DIGGING UP BONES OR BURIED TREASURE – ENVIRONMENTAL PROPERTY DAMAGE CLAIMS IN ARKANSAS, RECENT DEVELOPMENTS

By G. Alan Perkins[1]

I. COMMON LAW CAUSES OF ACTION

A. Negligence:

1. Elements:

> The elements of common law negligence are typically described as four-fold: (1) the existence of a duty on the part of the defendant to conform to a specific standard of conduct to protect the plaintiff; (2) breach of that duty by the defendant; (3) injuries to the plaintiff actually and proximately caused by the breach; and (4) resulting damages to the plaintiff or his property. The burden is on the plaintiff to establish all four elements.

Howard W. Brill, *Arkansas Law of Damages*, 545 (1996), citing *Morton v. American Medical International, Inc.*, 286 Ark. 88, 689 S.W.2d 535 (1985).

2. SOL:

- Three years. Ark. Code Ann. § 16-56-105. *See Burton v. Tribble*, 189 Ark. 58, 70 S.W.2d 503 (1934).

- General Rule: "The limitation period found in § 16-56-105 begins to run when there is a complete and present cause of action, and, in the absence of concealment of the wrong when the injury occurs, not when it is discovered." *Arkansas v. Diamond Lakes Oil Co.,* 347 Ark. 618, 623, 66 S.W.3d 613, 616 (2002).

B. Nuisance:

1. Elements:

> Nuisance is defined as conduct by one landowner which unreasonably interferes with the use and enjoyment of the lands of another and includes conduct on property which disturbs the peaceful, quiet, and undisturbed use and enjoyment of nearby property.

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Southeast Arkansas Landfill, Inc. v. State, 313 Ark. 669, 858 S.W.2d 665, 667 (1993); *Milligan v. General Oil Company*, 293 Ark. 401, 738 S.W.2d 404 (1987). Furthermore, the mere diminution in property value, without irreparable injury, does not give rise to an equitable cause of action for nuisance. *Milligan*, 293 Ark. at 404, 738 S.W.2d at 405.

2. SOL:

- Three years. Ark. Code Ann. § 16-56-105.

C. Trespass:

1. Elements:

> According to common law, a trespass is an entry on land that is in the peaceable possession of another, regardless of the willfulness of the entry, the degree of force used, the duration of the intruding presence, and the absence of damage to the land.

Howard W. Brill, *Arkansas Law of Damages*, 568 (1996), citing *Pennington v. Woods,* 204 Ark. 26, 161 S.W.2d 16 (1942).

2. SOL:

- Three years. Ark. Code Ann. § 16-56-105(4).

- General Rule: "The limitation period found in § 16-56-105 begins to run when there is a complete and present cause of action, and, in the absence of concealment of the wrong when the injury occurs, not when it is discovered." *Arkansas v. Diamond Lakes Oil Co.,* 347 Ark. 618, 623, 66 S.W.3d 613, 616 (2002).

- Arkansas cases have recited various formulations for when the SOL is triggered; when the original act occurs (the "Occurrence Rule"), when the extent of damage is certain, or when the nature and extent of that damage reasonably can be known or fairly estimated. *Atlanta Exploration, Inv. v. Ethyl Corp.,* 301 Ark. 331, 784 S.W.2d 150 (1990); *St. Louis-San Francisco Railway Company v. Spradley*, 199 Ark. 174, 133 S.W.2d 5 (1939); *Arkebauer v. Falcon Zinc Company*, 178 Ark. 943, 12 S.W.2d 916 (1929).

D. Strict Liability – Ultra-Hazardous Activities:

1. Elements:

> A property owner is absolutely liable for damages that result from certain ultra-hazardous activities. . . . An activity is ultra-hazardous if it necessarily involves risk of serious harm to persons or property, which cannot be eliminated by exercise of utmost care, and is not an activity customarily carried on by many people in the community.

Howard W. Brill, *Arkansas Law of Damages*, 568 (1996), citing *Tri-B Advertising Co. v. Thomas,* 278 Ark. 58, 643 S.W.2d 547 (1982). Blasting is a typical ultra-hazardous activity. *Western Geophysical Co. v. Mason,* 240 Ark. 767, 402 S.W.2d 657 (1966). The action is not available to a landowner who knowingly consents to the activity on his property. *Carroll-Boone Water District v. M&P Equipment Company*, 280 Ark. 560, 571, 661 S.W.2d 345, 351 (1983).

