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DAMAGE TO REAL PROPERTY: THE LAY OF THE LAND

Introduction

The prosecution and defense of claims for damage to real property often involve relatively unique issues. For example, harm to real property, even if severe, can be latent and remain undiscovered for many years. Because the Kansas statute of repose bars claims that have not been instituted within 10 years of the act giving rise to the cause of action, state law claims may be barred before the damage is even discovered. Rural landowners could face numerous scenarios where discovery within 10 years is unlikely. For instance, realty adjacent to an industrial plant, refinery, gas station, or slaughterhouse is vulnerable to migration of petroleum products or chemical waste. If the migration occurs through the substrata, the resulting damage might only be detected by a test program involving numerous well-placed borings. Absentee owners are similarly at risk, especially if their property is densely matted with vegetation, because even visible surface flooding or migration can disappear over time. Thus, the harm may escape even a diligent owner's periodic visual inspections. Nonetheless, the repose period will inexorably continue to run.

If the property has been sold, the general rule prohibiting the assignment of tort claims may come into play. Also, depending upon the type and character of the claim, the lawyer handling the lawsuit may grapple with procedural issues, such as the triggering and tolling of statutes of limitations. In addition, all damage to land must be evaluated and classified as either permanent or temporary and valued accordingly.

This article will provide a brief survey of property damage claims and defenses that are available in Kansas (with some abbreviated discussion of federal remedies). It will focus particularly on issues related to the statutes of limitations and repose, the assignment of claims, causation, and damage characterization.

A Compendium of Claims for Harm to Real Property

Trespass

A trespass can be (1) intentional, (2) the result of negligence, or (3) based on strict liability if the defendant was engaged in an abnormally dangerous activity. [1] Stated differently, in the absence of proof that the defendant was engaged in an abnormally dangerous activity or that the defendant was negligent, a plaintiff must prove that the trespass was intentional. [2] A trespass is intentional when:

> *7 [The] defendant intends to have the foreign matter intrude upon the land, or where defendant's 'act is done with knowledge that it *will to a substantial certainty result in the entry of foreign matter*.' [3]

When has a trespass occurred? In *Nida v. American Rock Crusher Co.*,[4] the Court held that "[t]here is no trespass until the entry is accomplished *and* the damage occurs (or has begun to occur as in a case of continuing trespass) (emphasis in original). The trespass counterpart of the negligence 'wrongful act' is the entry and the damage."

In *United Proteins Inc. v. Farmland Industries Inc.*, defendant Farmland's chemicals leaked into an aquifer, causing injury to a pet food producer. The plaintiff pled intentional trespass, negligence, and strict liability. The issue was whether Farmland's mere knowledge that the substance had reached the plaintiff's land would satisfy the plaintiff's burden to prove the original intrusion was intentional. The Court held in favor of Farmland because there was no evidence that the release of harmful chemicals "was either purposeful or substantially certain to occur."[5] Without proof that the defendant intended to enter, or was substantially certain an entry would result, the mere knowledge (after-the-fact) that an entry occurred will not support a claim for trespass. The Court was not receptive to a constructive intent theory, viewing it as an impermissible attempt to impose absolute liability.[6] Given the inherent difficulty of proving that the perpetrator either intended for mischievous agents to invade his neighbor's land or was substantially certain the invasion would occur, most lawyers prefer to base trespass claims on negligence or strict liability.[7]

Trespass claims are ordinarily subject to a two-year statute of limitations.[8] However, a continuing trespass that began more than two years prior to suit can survive a statute of limitations attack. Like trespass actions, continuing trespass actions must show that the original intrusion was tortious.[9] In addition, a plaintiff must prove that the defendant allowed the contamination to remain on the plaintiff's property within the limitations period.[10] In *United Proteins*, the plaintiff's strict liability and negligence theories had been dismissed prior to trial based on the two-year statute of limitations, but the plaintiff was allowed to pursue theories of continuing trespass and intentional nuisance.[11] However, under these unique circumstances, a claimant may only recover for damages inflicted within the limitations period.[12] In *United Proteins*, the Court stated:

> ... [United Proteins] was left in the unenviable position of pursuing theories which alleged Farmland had engaged in some tortious conduct within the limitations period. Continuing trespass was one such possible theory. Although the original trespass was outside the limitations period, if [United Proteins] could prove that Farmland permitted the contamination to remain on [United Proteins'] property within the limitations period and that the original intrusion was tortious, there might be culpable conduct on which recovery could be based.[13]

Nuisance

Nuisance actions can be framed as intentional, or can be based on negligence or strict liability.[14] In *Finlay v. Finlay*,[15] ***8** the issue was whether a malodorous cattle feeding operation was a nuisance to adjacent property owners. The court defined nuisance as "an annoyance, and any use of property by one, which gives offense to or endangers the life or health, violates the laws of decency, unreasonably pollutes the air with foul, noxious odors or smoke, or obstructs the reasonable and comfortable use and enjoyment of the property of another ..."[16] The court further stated that "[w]hat may or may not constitute a nuisance in a particular case depends upon many things, such as the type of neighborhood, the nature of the thing or wrong complained of, its proximity to those alleging injury or damage, its frequency, continuity or duration, and the damage or annoyance resulting."[17] A nuisance claim is only proper where the alleged nuisance "has been in existence for some period of time rather than being an isolated instance of a temporary nature."[18] Isolated instances are properly addressed through negligence claims.[19]

