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## Mediating wildfire cases

### UNDERSTANDING THE PERSONAL-REASON EXCEPTION AND OTHER NUANCES OF RECOVERY FOR DAMAGES TO REAL PROPERTY

The unfortunate increase in wildfires has been the impetus for a proliferation of claimants seeking relief. Some of the damages available to these claimants are subject to interpretation, with nuances that are important to understand to successfully mediate claims and reach fair settlements. This article examines some of the arguments that can arise while mediating wildfire damages, such as how to apply what is known as the “personal reason exception” to the general rule of recovery for harm to real property and the extent to which annoyance and discomfort damages are available.

#### **The personal-reason exception**

The general rule for the recovery of damages for harm to real property is that a plaintiff must prove the diminution in the property’s value or the reasonable cost of repairing the harm. If there is evidence of both, the plaintiff is entitled to the lesser of the two amounts. (See CALJIC No. 3903F (Mar. 2019 update).) The lesser of the two amounts is often the diminution in property value because land usually maintains its value with or without improvements. Pre-fire and post-fire appraisals often show little, if any, difference in the cost of the actual land,

even if the home upon it has been totally destroyed. For this reason, an award of diminution in value is rarely sufficient to rebuild or repair a home.

Accordingly, many claimants seek to apply the personal-reason exception, which provides that “[r]estoration costs may be awarded even though they exceed the decrease in market value if ‘there is a reason personal to the owner for restoring the original condition’ or ‘where there is reason to believe that the plaintiff will, in fact, make the repairs.’” (*Heninger v. Dunn* (1980) 101 Cal.App.3d 858, 863 (internal citations omitted).)

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The principle behind this exception is that holding a claimant “without remedy merely because the value of the land has not been diminished, would be to decide that by the wrongful act of another, an owner of land may be compelled to accept a change in the physical condition of his property, or else perform the work of restoration at his own expense.” (*Id.* at p. 864.)

The personal-reason exception is not without limitation. Cost of repair will only be awarded where such costs are reasonable in light of the damage to the property and the value after repair. (See CALJIC No. 3903F (Mar. 2019 update).) Whether “restoration costs are reasonable is a question for the trier of fact in the first instance, but an award of such costs may be unreasonable as a matter of law if it is grossly disproportionate to the value of the property or the harm caused by the defendant.” (*Kelly v. CB&I Constructors, Inc.* (2009) 179 Cal.App.4th 442, 451.)

A quick review of the caselaw demonstrates how courts have applied the personal-reason exception. In *Heninger v. Dunn*, the plaintiff landowner brought an action against an adjoining landowner who bulldozed through plaintiff’s property, killing or damaging 225 trees and significant vegetative undergrowth. (*Id.*, 101 Cal.App.3d at p. 861.) The court found that plaintiff had a personal reason to restore the land because he lived on it, thought it was “beautiful” and intended to leave the forest unimproved. As a result, the court held that while the cost of a substantially identical restoration, which required the transplanting of a large number of mature trees, was “an unreasonable expense in relation to the value of the land prior to the trespass,” the lesser cost of restoring small trees and undergrowth would cover the scar created by trespass and might therefore be reasonable.

In *Orndorff v. Christiana Community Builders* (1990) 217 Cal.App.3d 683, plaintiffs’ home was built on defectively compacted soil. The court found that the cost to repair the defects and relocate the plaintiffs during repair

was \$243,539.95, while the home was appraised at \$238,500. The court applied the personal-reason exception, finding that the plaintiffs had lived in the house for 11 years and had no desire to leave it. Importantly, the court adopted a broad interpretation of “personal reason”:

Contrary to the defendants’ argument, the ‘personal reason’ exception does not require that the Orndorffs own a ‘unique’ home. Rather all that is required is some personal use by them and a bona fide desire to repair or restore. For instance in *Heninger* the court relied on the plaintiff’s simple statement that ‘I think the land is beautiful, the natural forest beautiful, and I would like to see it that way.’ According to the commentators to the Restatement, ‘if a building such as a homestead is used for a purpose personal to the owner, the damages ordinarily include an amount for repairs, even though this might be greater than the entire value of the building.’

(*Id.* at pp. 688-89, internal citations omitted, emphasis in original.)