Examples recognized in Arkansas: delivery of propane gas to a storage yard, *Zero Whsle. Gas Co., Inc. v. Stroud,* 264 Ark. 27, 571 S.W.2d 74 (1978); and the spraying of chemicals on crops, *Chapman Chem. Co. v. Taylor,* 215 Ark. 630, 222 S.W.2d 820 (1949).

2. SOL:

- Three years. Ark. Code Ann. § 16-56-105.

- General Rule: "The limitation period found in § 16-56-105 begins to run when there is a complete and present cause of action, and, in the absence of concealment of the wrong when the injury occurs, not when it is discovered." *Arkansas v. Diamond Lakes Oil Co.,* 347 Ark. 618, 623, 66 S.W.3d 613, 616 (2002).

<u>E. Breach of Lease or Other Contract:</u>

1. Elements:

- Depends on the specific provisions of the contract; e.g., indemnity provisions, maintenance requirements, regulatory compliance covenants, prohibited activity provisions, and property condition at lease termination covenants.

2. SOL:

- Three years for an oral contract. Ark. Code Ann. § 16-56-105(1).

- Five years for a written contract. Ark. Code Ann. § 16-56-111.

A cause of action for breach of contract "accrues the moment the right to commence an action comes into existence." *Dupree v. Twin City Bank*, 300 Ark. 188, 191, 777 S.W.2d 856, 858 (1989); *Oaklawn Bank v. Alford*, 40 Ark. App. 200, 203, 845 S.W.2d 22, 24 (1993). Stated another way, the true test in determining when a cause of action arises or accrues is to establish the time when the Plaintiff could have first maintained the action to a successful conclusion.

II. POTENTIAL STATUTORY CAUSES OF ACTION

Federal Statutory Actions

A. Comprehensive Environmental Response, Compensation & Liability Act (CERCLA or Superfund), 42 U.S.C. § 9659:

Citizen Suit provision – generally allows a civil action to enforce the requirements of CERCLA, including removal or remedial (cleanup) actions in appropriate cases, and for civil penalties. CERCLA does not provide for an award of money damages except in contribution actions to reimburse the plaintiff for its cleanup costs. 42 U.S.C. § 9613(f). Successful CERCLA plaintiffs may be awarded reasonable attorneys fees and expert fees as costs. 42 U.S.C. § 9659(f). Numerous conditions and prerequisites apply to bringing a successful CERCLA citizens suit.

B. Resource Conservation & Recovery Act (RCRA), 42 U.S.C. § 6972:

Citizen Suit provision – generally allows a civil action against any person in violation of the requirements of RCRA. RCRA does not provide for an award of money damages. Successful RCRA plaintiffs may be awarded reasonable attorneys fees and expert fees as costs. 42 U.S.C. § 6972(e). Numerous conditions and prerequisites apply to bringing a successful RCRA citizens suit.

C. Clean Water Act (CWA), 33 U.S.C. § 1365:

Citizen Suit provision – generally allows a civil action against any person in violation of the requirements of the CWA. The CWA does not provide for an award of money damages. Successful CWA plaintiffs may be awarded reasonable attorneys fees and expert fees as costs. 33 U.S.C. § 1365(d). Numerous conditions and prerequisites apply to bringing a successful CWA citizens suit.

D. Clean Air Act (CAA), 42 U.S.C. § 7604:

Citizen Suit provision – generally allows a civil action against any person in violation of the requirements of the CAA. The CAA does not provide for an award of money damages. Successful CAA plaintiffs may be awarded reasonable attorneys fees and expert fees as costs. 42 U.S.C. § 7604(d). Numerous conditions and prerequisites apply to bringing a successful CAA citizens suit.

State Statutory Actions

E. Arkansas Remedial Action Trust Fund Act (RATFA), Ark. Code Ann. § 8-7-520:

Contribution – "Any person who has undertaken or is undertaking remedial action at a hazardous substance site in response to an administrative or judicial order initiated against such person pursuant to §§ 8-7-508 or 8-7-1104(d) may obtain contribution from any other person

who is liable for such hazardous substance site." A.C.A. § 8-7-520(a). "Remedial Action" for which contribution is available includes legal fees and expenses "necessary to plan and direct remedial actions, to recover the cost thereof, and to enforce the provisions of this subchapter." A.C.A. § 8-7-503(10). The Court in a contribution action must allocate the remedial costs "among all persons liable for the hazardous substance site, using such equitable factors as the court determines are appropriate." A.C.A § 8-7-520(d).