Claims for intentional nuisance have been upheld where other tort claims were barred by the statute of limitations. Comment 3 to PIK 3d 127.90 states that "if the statute of limitations has run on the strict liability and negligence theories, a plaintiff may find relief under the theory of intentional nuisance." [20] In *United Proteins*, the Court noted that because the limitations period had run on the plaintiff's negligence and strict liability claims, the plaintiff was forced to pursue claims — intentional nuisance and continuing trespass — based on tortious conduct that occurred within the limitations period. [21] The *Culwell v. Abbott Constr. Co.* Court delineated nuisance from negligence and strict liability, stating that "a nuisance may result from conduct, which is intentional or negligent or conduct, which falls within the principle of strict liability without fault. The point is that nuisance is a result and negligence is a cause ..." [22] Therefore, the doctrine of intentional nuisance can save at least a portion of some time-barred claims.

However, the elements of intentional nuisance can be problematic. It is difficult in most circumstances to prove that the perpetrator intended to interfere with the owner's use and enjoyment of the property. The dilemma has been summarized as follows:

> To create an 'intentional' nuisance, it is not enough to intend to create a condition causing harm; the defendant must either specifically intend to damage the plaintiff or act in such a way as to make it 'substantially certain' that damage will follow. [23]

In *United Proteins*, the plaintiff asserted a claim for intentional private nuisance. [24] The Court stated that intentional nuisance applies only if a party acts with intent to cause the nuisance, or knows that it is substantially certain to result from his actions. [25] An invasion is not "intentional" simply because "an actor realizes or should realize that his conduct involves a serious risk or likelihood of causing invasion." [26] Thus, nuisance claims based on negligence or strict liability (if available) are easier to prove. [27]

Strict liability

Strict liability for harm to land is imposed apart from either: (1) an intent to interfere with a legally protected interest or (2) a breach of a duty to exercise reasonable care (i.e., actionable negligence). [28] In *Williams v. Amoco* ***24** *Production Co.*, the Kansas Supreme Court adopted the approach set forth in the Second Restatement of Torts to determine when a party should be held strictly liable. [29] This approach has made it increasingly difficult to impose strict liability. Restatement section 519 sets forth the general rule for strict liability based on abnormally dangerous activities [30] as follows:

> (1) One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land, or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm.
>
> (2) This strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous. [31]

The core structure of the analysis turns on "whether the risk created is so unusual, either because of its magnitude or because of the circumstances surrounding it, as to justify the imposition of strict liability for the harm that results from it, even ... without the need of a finding of negligence." [32]

In *Williams*, farmers brought an action when natural gas invaded their irrigation water. The *Williams* Court noted that the gas field where defendants were drilling was the largest known reservoir of natural gas in the world, thus, the drilling and operation of natural gas wells in that area was common, accepted, and a natural use of the land. [33] The Court noted that natural gas is not a "harmful agent" once it is brought above ground, that natural gas does not spoil drinking water, destroy vegetation, or harm livestock, and that natural gas is not known to be "mischievous" if it enters the property of another. [34] Therefore, the *Williams* Court held that the drilling and operation of natural gas wells is not an abnormally dangerous activity in relation to the type of harm sustained by the plaintiffs. [35]

Negligence/negligence per se

Negligence liability for harm to land is governed by fundamental negligence principles. However, when attempting to prove that a business was negligent, the fight can move to the arena of compliance with industry practices. Conformity

***25** with industry-wide standards is not an absolute defense to negligence claims. [36] Although in some instances conformity may be presented as evidence of due care, or compliance with industry standards (or standards imposed administratively or legislatively), it does not preclude liability if a reasonable person would have taken additional precautions. [37] Furthermore, "evidence of prior similar accidents is admissible to prove foreseeability as long as the prior accidents involve substantially similar circumstances." [38]

To recover under a theory of negligence per se, a plaintiff must establish the following: (1) the defendant violated a statute, [39] ordinance, or regulation; (2) an individual right of action for injury arising out of violation was intended by the legislative body that passed the statute, ordinance, or regulation; and (3) the defendant's violation caused the plaintiff's damages. [40] Violation of an ordinance alone is insufficient to prove negligence per se. [41] Furthermore, if the statute was enacted to protect the public at large, then no individual right of action exists. [42]

Contract

A lawsuit on a breach of contract theory always has advantages. The contract may provide attorney's fees for the prevailing party. The contract may contain an arbitration clause, which may truncate the litigation and reduce your client's overall costs. [43] Also, actions on a written contract are governed by a five-year statute of limitations instead of the two-year limitations period applicable to torts. [44] Contract suits are especially attractive to avoid claims assignment issues. [45] However, no punitive damages are available. [46]

***26 Federal statutes**

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) provides a right of recovery for damages caused by release of various hazardous chemicals, [47] but it specifically exempts petroleum products. [48] CERCLA actions are particularly attractive to landowners seeking relief, because certain attorney's fees are assessable. [49] In addition, CERCLA pre-empts state repose and limitation statutes, imposing a federally required commencement date of when "the plaintiff knew (or reasonably should have known) that the personal injury or property damages ... were caused or contributed to by the hazardous substance or pollutant or contaminant concerned." [50] Unlike CERCLA, the

Resource Conservation and Recovery Act [51] only provides for injunctive relief — it does not create a private cause of action for damages. [52] Similarly, the Kansas Solid and Hazardous Waste Act [53] will not support a private action for damages. [54]

Repose and Assignment: Bitter Enemies of Landowners

Repose

Whereas the statute of limitations is nuanced, [55] the statute of repose is a rule of "extreme harshness and dubious fairness." [56] Subsection (b) of K.S.A. 60-513 limits commencement of tort actions in the following way:

> ... in no event shall an action be commenced more than 10 years beyond the time of the act giving rise to the cause of action.

