc.*[78] the South Carolina Supreme Court finally addressed, in a limited way, stigma damages with respect to real property. In *Gray* a property owner brought suit against petroleum plant operators for pumping gasoline into a creek adjacent to the landowner's property.[79] The creek erupted into fire, but did not cause physical damage to the landowner's property.[80] However, a real estate appraiser testified that the property value had diminished ten percent as a result of the fire.[81] The appraiser gave the following testimony:

> "Q. And you believe the property has been damaged because of the fire, is that right?["]
> "A. [I]t does not have any physical damage, actual physical damage to the property but we are speaking of the damage to the resale value to the piece of property.["]
> "Q. Now, if there were no way for petroleum products to get into this stream so there could be another fire there would be no damage would there?["]
> "A. I can't say that for this particular reason: you may abate the possibility of petroleum products going into the stream, but it is another thing to convince the public that this has been done.["]
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> . . .

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74. *Newman*, 228 S.C. at 476-77, 90 S.E.2d at 651-52.

75. *Id.* (quoting Littlejohn v. Elionsky, 36 A.2d 52, 53 (Conn. 1944)); *see also* Adams v. Orr, 260 S.C. 92, 99, 194 S.E.2d 232, 235 (1973) (holding that "the plaintiff was entitled to recover for loss of use of the vehicle and for depreciation, which every wrecked vehicle experiences").

76. 234 S.C. 583, 109 S.E.2d 572 (1959).

77. *Id.* at 591, 109 S.E.2d at 576 (quoting Rossier v. Union Auto Ins. Co., 291 P. 498, 500 (1930).

78. 256 S.C. 558, 183 S.E.2d 438 (1971).

79. *Id.* at 561, 183 S.E.2d at 439.

80. *Id.* at 561-62, 183 S.E.2d at 439.

81. *Id.* at 564, 183 S.E.2d at 440.

"Q. This is really a damage to the reputation of the property, wouldn't you say . . . ?["]
"A. Yes, to a degree, that's correct.["]
. . .
"Q. If you went out there today there would be absolutely no evidence that there had ever been a fire would there?["]
"A. No sir.["]
"Q. So what you are talking about is damage that people have in their minds because of a history of something that has happened?["]
"A. Yes, sir.["]
"Q. And damage through fear that this might happen again?["]
"A. That's about it, yes, sir."[82]

The court noted the general rule that "'injury to the reputation of . . . property has been held not to be a proper element of damages.'"[83] The court commented that only a few courts in other jurisdictions had considered the issue, but that no general rule had been developed.[84] The court declined to establish a rule of its own because "[t]he evidence as to the diminution of market value is, in our view, speculative, not only as to the amount but speculative as to the portion thereof proximately and directly resulting from . . . the respondents."[85] The court decided that the landowner failed to prove proximate cause because other petroleum plants were located in the same area, and because these plants had also occasionally leaked gasoline into the creek.[86] Because the plaintiff failed to prove causation, the court declined to address the stigma damage issue.[87]

In *Yadkin Brick Co. v. Materials Recovery Co.*[88] the South Carolina Court of Appeals took a more definitive stance in addressing stigma damages.[89] In *Yadkin* the owner of a brickyard sued a chemical company that shipped hazardous materials to the brickyard.[90] The brickyard had received permission from North Carolina environmental authorities allowing the brickyard "to incorporate defined proportions of petroleum-contaminated soils into its brick-making process."[91] However, the sludge that the chemical company shipped to

82. *Id.* at 564-65, 183 S.E.2d at 440-41.
83. *Id.* at 569, 183 S.E.2d at 443 (quoting 22 AM. JUR. 2D *Damages* § 136) (omission in original).
84. *Gray*, 256 S.C. at 569-70, 183 S.E.2d at 443.
85. *Id.* at 571, 183 S.E.2d at 444.
86. *Id.* at 570, 183 S.E.2d at 444.
87. *Id.*
88. 339 S.C. 640, 529 S.E.2d 764 (Ct. App. 2000).
89. *Id.* at 646-48, 529 S.E.2d at 767-68.
90. *Id.* at 644, 529 S.E.2d at 766.
91. *Id.*

the brickyard was contaminated with Dowtherm.[92] The brickyard did not have authorization to process or store Dowtherm.[93] The brickyard sued for damages arguing that the presence of Dowtherm diminished the value of the brickyard property.[94] At the time of trial the brickyard had been sold to a third party.[95] The former brickyard owners offered the reduced selling price as evidence of the diminution in value.[96]