- SOL: Three years from "the date of the administrative or judicial order or settlement with respect to such remedial action." A.C.A § 8-7-520(g).

F. Arkansas Hazardous Waste Management Act (AHWMA), Ark. Code Ann. § 8-7-206:

Private Right of Action – "Any person adversely affected by a violation of this subchapter or of any rules, regulations, or orders issued pursuant thereto shall have a private right of action for relief against such violation." A.C.A. § 8-7-206. There is no further guidance in the statute as to what relief is available. Practitioners disagree on whether "relief against such violation" includes money damages or is restricted to injunctive relief. The statute has no attorney's fee-shifting provision.

- SOL: No explicit SOL in the statute. Presumably, the 3-year SOL in A.C.A. § 16-56-105(3) applies to private actions. *See Ark. Dept. of Envtl. Quality v. Brighton,* 352 Ark. 396, 412, 102 S.W.3d 458, 469 (2003).

G. Arkansas Solid Waste Management Act (ASWMA), Ark. Code Ann. § 8-6-206:

Private Right of Action – "Any person adversely affected by a violation of this subchapter or of any rules, regulations, or orders issued pursuant thereto shall have a private right of action for relief against the violation." A.C.A. § 8-6-206. There is no further guidance in the statute as to what relief is available. Practitioners disagree on whether "relief against such violation" includes money damages or is restricted to injunctive relief. The statute has no attorney's fee-shifting provision.

- SOL: No explicit SOL in the statute. Presumably, the 3-year SOL in A.C.A. § 16-56-105(3) applies to private actions. *See Ark. Dept. of Envtl. Quality v. Brighton,* 352 Ark. 396, 412, 102 S.W.3d 458, 469 (2003); *Highland Industrial Park v. BEI Defense Systems Co.,* 357 F.3d 794 (8th Cir. 2004).

III. SIGNIFICANT RECENT DECISIONS

A. *Arkansas v. Diamond Lakes Oil Company,* 347 Ark. 618, 66 S.W.3d 613 (2002).

Case Summary – Diamond Lakes purchased a Malvern gas station in 1992, and was aware of a previous investigation of gasoline odors in the vicinity by ADEQ. But no leaks had been discovered. In 1997 an adjoining landowner complained again of gas fumes and this time ADEQ's inspection identified significant gasoline contamination underground. ADEQ ordered

Diamond Lakes to undertake cleanup, for which Diamond Lakes would be eligible for reimbursement from the Regulated Storage Tank Trust Fund, administered by ADEQ. A.C.A. § 8-7-901 *et seq*.

Further investigation revealed that the gasoline contamination was really coming from a different gas station across the street from Diamond Lakes. In 1998, the neighboring landowner sued Diamond Lakes alleging property contamination, and Diamond Lakes in turn brought a third party claim against the other station owner. ADEQ intervened in the action to protect its interests in the Trust Fund. ADEQ argued that: (1) Diamond Lakes' action was barred by the 3-year SOL in A.C.A. 16-56-105(4) for trespass actions; and (2) Diamond Lakes could not recover cleanup costs because of the Trust Fund coverage. Diamond Lakes countered that (1) it did not have a complete cause of action until 1997; (2) the gasoline contamination was a recurring event; and (3) the collateral source rule prohibited ADEQ from introducing evidence of Trust Fund reimbursement. Diamond Lakes also objected to ADEQ's attempt to introduce evidence of the FMV of the property, since its action was based on the cost of repair (for temporary damages) instead of diminution in value.

The trial court rejected ADEQ's defenses and granted Diamond Lakes' motion to exclude evidence of the property value. The jury returned a verdict for Diamond Lakes, awarding $200,000 for cleanup costs, and $100,000 for consequential property damages. The Arkansas Supreme Court affirmed.