The statute of repose runs from "the time of the defendant's last wrongful act, which subsequently caused or contributed to the plaintiff's injuries." [57] Repose "abolishes [a] cause of action after the passage of time even though the cause of action may not have yet accrued." [58] Thus, a damage claim may expire before the owner becomes aware of it. [59] In *A.S.I. Inc. v. James T. Sanders*, the defendants had secretly buried drums of toxic waste in the mid-1970s on property that was sold to the plaintiffs in 1985. [60] The plaintiffs learned of the buried drums sometime between 1990 and 1992 (when they filed suit). [61] The repose issue was whether the 10-year period began to run when the defendant buried the drums, when the drums were discovered, or when the drums injured the plaintiffs. The Court held that the statute began to run when the drums were buried, thus, the plaintiff's claim was time-barred. [62]

Assignment

The sale of land with latent damage breeds a severe injustice in Kansas because tort claims available to the seller of land are not assignable with the land. [63] Thus, a buyer of damaged land will be claimless against the perpetrator. In *Morsey v. Chevron U.S.A. Inc.*, [64] an oil lease owner brought ***27** an action against a neighboring leaseholder based on damage caused by Chevron's water flooding of oil and gas fields, the majority of which occurred prior to Morsey's ownership of his lease. Shortly after Morsey purchased his lease, he learned that there had been communication between Chevron's pipes and his pipes, which had damaged the oil producing capabilities of his lease. [65] Morsey alleged trespass, conversion, private nuisance, breach of contract, breach of duties owned to owners of a common pool, and strict liability for permanent and temporary damages. [66] He posited that because his predecessors-in-interest assigned their rights to him, he was entitled to recover for damage that occurred prior to his purchase. [67] The Court held that "any tort for damages done to the leasehold before [Morsey] acquired it belonged to his predecessors-in-interest and lapsed when they transferred it. In Kansas, tort claims such as those in question are unassignable." [68]

Permanent or continuing damage?

Injuries to land, whether framed in tort or contract, are divided into two categories: permanent and temporary. [69] Generally speaking, permanent damages are damages that are practically irremediable. [70] Permanent damages are based on the theory that the cause of the damage is fixed. [71] Evidence that damage will exist indefinitely will support a judgment

for permanent damages.[72] Past, present, and future damages based upon a permanent injury must be collected in a single action.[73] The measure of damages for a permanent injury is the difference in fair market value before and after the injury.[74] When computing damages, an owner is generally entitled to consider the property's most advantageous use.[75] However, an owner may not assess damages by assuming capital improvements that have not yet been made to the land.[76]

Damages are classified as temporary or continuing, if the cause of damages is remediable, removable, or abatable.[77] Temporary damages include only injuries that are intermittent and occasional.[78] Temporary damages are based on the theory that the cause of the injury will eventually be eliminated.[79] A plaintiff may recover temporary damages as they occur.[80] Damages are classified as temporary only if they are remediable within feasible economic and temporal limits.[81] If damages may be remedied, removed, or abated within a reasonable period of time and at a reasonable expense, then they are temporary.[82] The measure of temporary damages is the "reasonable cost of repairing the injury with interest, which may include value of use, or diminution of rental value, together with special damages for injury to crops or improvements."[83] In *Monfort v. Layton*,[84] crop damage was classified as temporary damage while soil damage resulting in a failure to produce future crops was classified as permanent damage.

Causation: RIL and Alternative Liability

Res ipsa loquitur

When a property owner discovers damage years after it occurred, the cold trail to the responsible party creates a proof problem. Furthermore, nearby landowners may shy away from sharing information that could implicate them. Since negligence is never presumed, the occurrence of injury by itself does not establish liability.[85] However, where direct proof does not exist, circumstantial proof may be used.[86] *Res ipsa loquitur* (RIL), which means "the thing speaks for itself," is a rule of evidence[87] that allows a claimant to plead circumstances, which infer negligence. Upon making a prima facie case, the burden shifts to the defendant to prove that he was not at fault.[88] The underlying rationale is that the defendant who is in control of the instrumentality that has caused the damage has access to, and control over, causation evidence, whereas the plaintiff must rely on circumstantial proof.[89]

To apply RIL, a party's petition must contain the following three elements:

> ***28** 1. The thing or instrumentality causing injury or damage was within the exclusive control of the defendant;
>
> 2. The occurrence must be of such kind or nature as ordinarily does not occur in the absence of someone's negligence; and
>
> 3. The occurrence must not have been due to contributory negligence (or fault) of the plaintiff.[90]