So, how do these cases come into play during wildfire mediation? Claimants wishing to apply the personal-reason exception must pay some attention to demonstrating that they have a desire to repair. Though this may seem like an obvious statement, in practice, it can get overlooked. For example, it is not unusual for claimants whose homes have been destroyed to relocate to another state, to move in with family or friends, or to live in temporary housing such as a FEMA trailer. If the claimant lacks the financial means to repair and is absent from the property for a prolonged period, defendants can argue that the claimant has no bona fide intention to rebuild. Claimants who successfully rebut this contention often submit a video or written narrative to the mediator, explaining that they do wish to move back and restore their home, and providing the reasons why they have been unable to do so.

Assuming a claimant does have a personal reason for repair, how broadly

can this personal-reason exception be applied? For example, does it apply to rental properties? In *Kelly v. CB&I Constructors, Inc.*, the property consisted of a ranch with three houses. The plaintiff lived in one of the houses for 23 years and sometimes rented the other two houses. He eventually moved out and rented all three properties, save for the storage buildings where he kept tools and equipment. (*Id.*, 179 Cal.App.4th at pp. 447-48). A fire caused by defendants burned the brush, trees and some of the structures on plaintiff’s property. After the fires, heavy rains resulted in mudslides that caused extensive further damage to the property. The court found that the fire was a substantial factor in causing the mudslide damages.

At trial, the plaintiff testified that he intended to move back to the property as soon as possible. He stated that the property was ideal because he could care for his son, who was a disabled veteran, but they could still live in separate houses and maintain their privacy. Plaintiff further explained that he had not yet moved back to the property because his fiancée required daily medical treatment at a facility that was far away. The jury applied the personal-reason exception under these circumstances.

At first glance, *Kelly* appears to support the argument that a rental property can be construed as being “used for a purpose personal to the owner.” (See *Orndorff*, 217 Cal.App.3d at pp. 688-89.) Certainly, there is an argument that rental income amounts to a personal use of land. Moreover, like most landlords, the *Kelly* plaintiff did not live on the property at the time of the fire but still availed himself of the personal-reason exception.

On the other hand, *Kelly* presents a unique set of facts. Though technically plaintiff’s land was used at least for some period as a rental property, the plaintiff also lived on the property for over two decades and was planning an imminent return. In mediation, this distinction is often drawn by defendants, who argue

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that a true rental, where the landlord does not reside at the property, does not provide the claimant with a personal reason to rebuild. This distinction is not settled in the case law, creating a gray area for mediation. While the personal-reason exception may arguably extend to a landlord under a broad interpretation, claimants should be prepared to show something more than just ownership and passive rental income to justify a “cost to restore” type of settlement.

If a claimant can establish that he or she has a personal reason to rebuild, there must also be a showing that restoration costs are “reasonable” in relation to the value of the property. Courts have provided some guidance in that regard, such as the finding in *Orndorff* that the total award was “2.5 percent greater than the undamaged value of the realty” and “well within reason.” (*Orndorff*, 217 Cal.App.3d at p. 690.) However, while defendants may attempt to use *Orndorff* to restrict the reasonableness of the cost to repair to a certain percentage of the overall value of the property, such an approach may not succeed.

In *Kelly*, the court held that “[d]amages must be assessed in the manner ‘most appropriate to compensate the injured party for the loss sustained in the particular case.... The vast variety of and disparity between awards in other cases demonstrates that injuries can seldom be measured on the same scale....’ Thus, whether the restoration costs awarded...are reasonable cannot be determined through a mechanical comparison to damage awards in other cases.” (*Kelly*, 179 Cal.App.4th at p. 453, internal citations omitted, emphasis in original.) In *Kelly*, plaintiff’s expert testified that the value of the property at the time of the fire was \$1.8 million. The jury awarded plaintiff \$2,629,810 for the present costs of rebuilding and repairing the property, not including the value of the lost trees and \$375,000 in tree damage, among other recovery. Defendant moved for a new trial, arguing that the damages were

unreasonable and exceeded the value of the property by 67 percent. The court upheld the jury’s award, finding that the damage award was neither unreasonable nor excessive.