Important Points:

SOL – After acknowledging the long-standing preference for the "occurrence rule," the Court applied a form of the "discovery rule" to the facts of this case, apparently based on the concept that the *cause of the injury* (i.e., the source of the gasoline causing the problem) was inherently concealed. "[N]o cause of action in tort begins to accrue *until the plaintiff knows, or by the exercise of reasonable diligence should have discovered, the cause of the injury*." 66 S.W.3d at 617, quoting *Martin v. Arthur,* 339 Ark. 149, 3 S.W.3d 684 (1999)(emphasis added by the Court). Elsewhere in the Court's discussion, it referred to "the full nature and extent of the injury," and to the "scope of the injury." 66 S.W.3d at 617, 618. These statements have given rise to more expansive arguments about the "discovery rule."

Measure of Damages – The Supreme Court affirmed the trial court's decision to exclude evidence of the fair market value of the property ($52,400). The Court reasoned that because the ADEQ had ordered the particular cleanup undertaken by Diamond Lakes, (1) the damage was temporary by its very nature; and (2) it could not argue that the cost was unreasonable or disproportionate to the value of the property (because Diamond Lakes had no choice but to carry out the cleanup).

B. ***Highland Industrial Park, Inc. v. BEI Defense Systems Company*, 357 F.3d 794 (8th Cir. 2004), *as revised* Mar. 12, 2004, *reh'g and reh'g en banc denied.*** (On appeal from the Western District of Arkansas, El Dorado Division)[2]

Case Summary – This is a property contamination case applying Arkansas law (diversity case). From 1966 until 1997, defendant BEI leased land from plaintiff Highland Industrial Park in south Arkansas. BEI made rockets there for the U.S. BEI disposed of its hazardous wastes by pouring them onto the ground and burning them at a spot called the Burn Area. In the late 1980s, BEI self-reported its disposal methods to environmental officials in Arkansas and performed a State-approved remedy at the Burn Area. Highland knew about BEI's waste disposal, the site testing, and the State-approved remedy. After 1989, BEI did not dispose of any waste at the Burn Area and had no other environmental violations.

In 1996, BEI lost its defense contract and notified Highland that it was terminating its lease. The parties then did more testing at the Burn Area. In June 1996 (> 3 yrs. prior to filing suit), outside consultants reported to BEI and Highland that a 3.2 acre plume containing five volatile organic chemicals in excess of EPA limits was in the shallow groundwater beneath the Burn Area. After more study (< 3 yrs, prior to filing suit), BEI reported the groundwater contamination to ADEQ officials, and proposed a voluntary consent order that would have made BEI responsible for cleaning up the site under ADEQ supervision. Highland disagreed with the terms of the consent order and refused to consent.

In July 1999, Highland sued BEI over the groundwater contamination, pleading nuisance, trespass, continuing trespass, negligence, strict liability, violation of the Arkansas Hazardous Waste Management Act (AHWMA), breach of (lease) contract, and equitable indemnity, and sought punitive damages. The DC granted summary judgment to BEI on several of those theories, but rejected BEI's limitations defenses, reasoning that Highland did not know the full "nature and extent of its injury" until the second consultant's report. The DC granted Highland summary judgment on its claim that BEI's environmental violations before 1989 breached provisions of its lease. After a bench trial, the DC entered judgment against BEI on Highland's claims for negligence, trespass, violation of the AHWMA, and breach of the lease. The DC awarded $500,000.00 for damages to a parcel worth $50,000.00.

On appeal, the 8th Circuit reversed all aspects of the judgment, but remanded to the DC to determine one remaining lease issue not decided at trial. The 8th Circuit gave specific instructions to the trial court as to the damages allowable on the remaining issue, if the plaintiff decided to proceed and was successful.

SOL for Tort Claims and AHWMA Claim – The 8th Circuit reversed and dismissed the trial court's judgments on the tort claims, negligence and trespass, and the statutory claim under the AHWMA based on the 3-year statute of limitations.

a. 3-year statute of limitations applies: A.C.A. § 16-56-105.

b. General Rule: SOL begins to run "when there is a complete and present cause of action, and, in the absence of concealment of the wrong, when the injury occurs, not when it is discovered." 357 F.3d at 796.

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[2] Mr. Perkins was the lead counsel at trial and on appeal for BEI Defense Systems Company.

c. 8th Circuit's review of *Arkansas v. Diamond Lakes Oil Co.* 347 Ark. 618 (2002). Some of the *Diamond Lakes* language is confusing and the Arkansas court applied a so-called "discovery rule" to property contamination claims. *Diamond Lakes* makes a reference to knowing the "scope of the injury" and Highland argued successfully to the district court in this case that the new rule meant that plaintiff had to know the full nature and extent of his injury before the statute began to run.