However, the South Carolina Court of Appeals held that this evidence did not prove that the buyer "subtracted a certain sum because of the Dowtherm on the property."[97] In affirming the trial court's directed verdict for the chemical company, the South Carolina Court of Appeals relied heavily on *Gray* and adhered to the traditional rule of damages.[98] Quoting *Gray*, the court explained the general rule on damages in South Carolina:

> [I]n case of an injury of a permanent nature to real property . . . the proper measure of damages is the diminution of the market value by reason of th[e] injury, or in other words, the difference between the value of the land before the injury and its value after the injury. Where the pollution . . . results in a temporary or nonpermanent injury to real property, the injured landowner can recover the depreciation in the rental or usable value of the property caused by the pollution.[99]

The appellate court held that the brickyard failed to establish a permanent injury to the property, and thus diminution in value was not the proper measure of damages: "There was no evidence presented to establish that damage to the property would continue to exist once the cleanup was accomplished."[100]

In response, the former brickyard owners argued a "novel theory of permanency."[101] The former owners contended that "since the property was sold during the pendency of the action and . . . the sales price was depressed due to the presence of the Dowtherm-contaminated soil, the damage to [the plaintiff] is therefore permanent" because the former owners sold their property at a reduced price.[102] The appellate court rejected this argument holding that the

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92. *Id.*
93. *Id.*
94. *Yadkin*, 339 S.C. at 644, 529 S.E.2d at 766.
95. *Id.* at 646-47, 529 S.E.2d at 767.
96. *Id.* at 646, 529 S.E.2d at 767.
97. *Id.* at 647, 529 S.E.2d at 767.
98. *Id.* at 645-46, 529 S.E.2d at 767.
99. *Id.* (quoting Gray v. S. Facilities, Inc., 256 S.C. 558, 569, 183 S.E.2d 438, 443 (1971) (alterations in original)).
100. *Yadkin*, 339 S.C. at 647, 529 S.E.2d at 768.
101. *Id.*
102. *Id.*

brickyard "must prove that the damage is permanent to the property," not to the plaintiff.[103]

Thus, the South Carolina Court of Appeals followed the same traditional, inflexible rule that the *Santa Fe Partnership* court followed. However, it is important to remember that in *Gray* the South Carolina Supreme Court refrained from deciding the stigma damage issue because the plaintiff failed to prove causation. However, in *Yadkin* the South Carolina Court of Appeals, rejecting the stigma damage claim, relied on *Gray* despite the *Gray* court's decision not to address the issue.

IV. THE FUTURE OF STIGMA DAMAGES IN SOUTH CAROLINA

A. Paoli *as a Model*

As stigma damage claims continue to rise, South Carolina courts will need to readdress and supplement the incomplete analyses offered by the *Gray* and *Yadkin* courts. In doing so, the courts should look to *Paoli* for guidance to formulate a rule that will address the opposing goals of full recovery and reasonable certainty.

Apart from the South Carolina automobile-wreck cases, South Carolina courts have adhered to the traditional measure of damages for real property, awarding diminution in value only when there is permanent physical injury.[104] This traditional measure ensures that the diminution in value is causally related to the physical injury. Furthermore, the court faces less risk of overcompensating the plaintiff, and the diminution in value is not as speculative when there is permanent damage to the property. The court is not faced with the problem of awarding damages based on misplaced public perceptions.