RIL does not apply where a plaintiff has pled specific acts of negligence.[91]

The RIL doctrine is especially helpful where there are two or more possible responsible parties.[92] However, there are caveats. First, the doctrine is stronger in cases involving joint tortfeasors, than where the plaintiff is unsure which of multiple parties caused the harm.[93] If there are two or more injuring instrumentalities, any of which were not under the defendant's control, RIL does not apply.[94] But, a plaintiff is not required to eliminate all other possible causes; he merely must produce evidence, which prompts a reasonable person to conclude that more likely than not the defendant was negligent.[95]

In cases involving gas and water pipeline leaks, emphasis is placed on the requirement that the evidence prove that a leak would not have occurred in the absence of negligence.[96] In these cases, the courts accept that a pipeline company has a duty to inspect and maintain in order to prevent leaks and breaks. Thus, plaintiffs typically plead that the broken or leaky pipe was either defective when laid, or was carelessly laid or maintained, and/or broke under unsafe external or internal force.[97] However, where the pipes have been buried for years, RIL is less likely to be applied because there is a greater chance that the leak occurred in the absence of fault.[98]

Alternative liability

Some jurisdictions have adopted the theory of alternative liability,[99] whereby two or more potentially responsible parties will be presumed liable unless they can exonerate themselves. One court explained the doctrine as follows:

> When more than one negligent defendant cannot be identified as the specific source for an injury, a plaintiff need not prove causation as to each individual defendant, but need only prove that the one who caused the injury is among the group of negligent defendants. The court will presume each individual defendant caused the whole injury unless the defendant can prove otherwise. 'The *Summers* burden shift seems intuitively fair where all those who could have caused the injury are before the court and the odds are equal and significant that each is liable and to the same degree.'[100]

It appears the doctrine is ripe for acceptance in Kansas. In *Mason v. Texaco Inc.*,[101] the U.S. District Court for the District of Kansas indicated that the Kansas Supreme Court would likely follow ***29** other jurisdictions under factual scenarios involving two independent wrong-doers who attempt to escape liability by arguing there has been a lack of proof as to which of them caused the injury.[102] Thus, in cases where it is unclear which potential defendant caused the harm, it might be advisable to sue under theories of RIL and alternative liability, urging the adoption of the doctrine.

Conclusion

A practitioner representing the owner of real estate subject to harm has a variety of state and federal claims available. Recovery for past harm (especially latent harm) may be complicated by the powerful defenses of repose, limitations, and assignment. The lawyer should determine whether the mischievous agent qualifies for a CERCLA recovery action, and search for any applicable contract rights, such as may be found in easement or right-of-way agreements. In addition, in appropriate circumstances, counsel may consider the application of RIL or alternative liability theories to prove causation.

Footnotes

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1 *Lofland v. Sedgwick County*, 26 Kan. App. 2d 697, Syl. ¶ 3, 996 P.2d 334 (1999).

2 *United Proteins Inc. v. Farmland Indus. Inc.*, 259 Kan. 725, Syl. ¶ 3, 915 P.2d 80 (1996).

3 *Id.* at 729 (quoting 1 HARPER, JAMES & GRAY, THE LAW OF TORTS, § 1.7, p. 1:30 (3d ed. 1996)) (emphasis in original).

4 *Nida v. Amer. Rock Crusher Co.*, 253 Kan. 230, 239, 855 P.2d 81 (1993)

5 *Id.* at 731.

6 *Id.* at 731 (citing *Moulton v. Groveton Papers Co.*, 112 N.H. 50, 54, 289 A.2d 68 (1972)).

7 *Infra.*

8 K.S.A. 60-513(a)(1).

9 *United Proteins*, 259 Kan. at Syl. ¶ 2.

10 *Id.* at Syl. ¶ 1.

11 *Id.* at 728-29.

12 *Id.* at 728

13 *Id.* Continuing trespass often arises when there is recurring migration of harmful agents onto the plaintiff's land. Uncertainty as to whether the damage occurred within the limitations period (i.e. how long it took the harmful substances to migrate) can create a fact question for trial.

14 *United Proteins*, 259 Kan. at 732, 915 P.2d at 85. The Pattern Instructions in Kansas (PIK) contain two nuisance instructions — one in the negligence section (PIK. 3d 103.06, "Nuisance") and one in the intentional torts section (PIK. 3d 127.90, "Private Nuisance"). PIK. 3d 103.06, Cmt. 3, states that "[a] nuisance may result from conduct, which is intentional or negligent or conduct, which falls within the principle of strict liability without fault." *See Culwell v. Abbott Constr. Co.*, 211 Kan. 359, 506 P.2d 1191 (1973) for distinctions between private and public nuisances.

15 *Finlay v. Finlay*, 18 Kan. App. 2d 479, 856 P.2d 183 (1993).

16 *Id.* at 485 (quoting *Sandifer Motors Inc. v. City of Roeland Park*, 6 Kan. App. 2d 308, Syl. ¶ 1, 628 P.2d 239).

17 *Id.* at 485 (quoting *Sandifer*, 6 Kan. App. 2d at Syl. ¶ 4).