8th Circuit determined that "scope of the injury" was not employed in *Diamond Lakes* as a synonym for "nature and extent." 357 F.3d at 796. "We believe instead that the Arkansas Supreme Court in *Diamond Lakes* was saying that the statute does not begin to run until the plaintiff knows, or reasonably should have known, that its land had suffered a remediable injury, that is one that was not merely technical or nominal." *Id.*

d. Application by 8th Circuit: Highland knew enough about its tort claims (including that BEI was the cause) by June 1996, at the latest, when it received the first environmental report. Suit was filed in July 1999, more than three years later and its tort claims are time-barred.

Continuing Trespass Theory of Tolling SOL Rejected –

a. Highland argued that because the contamination is still present at the site, the trespass is continuing, and the SOL is tolled by virtue of the continuing trespass, even if it was discovered in June 1996. This has been a common claim in pollution damage cases, but had never been decided in Arkansas in that context.

b. 8th Circuit observed that the Ark. Supreme Court has stated: "the continuing tort theory is not recognized in Arkansas." *Id. at 797,* citing *Chalmers v. Toyota Motor Sales,* 326 Ark. 895, 906 (1996). *Chalmers* is not a trespass case and does not deal with property contamination, so plaintiffs have argued that it should not apply to an analysis of continuing trespass. However, the 8th Circuit cited this case in deciding that Arkansas has never recognized the continuing tort theory – period.

c. 8th Circuit found support in *Diamond Lakes,* (Arkansas' "most forgiving statute-of-limitations case") because the statute eventually began to run in that case even though the contamination was ongoing at the time of trial; it was simply tolled until the injured party was on notice as to certain matters (principally the identity of the source of the released gasoline). *Id.* at 797.

d. *Sewell v. Phillips Petroleum Co.*, 197 F. Supp. 2d 1160 (W.D. Ark. 2002). This is a summary judgment denial of SOL claims in an oilfield damage case, cited by the DC in support of its decision on continuing trespass. The 8th Circuit stated that neither the *Sewell* opinion nor the Arkansas case on which it relies provide any support for the continuing trespass theory of tolling the SOL "in this or any other case." *Id.* at 798.

SOL for Breach of Contract – The 8th Circuit reversed the District Court's judgment based on breach of lease provisions, because the breaches occurred more than 5 years prior to suit, even thought the contract remained in force for several years after that.

a. 5-year SOL for breach of written contract applies: A.C.A. § 16-56-111.

b. General Rule: The statute begins to run when the breach occurs ("the moment the right to commence an action comes into existence.") *Id.* at 798.

c. Highland's prevailing breach of lease covenant claims were based on statutory / regulatory violations that ceased in 1989 (when BEI ceased open burning). Therefore, Highland's claims for breach of contract on which it prevailed at trial were barred at the latest in 1994 (even though the lease continued until 1997). *Id.* at 798.

Measure of Damages – Although some questions still linger about how broadly this will be applied, the 8th Circuit decided for the first time in any Arkansas case that the appropriate measure of damages for contaminated property can be no greater than the diminution in value; i.e., capped at the FMV of the property for all practical purposes. Several factors may have been important in the 8th Circuit's decision (they didn't say), and could be requirements for application of this rule in future cases: (1) no regulatory order to clean up property; (2) no obligation of plaintiff to spend money to clean up property; (3) no significant threat to human health or the environment; (4) commercial property; i.e., no special factors like homestead; (5) damages claimed pursuant to a breach of contract claim (not clear if there is any basis for distinction in a tort case involving commercial property).

a. "Since the burn area's groundwater can be treated and remediated, the district court awarded Highland full restoration costs of $500,000 even though the difference in the property's fair market value with and without the groundwater contamination was only $50,000." *Id.* at 799.

b. General Rule: "In general, damages recoverable for breach of contract are those damages which would place the injured party in the same position as if the contract had not been breached." *Id.* at 800, quoting *Dawson v. Temps Plus Inc.,* 337 Ark. 247, 258 (1999).

c. Application by the 8th Cir.: An award of costs of remediation on the remaining claim, therefore would not be appropriate. A diminution in value award would make Highland whole. If Highland prevails on remand, "it is this measure of damages that the district court must employ." *Id.* at 800.