*Kelly* makes clear that an assessment of reasonableness is not formulaic. Therefore, in the same way that defendants often use *Orndorff* to try to restrict the cost to repair to a small percentage of the property value, plaintiffs often counter with *Kelly*, arguing that the reasonable cost to repair can be multiples of the pre-fire property value. In reality, the value is often somewhere in between. As the *Kelly* court explained, damages should be measured by the factual circumstances of each case. In *Kelly*, there was evidence to show that the property had no market value and had been rendered “unsuitable for plaintiff’s purposes” after fire damage had been compounded by mudslide damage. The repair costs necessitated a new drainage system, streambed filling and other expensive improvements to restore the property to a safe and habitable condition. Not every real-property loss will be as extreme or warrant a high cost to rebuild.

In mediation, the issue of “reasonable” cost of repair is typically presented through pre- and post-fire property appraisals and photos, as well as construction estimates. Persuasive construction estimates are those that are generated by contractors local to the devastated area and who are familiar with the cost (and/or possible shortage) of supplies and labor. Ideally, the estimating contractor will have specific experience restoring homes post-fire, or if not, he or she will have made a site visit to the property and know firsthand what is required to rebuild. Estimates made from afar are far less compelling. To the extent a claimant has insurance proceeds, his or her claims file may have copies of construction estimates, which also may inform the cost to repair. Landscape experts are also helpful to establish the actual or estimated cost to restore vegetation or trees. The more detailed the estimates, the better the

parties can assess reasonableness of costs and facilitate settlement.

### **Annoyance and discomfort damages**

Not to be confused with damages for mental and emotional distress, annoyance and discomfort damages “are intended to compensate a plaintiff for the loss of his or her peaceful occupation and enjoyment of the property.” (*Kelly*, 179 Cal.App.4th at p. 456.) In *Kornoff v. Kingsburg Cotton Oil Co.* (1955) 45 Cal.2d 265, defendant owned and operated a cotton gin on land adjacent to plaintiff’s property. Plaintiff contended that during the ginning season, large quantities of fumes, vapors, dust, dirt, sediment, lint and waste materials were emitted into the atmosphere and penetrated into the house and shop, covering them with an offensive, injurious and adhesive coating of dust, lint and ginning waste and causing injury to their house, furniture, and persons. Defendants challenged the award of annoyance and discomfort damages to plaintiff, arguing that plaintiff alleged no personal injury. The court reasoned:

While defendant’s trespass here is not of the type to cause fright or shock or even physical illness (as found by the jury), it obviously is of the type to cause plaintiffs much annoyance and discomfort. Plaintiff’s property – lawns, flowers, shrubs, window screens, hedges and furniture are, during the ginning season which lasts for approximately six months of each year, covered with a thick coating of dust and lint and ginning waste. This was specifically found to be a trespass and an injury to the real property. The annoyance and discomfort suffered by plaintiffs as a result of the injury to the real property is a natural consequence thereof. (*Id.* at p. 273.)

The court concluded that “California cases appear to draw no distinction between cases involving nuisance and those involving trespass

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in permitting an award of damages for discomfort and annoyance directly resulting from an injury to real property. There seems to be no sound reason to refuse to award damages for discomfort and annoyance where the only injury is to the real property since it is obvious that such an injury may cause discomfort and annoyance without also causing an actual physical injury to the person.” (*Id.* at p. 275.)

In *Kelly*, the court found that a plaintiff is entitled to annoyance and distress damages only if he or she is an occupant of the property. (*Kelly*, 179 Cal.App.4th at p. 456.) Further, the court explained, “the ‘annoyance and discomfort’ for which damages may be recovered on nuisance and trespass claims generally refers to distress arising out of physical discomfort, irritation, or inconvenience caused by odors, pests, noise, and the like.” (*Ibid.*)

More recently, in *Hensley v. San Diego Gas & Electric Co.* (2017) 7 Cal.App.5th 1337, 349, the court found that an occupant of the land “may recover damages for the discomfort and annoyance of himself and the members of his family and for mental suffering occasioned by fear for the safety of himself and his family when such discomfort or suffering has been proximately caused by a trespass or a nuisance.” The court underscored the “significance and importance” of an interest in real property, stating: “It cannot be denied that annoyance and discomfort would naturally ensue when a fire damages a family home and destroys unique and valued property features.” (*Id.* at p. 1352.) Finally, *Hensley* clarified that the legal occupant of the property need not be “personally or physically present on the invaded property during the trespass or nuisance” in order to recover annoyance and discomfort damages. Instead, he or she must have “immediate and personal possession, as a resident or commercial tenant would have.” (*Id.*, at p. 1352.)