18 *Culwell v. Abbott Const. Co.*, 211 Kan. 359, 366, 506 P.2d 1191 (1973).

19 *Grover v. City of Manhattan*, 198 Kan. 307, 312, 424 P.2d 256 (1967). Where nuisance is rooted in negligence, comparative negligence is a defense. *See* PIK 3d 103.06 Comt. 4 (citing *Sandifer*).

20 PIK 3d 127.90 (2005), (referencing *Culwell v. Abbott Constr. Co.*, 211 Kan. 359, 366, 506 P.2d 1191 (1973) and *United Proteins Inc. v. Farmland Indus. Inc.*, 259 Kan. 725, Syl. ¶ 3, 915 P.2d 80 (1996).

21 *United Proteins*, 259 Kan. at 728-31, 915 P.2d at 83-4.

22 *Culwell*, 211 Kan. at 364, 506 P.2d at 1196.

23 *United Proteins*, 259 Kan. at 733 (quoting *Sandifer*, 6 Kan. App. 2d 308, Syl. ¶ 11).

24 Although the plaintiff asserted separate claims of negligence and strict liability, the Court pointed out that plaintiff could have based the nuisance action on negligence or engagement in an abnormally dangerous activity. *Id.* at 732.

25 *Id.* at 732-33 (citing RESTATEMENT (SECOND) OF TORTS § 825 (1965)).

26 *Id.* (quoting RESTATEMENT § 825 comment c.)

27 *See also Williams v. Amoco Prod. Co.*, 241 Kan. 102, 117-18, 734 P.2d 1113 (1987) (Amoco not liable under an intentional nuisance theory because there was no evidence that Amoco intended for its natural gas to leak and eventually enter the plaintiff's irrigation water nor was there any evidence that Amoco intended for the condition to continue once it was discovered).

28 *Williams v. Amoco Prod. Co.*, 241 Kan. 102, 112-13, 734 P.2d 1113 (1987) (relying on PROSSER AND KEETON ON TORTS, § 75, p. 534 (5th ed. 1984)).

29 This approach replaced the common law doctrine promulgated in the English case of *Fletcher v. Rylands*, L.R. 1 Exchequer 263, first recognized by a Kansas court in *Helms v. Eastern Kansas Oil Co.*, 102 Kan. 164, 169 P. 208 (1917). Under the *Rylands* doctrine, liability arises when a defendant brings a harmful substance onto his property and allows it to escape. *Id. See also Berry v. Shell Petroleum Co.*, 33 P.2d 953 (Kan. 1934).

30 The applicable jury instruction for strict liability based on engagement in an abnormally dangerous activity is PIK 3d 126.80 (2003), "Ultrahazardous Activities." Dangerous instrumentalities are analyzed separately. *Falls v. Scott*, 249 Kan. 54, 58, 815 P.2d 1104 (1991); PIK 3d 126.80 (2003), "Dangerous Instrumentalities." Examples of dangerous instrumentalities (in Kansas) include poisons, explosives, firearms, dry ice, and, in limited circumstances, electricity, airplanes, certain machines, and bottled beverages. *Id.*

31 *Williams*, 241 Kan. at 114 (quoting RESTATEMENT (SECOND) OF TORTS § 519 (1976)). RESTATEMENT (SECOND) OF TORTS, § 520 provides the following factors for determining whether an activity is abnormally dangerous:
(a) existence of a high degree of risk of some harm to the person, land or chattels of others;
(b) likelihood that the harm that results from it will be great;
(c) inability to eliminate the risk by the exercise of reasonable care;
(d) extent to which the activity is not a matter of common usage;
(e) inappropriateness of the actity to the place where it is carried on; and
(f) extent to which its value to the community is outweighed by its dangerous attributes.
Compare this approach with PIK 3d 126.80 (2003), "Ultrahazardous Activities," which seems to codify the *Rylands* (pre-*Williams*) doctrine, discussed in FN 29, *supra*. In *Greene v. Product Mfg. Corp.*, 842 F. Supp. 1321 (D. Kan. 1993), the plaintiffs asserted that there are two forms of strict liability — one involving abnormally dangerous activities (the Restatement doctrine) and the other involving *Rylands* activites. *Greene*, at 1326. The Court disagreed, indicating that the two doctrines are not separate recovery theories. *Id.*

32 *Anderson v. Farmland Indus. Inc.*, 136 F. Supp. 2d 1192, 1198 (D. Kan. 2001) (quoting *Greene v. Product Mfg. Corp.*, 842 F. Supp. 1321 (D. Kan. 1993)). The *Anderson* Court considered the plaintiffs' claim that they developed asthma due to an oil refinery's emission of hydrogen sulfide and sulphur dioxide, holding that operation of a petroleum refinery was not an abnormally dangerous activity because health risks were not high, the potential of harm was not great, the exercise of reasonable care could have kept emissions within recognized safety criteria, the refinery was located within an industrial zone, and the refinery bestowed financial benefits to the community. *Id.* at 1198-1200. There are no recent Kansas cases that address the related issue of strict liability for oil pipeline leaks. Other jurisdictions have imposed strict liability for oil pipeline leaks pursuant to statutes. *See, e.g., State of Wyoming v. Platte Pipe Line Co.*, 649 P.2d 208 (1982) (the owners of a pipeline, which ruptured, spilling oil into the waters of the state, were liable pursuant to statute, regardless of fault); *True v. United States*, 894 F.2d 1197 (10th Cir. Wyo. 1990) (civil penalty imposed under the Federal Water Pollution Control Act for oil leak from pipelines).