The traditional rule certainly does have some benefits. However, the *Paoli* rule manages to preserve these benefits while acknowledging the reality that public perception does influence property value. By requiring actual physical injury to the land, the *Paoli* test ensures that any stigma damage is causally related to the injury caused by the defendant. The requirement that the plaintiff prove that remediation will not restore the value of the property to its prior level protects against overcompensating the plaintiff. Finally, the requirement that the plaintiff prove that there is some ongoing risk to the property protects against awarding damages based on the public's unfounded fears and perceptions about the property. If the plaintiff can prove that there will be a continuing risk, the negative public perception is likely to remain consistent over time. The plaintiff will not recover for the public's fear that there will be

103. *Id.* at 647-48, 529 S.E.2d at 768.
104. *See id.* at 645-46, 529 S.E.2d at 767.

another injury to the property, unless there actually is a proven risk of further injury to the property.

The *Restatement (Second) of Torts* § 929 addresses recovery for harm to land from past invasions.[105] Consider comment *a* of § 929:

> In some cases *the measure of recovery may include an amount for depreciation in market value although there has been no substantial physical harm*, as when a test well is bored by a trespasser and proved to be dry, and as a result the land loses its value as an oil prospect. In this case the owner may be entitled to substantial damages on the ground that although he is not entitled to represent it as oil-bearing land after discovering that it is not, or to insist on the silence of one who had acquired information of the truth without committing a trespass, he is entitled to have the aleatory character of his land protected against trespasses.[106]

The foregoing example is analogous to property damage caused by remediable contamination. The property owner will have to disclose to all future purchasers that the property was once contaminated.[107] Thus, the price of the owner's property will be reduced by the fears of prospective buyers that the property is still contaminated. The *Second Restatement* example involves a trespasser who reveals an inherent characteristic in the land, the knowledge of which makes the land less valuable—namely, the absence of oil on the land. The *Second Restatement* allows recovery because this knowledge is obtained by unlawful means.

An even stronger case for stigma damage recovery exists when the nuisance or trespass occurs in the form of contamination. Not only is the nuisance or trespass unlawful in itself, but, in the form of contamination, the nuisance or trespass causes physical injury to the land. This type of injury is more severe than the example offered by the *Restatement (Second) of Torts*. In the *Second Restatement* example, the trespass did not cause physical injury to the land. Rather, the trespass merely revealed the fact that the land was not suitable for drilling oil, the knowledge of which decreased the value of the land.[108] Presumably, either the current owner or a subsequent owner would eventually learn on her own that the land was not suitable for drilling oil.

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105. *See* RESTATEMENT (SECOND) OF TORTS § 929 (1979).

106. *Id.* § 929 cmt. a (emphasis added).

107. *See* Timothy J. Muldowney & Kendall W. Harrison, *Stigma Damages: Property Damage and the Fear of Risk*, 62 DEF. COUNS. J. 525, 529 (1995) (noting that the advent of residential real estate disclosure laws make "the climate for stigma damages claims very favorable").

108. *See* RESTATEMENT (SECOND) OF TORTS § 929 cmt. a (1979).

Contamination causes a more severe injury because not only is the contamination itself a trespass or nuisance, but additionally, the contamination actually injures the land. The *Second Restatement* anticipated the reality that the *Paoli* court acknowledged in its formulation of stigma damages: that real property is subject to stigma and that this has an appreciable effect on the property's value.[109]

B. Policy Considerations

Stigma damage reflects the reality that injury to real property is not necessarily confined by boundary lines, nor does the injury necessarily disappear when the source of the harm is remediated. Stigma damage represents the market's perception of the decrease in property value caused by the injury to the property. This perception is limited by the amount of reliable information available to the public regarding the property in question.[110] When more information is available to the public about the property's condition, the stigma will more accurately represent the actual decrease in value caused by the injury. When less information is available to the public, the stigma will more likely be based on irrational fears.

This asymmetry of information poses a problem for courts, which must address claims for stigma damage based on both accurate information and irrational fears. In formulating a rule to address stigma damage claims, the courts should consider addressing the issue from a public policy standpoint. It is an economic reality that real property may experience a diminution in value despite remediation. In addressing stigma damage claims, the courts must decide whether to protect the tortfeasor from liability for damages based on public perceptions, or whether to compensate the innocent landowner for his property's diminution in value. That is, should the plaintiff or the defendant bear the liability for the discrepancy between what the property is actually worth and the value the market has attributed to the property?[111]

As a matter of public policy, the courts should consider that awarding stigma damages can serve as an economic deterrent to property-damaging tortfeasors.[112] If property-damaging tortfeasors are held liable for post-remediation stigma damages, they will be forced to acknowledge the reality

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109. *See id.*; *In re* Paoli R.R. Yard PCB Litig., 35 F.3d 717, 798 (3d Cir. 1994).