33 *Williams*, 241 Kan. at 115.

34 *Id.* at 115-116

35 Kansas has always applied a negligence standard rather than strict liability to explosion or fire caused by natural gas. *See Milwaukee Ins. Co. v. Gas Service Co.*, 185 Kan. 604, 347 P.2d 394 (1959) (plaintiff's home partially destroyed by natural gas explosion). Similarly, one who allows fire to escape his property is not subject to strict liability. *Koger v. Ferrin*, 23 Kan. App. 2d 47, 926 P.2d 680 (1996). The *Koger* court distinguished several pre-*Williams* cases, noting that even though the damaging instrumentalities in those cases did not meet the definition of abnormally dangerous, the Kansas Supreme Court has exempted certain chemical agents from Restatement analysis, presumably to promote safe, clean water. *Id.* at 55. *See Klassen v. Central Kansas Co-op. Creamery Ass'n*, 160 Kan. 697, 165 P.2d 601 (1946) (creamery waste produced by defendant constituted a "non-natural" use of the land, which was dangerous and likely to cause damage if permitted to escape); *Atkinson v. The Herington Cattle Co.*, 200 Kan. 298, 436 P.2d 816 (1968) (defendant strictly liable for allowing contaminated water, the source of which defendant had produced on his land, to escape and damage neighboring land, despite the fact that defendant's business was lawful); *Berry v. Shell Petroleum Co.*, 33 P.2d 953 (Kan. 1934) (oil company held strictly liable for damages caused by salt water that escaped its premises). *Koger* referred to these cases as "water law cases," indicating that their precedent was limited to "water cases" based on an absolute nuisance theory. *Koger v. Ferrin*, 23 Kan. App. 2d 47, 54, 926 P.2d 680 (1996) (citing *Berry*, 140 Kan. at 102); PROSSER AND KEETON ON TORTS, § 78, pp. 546-47 (5th Ed. 1984).

36 *Folks v. Kansas Power & Light Co.*, 243 Kan. 57, Syl. ¶ 3, 755 P.2d 1319 (1988).

37 *Id.*

38 *Id.* at Syl. ¶ 4.

39 Kansas statutes governing water pollution and hazardous waste disposal are contained within Ch. 65 of the K.S.A., Art. 33, "Water Pollution Control." and Art. 34, "Solid and Hazardous Waste." In addition, public utilities and common carriers may be liable for actual damages and attorney's fees for violations of K.S.A. 66-176.

40 *Pullen v. West*, 278 Kan. 183, Syl. 3, 92 P.3d 584 (2004). 66-176.

41 *Kerns v. G.A.C. Inc.*, 255 Kan. 264, 281, 875 P.2d 949, 962 (1994).

42 *Schlobohm v. United Parcel Ser. Inc.*, 248 Kan. 122, Syl. 1, 804 P.2d 978, 980 (1991). *See also Rollo v. City of Kansas City, Kan.*, 857 F. Supp. 1441, 1447.

43 These are especially prevalent in pipeline easement contracts, most of which originated in the 1930s and 40s. *See Thompson v. Phillips Pipe Line Co.*, 200 Kan. 669, 676, 438 P.2d 146 (1968); *McLeod v. Cities Service Gas Co.*, 131 F. Supp. 449 (D. Kan. 1955); *Berns v. Standish Pipe Line Co.*, 105 P.2d 893 (Kan. 1940); *Kennedy v. Great Lakes Pipe Line Co.*, 86 P.2d 521 (Kan. 1939).

44 K.S.A. 60-511 and K.S.A. 60-513. Beware that masking an injury that sounds in tort as a contract action after the two-year statute of limitations has run may fail. *See Malone v. Univ. of Kansas Med. Ctr.*, 220 Kan. 371, 552 P.2d 885 (1976) (plaintiff may not characterize a tort action as contract action in order to avoid the bar of the statute of limitations or governmental immunity).

45 *Infra.*

46 *Mabery v. Western Cas. & Sur. Co.*, 173 Kan. 586, Syl. 2, 250 P.2d 824 (1952).

47 42 U.S.C. § 9607 (2002). To fall within CERCLA's purview, a plaintiff must show that damages were caused by exposure to a hazardous substance that was released into the environment. *Morgan v. Exxon Corp.*, 869 So.2d 446, 450 (Ala. 2003). *See also Bolin v. Cessna Aircraft Co*, 759 F. Supp. 692, 698 (D. Kan. 1991).

48 42 U.S.C. 9601(14) and (33); *Exxon Corp. v. Hunt*, 475 U.S. 355, 359, 106 S. Ct. 1103 (1986). However, CERCLA does apply to damage involving waste oil. *Osco Inc. v. St. Paul Fire & Marine Ins. Co.*, 656 N.E.2d 548 (Ind. App. 1995) (property damage caused by leakage of waste oil from unlined storage lagoons entitled the plaintiffs to CERCLA remedies); *Sanborn Plastics Corp. v. St. Paul Fire & Marine Ins. Co.*, 616 N.E.2d 988, 994 (Ohio App. 1993) (environmental clean-up claims arising from a release of used hydraulic oil at a recycling facility were covered by CERCLA).

49 *City of Wichita v. Trustees of APCO Oil Corp. Liquidating Trust*, 306 F. Supp. 2d 1040, 1095 (D. Kan. 2003) (attorney's fees related to identification of potentially responsible parties recoverable as necessary response costs); *Sinclair Oil Corp. v. Dymon Inc.*, 988 F. Supp. 1394, 1398 (D. Kan. 1997) (attorney fees allowable if they represent response costs incurred in relation to cleanup of hazardous waste). *See also Greene v. Product Mfg. Corp.*, 842 F. Supp. 1321, 1323-24 (D. Kan. 1993) (attorney fees stemming from litigation of recovery action are not recoverable, but necessary attorney fees for removal-related nonlitigation activities are recoverable); *FMC Corp. v. Aero Indus. Inc.*, 998 F.2d 842, 847 (10th Cir. 1993) (attorney fees related to removal activities are recoverable, whereas litigation fees are not); *Key Tronic Corp. v. United States*, 511 U.S. 809, 114 S. Ct. 1960 (1994) (CERCLA does not provide for litigation fees related to bringing a cost of recovery action, but it does provide for attorney fees related to actual cleanup, such as identifying potentially responsible parties). For a different application, *see Bolin v. Cessna Aircraft Co.*, 759 F. Supp. 692, 710 (D. Kan. 1991) (litigation costs are recoverable to the extent they constitute "necessary costs").

50 *Morgan v. Exxon Corp.*, 2003 WL 21362958 (Ala. 2003), at *3-4.18. *See A.S.I. Inc. v. James T. Sanders*, 835 F. Supp. 1349 (D. Kan. 1993) (under CERCLA, damage caused by buried drums of toxic waste was actionable even though it was discovered outside of the Kansas 10-year repose period).

51 42 U.S.C. §§ 6901 *et. seq.*

52 *Short v. Ultramar Diamond Shamrock*, 46 F. Supp. 2d 1199, 1200-01 (D. Kan. 1999).

53 K.S.A. 65-3401 *et. seq.*

54 *Id.*

55 For examples of applications of the statute of limitations, *see, e.g., BancAmerica Comm'l Corp. v. Mosher Steel of Kansas Inc.*, 1993 WL 370818 (D. Kan. Aug. 13, 1993); *City of Wichita v. U.S. Gypsum Co.*, 72 F.3d 1491 (1996); *A.S.I. Inc. v. James T. Sanders*, 835 F. Supp. 1349 (D. Kan. 1993).

56 *A.S.I. Inc. v. James T. Sanders*, 835 F. Supp. 1349, 1355 (D. Kan. 1993). *See also Bolin v. Cessna Aircraft* Co., 759 F. Supp. 692, 700 (D. Kan. 1991); *Tomlinson v. Celotex Corp.*, 244 Kan. 474, 770 P.2d 825 (1989).

57 *A.S.I. Inc. v. James T. Sanders*, 835 F. Supp. 1349, 1355 (D. Kan. 1993).

58 *Id.* at 1356 (quoting *Harding v. K.C. Wall Products Inc.*, 250 Kan. 655, 668, 831 P.2d 958 (1992)).

59 *Id.*

60 *Id.* at 1351.

61 *Id.* at 1358.

62 The plaintiffs were allowed to proceed against two of the defendants pursuant to CERCLA claims, which are not subject to the Kansas 10-year statute of repose. *Id.* at 1355, 1358. To overcome the statute of repose, a plaintiff may also employ the doctrine of equitable estoppel if evidence exists that the defendant affirmatively acted to fraudulently conceal its tortious conduct. *Robinson v. Shah*, 23 Kan. App. 2d 812, 826, 936 P.2d 784 (1997).

63 *Kansas Midland Ry. Co. v. Brehm*, 39 P. 690 (1895). *See also Heinson v. Porter*, 244 Kan. 667, 772 P.2d 778 (1989) (tort claims remain unassignable in Kansas); *Scheufler v. General Host Corp.*, 126 F.3d 1261 (10th Cir. Kan. 1997) (property interest of a landowner and tenant are distinct, and one may not recover damages based upon the other's interests).

64 *Morsey v. Chevron U.S.A. Inc.*, 94 F.3d 1470, 1478 (10th Cir. 1996).

65 *Id.* at 1474.

66 *Id.*

67 *Id.*

68 *Id.* at 1478. Some jurisdictions, including Missouri, distinguish between personal torts and property torts, holding that the latter are assignable. *Gremminger v. Missouri Labor & Indus. Relations Comm'n*, 129 S.W.3d 399, 403 (Mo. App. E.D. 2004).

69 Whether damages are classified as temporary or permanent is a question of fact. *Berry v. Shell Petroleum Co. et al.*, 33 P.2d 953 (Kan. 1934).

70 *McAlister v. Atlantic Richfield Co.*, 233 Kan. 252, Syl. ¶ 7, 662 P.2d 1203 (1983).

71 *Id.*

72 *Berry v. Shell Petroleum Co. et al.*, 33 P.2d 953, Syl. ¶ 3 (Kan. 1934).