110. *See* Phillip S. Mitchell, *Estimating Economic Damages to Real Property Due to Loss of Marketability, Rentability, and Stigma*, 68 APPRAISAL J. 162, 163 (2000) (citing "[u]ncertainty due to the lack of generally available, accurate market information concerning the property's current status" as a cause of diminished marketability).

111. In *Adkins v. Thomas Solvent Co.*, 487 N.W.2d 715, 737 (Mich. 1992), a contamination case, the dissent addressed this very question. Justice Levin, dissenting from the majority's denial of plaintiffs' stigma damage claim, stated that "[p]rotecting polluters of the water supply against the consequences of their conduct is not . . . an interest deserving of judicial indulgence."

112. *See* RESTATEMENT (SECOND) OF TORTS § 901 (1979) (stating that one function of damages in tort is to "deter wrongful conduct.").

that remediation does not always restore property values to their pre-injury value. In the contamination context, stigma damage awards can act as an economic deterrent that can supplement statutory regulation.[113]

V. CONCLUSION

Currently, the South Carolina courts have only addressed stigma damage in a limited way. In *Gray v. Southern Facilities, Inc.* the South Carolina Supreme Court declined to address the stigma damages issue because the plaintiffs failed to prove causation.[114] However, in *Yadkin Brick Co. v. Materials Recovery Co.* the South Carolina Court of Appeals determined that diminution in value, and thus stigma damage, is not an element of recovery in the absence of permanent damage to real property.[115] The appellate court cited *Gray* despite the fact that the *Gray* court chose not to address the stigma damage issue.[116] Therefore the issue of stigma damages is still unresolved in South Carolina.

Although the South Carolina Supreme Court has not yet addressed the issue of stigma damage, the issue is likely to appear before the court soon. The frequency with which plaintiffs are seeking stigma damages in suits for injury to real property is increasing. These suits do not involve only nuisance and trespass; they also include suits for breach of pest control contracts, defective construction, deceptive trade practices, and CERCLA. Stigma damage has also been an issue in the increasingly litigious area of synthetic stucco.[117]

The stigma damage rule developed by the *Paoli* court is broad enough to cover the different types of litigation under which stigma damages arise. Yet, the *Paoli* rule is refined enough to manage the opposing goals of full compensation and reasonable certainty. While not discussed by the *Paoli* court, the South Carolina Supreme Court may consider that as a matter of public policy, awarding stigma damages can also serve as an economic deterrent that

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113. *See* Susan Rose-Ackerman, *Tort Law in the Regulatory State*, *in* TORT LAW AND THE PUBLIC INTEREST 80, 86 (Peter H. Schuck ed., 1991) ("Ideally, tort law and regulatory standards work together to further deterrence and compensation goals."). Rose-Ackerman notes three situations in which tort law and statutory regulations can be complementary:

> (1) when tort doctrines are stopgaps that apply absent more stringent statutes; (2) when regulatory standards are intended as minima that more stringent tort doctrines can supplement; and (3) when a regulatory standard is set at the socially optimal level and tort doctrine imposes either strict liability or a standard of care lower than that required by the agency.

Id.

114. 256 S.C. 558, 570, 183 S.E.2d 438, 443-44 (1971).

115. 339 S.C. 640, 645-48, 529 S.E.2d 764, 767-68 (Ct. App. 2000).

116. *Id.* at 647-48, 529 S.E.2d at 768.

117. *See In re* Stucco Litig., 175 F.R.D. 210, 219 (E.D.N.C. 1997) (denying class certification because plaintiffs asserted stigma damage when only some plaintiffs suffered physical damage to property and because some plaintiffs lived in a region where synthetic stucco carries no stigma).

will protect landowners from property-damaging tortfeasors. The South Carolina Supreme Court should consider *Paoli* as the court seeks to formulate a rule on stigma damage that will fairly serve both the defendants and the plaintiffs of South Carolina.

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