73 *McAlister*, at Syl. ¶ 8.

74 *Kiser v. Phillips Pipe Line Co.*, 41 P.2d 1010 (Kan. 1935). *See* PIK 3d 171.20, "Real Estate — Permanent Damage."

75 *Williams*, 241 Kan. at 110-11

76 *Id.*

77 *McAlister*, at Syl. ¶ 5.

78 *Id.* Water law provides several applications of this rule. In actions for damages resulting from recurring or transient contamination or flooding, a separate cause of action accrues for temporary damages each time the plaintiff's land or crops are harmed by overflow, and each injury commences a fresh two-year limitations period — until the injury becomes permanent. *McAlister v. Atlantic Richfield Co.*, 233 Kan. 252, 263, 662 P.2d 1203 (1983), quoting *Gowing v. McCandless*, 219 Kan. 140, 144, 547 P.2d 338 (1976). If damages are permanent, then the action must be filed within two years of the time the injury became reasonably ascertainable. *Dougan v. Rossville Drainage Dist.*, 270 Kan. 468, 473, 15 P.3d 338 (2000) (citing *Thierer v. Bd. of County Comm'rs*, 212 Kan. 571, 574, 512 P.2d 343 (1973). Nuisance appears to be the preferred cause of action in flooding cases.

79 *Id.*

80 *Id.* at Syl. ¶ 6.

81 *Morsey v. Chevron U.S.A. Inc.*, 94 F.3d 1470, 1476 (10th Cir. 1996).

82 *Id.*

83 *Kiser v. Phillips Pipe Line Co.*, 41 P.2d 1010 (Kan. 1935). *See also*, PIK 3d 171.21, "Real Estate — When Repairs Will Restore To Original Condition"; *Morsey v. Chevron U.S.A. Inc.*, 94 F.3d 1470, 1476 (1996) (proof of permanent damages is no substitute for proof of temporary damages); *Maxedon v. Texaco Producing Inc.*, 710 F. Supp. 1306, 1316 (D. Kan. 1989) (amount of possible temporary damages to be awarded for injury to land can exceed the value of the land).

84 *Monfort v. Layton*, 1 Kan. App. 2d 622, 628, 571 P.2d 80 (1977).

85 *Worden v. Union Gas Sys. Inc.*, 182 Kan. 686, 324 P.2d 501 (1958).

86 *Id.*

87 RIL does not provide the substantive basis for a claim. *Worden v. Union Gas Sys. Inc.*, 182 Kan. 686, 324 P.2d 501 (1958).

88 *Woods v. Kansas City, K.V.& W.R. Co. et al.*, 8 P.2d 404, 406 (1932).

89 *Worden*, at 688, citing *Bradley v. Conway Springs Bottling Co.*, 154 Kan. 282, 118 P.2d 601; WIGMORE ON EVIDENCE, § 2509 (3d ed.).

90 *Bias v. Montgomery Elevator Co.*, 216 Kan. 341, 532 P.2d 1053 (1975).

91 *John T. Arnold Assoc. Inc. v. City of Wichita*, 5 Kan. App. 2d 301, 615 P.2d 814 (1980).

92 *Worden* at 689.

93 *Voss v. Bridwell*, 188 Kan. 643, 364 P.2d 955 (1961). *See* 65 C.J.S. Negligence §220(8), p. 1014 ("Where either one of two defendants wholly independent of each other may be responsible for the injury complained of, the rule of *res ipsa loquitur* ... cannot be applied. However, the doctrine may be availed of as against plural defendants who were, under the circumstances involved, joint tort-feasors.").

94 *Starks Food Markets Inc. v. El Dorado Refining Co.*, 156 Kan. 577, 134 P.2d 1102, 1105 (1943).

95 *Bias*, 216 Kan. at 2. *See also Stroud v. Sinclair Ref. Co.*, 144 Kan. 74, 58 P.2d 77; PROSSER ON TORTS, § 39, p. 211 (4th Ed.).

96 *John T. Arnold Assoc. Inc. v. City of Wichita*, 5 Kan. App. 2d 301, 615 P.2d 814 (1980).

97 *Martin v. Bd. of County Comm'rs of Johnson County*, 18 Kan. App. 2d 149, 161, 848 P.2d 1000 (1993); *Adam Hat Stores v. Kansas City*, 316 S.W.2d 594, 598 (Mo. 1958).

98 *George Foltis Inc. v. City of New York*, 38 N.E.2d 455 (1941); *Midwest Oil Co. v. City of Aberdeen*, 10 N.W.2d 701 (S.D. 1943).

99 This theory of liabiity first surfaced in a California Supreme Court Case, *Summers v. Tice*, 33 Cal. 2d 80, 199 P.2d 1 (1948). Kansas has not yet adopted this doctrine.

100 *Wood v. Eli Lilly & Co.*, 38 F.3d 510, 512 (10th Cir. Okla. 1994), (citing *Menne v. Celotex Corp.*, 861 F.2d 1453 (10th Cir. 1988) (applying Nebraska law)).

101 *Mason v. Texaco Inc.*, 741 F. Supp. 1472, 1481 (D. Kan. 1990).

102 *Id.*

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