Provided that claimant can establish occupancy, this category of damages is

discretionary and determined by the trier of fact. In mediation, therefore, the parties often debate how to set a value for annoyance and discomfort damages. Case law provides some, if not much, direction on the matter. In *Kelly*, the jury awarded “\$543,000 for discomfort, annoyance, inconvenience or mental anguish.” (*Kelly*, 179 Cal.App.4th at p. 450.) Although the Court of Appeal reversed the award because the plaintiff had relinquished possession of the property to his tenants, *Kelly* is nonetheless instructive as to the value that a jury would place on the emotional value of damage to one’s property.

Also instructive on this issue is *Rathje, et al. v. Southern California Edison* (Oct. 21, 2015) B250166 [2015 WL 6164841]. Although unpublished and non-citable, *Rathje* also demonstrates a value juries place on annoyance and discomfort damages. In *Rathje*, the plaintiffs owned a 20-acre property that included a 2.5-acre field that was planted with 12,000 lavender bushes. On a particularly windy day, a fiber-optic cable blew too close to a wind damper, which caused arcing that resulted in molten metal falling to the ground, sparking a fire that ultimately destroyed all 12,000 of plaintiffs’ lavender bushes. The jury awarded the Rathjes \$500,000 for annoyance and discomfort inflicted as a result of the fire.

With respect to tree damage, the court has held that “recoverable annoyance and discomfort damages are subject to the damage multiplier for timber trespass under Code of Civil Procedure section 733 and Civil Code section 3346.” (*Fulle v. Kanani* (2017) 7 Cal.App.5th 1305, 1313.) In *Fulle*, defendant hired workers to cut down the limbs and branches of six trees located on plaintiff’s property. The jury awarded \$27,500 for damage to the trees and \$30,000 for annoyance and discomfort damages. After the verdict, plaintiff moved for treble damages. The court held, “Where, as here, the jury finds willful and malicious conduct by the defendant, the trial court must award double damages and has discretion to

award treble damages for annoyance and discomfort.” (*Id.*, at p. 1317.)

One potential footnote to *Fulle* is the argument that this damage doubling does not apply to public entities. Government Code section 818 provides that public entities are not subject to damages “imposed primarily for the sake of example and by way of punishing the defendant.” Courts have found that Civil Code section 3346 and Code of Civil Procedure section 733 “must be ‘treated as penal and punitive.’” (*Hassoldt v. Patrick Media Group, Inc.* (2000) 84 Cal.App.4th 153, 168, see also *Swall v. Anderson* (1943) 60 Cal.App.2d 825, 828.)

That said, in these cases claimants often focus on the fact that the jury awarded substantial annoyance and discomfort damages even though, in *Kelly*, the property was not the plaintiff’s primary residence and did not include the loss of all of the plaintiff’s possessions; in *Rathje*, plaintiffs lost no home in the fire; and in *Fulle*, plaintiff was eligible for treble damages for the loss of six trees. To be sure, in the current environment, there is no lack of sympathy toward victims of fire, a risk that defendants face when trying these cases.

Perhaps in recognition of that reality, defendants generally do not deny the availability of annoyance and discomfort damages in mediation, but instead try to erode the potential of a large settlement by taking a discount for proportionate fault by another person or entity. Defendants also try to argue that claimants are comparatively at fault for failing to maintain a defensible space around their homes, though this assertion rings hollow in large wildfire cases. In addition, defendants may try to claim that annoyance and discomfort damages are compensated by insurance proceeds or to highlight other case-specific facts to show that claimants did not in fact suffer substantial annoyance or discomfort. Oftentimes, claimants combat these arguments

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with narratives, diaries or videos describing the day of the fire and their lives since. In addition, post-fire photos depicting the condition of the property are important indicators of annoyance and discomfort. While the need for narratives and photos may not be critical in large, highly visible wildfires, such materials can be helpful in smaller, less well-publicized fires.

From a mediator's perspective, it goes without saying that having "ammunition" when negotiating a claim makes it easier to close the gap between the parties' positions and to avoid impasse. Therefore, a successful mediation starts with a claimant's solid understanding of the law underlying available damages. To that end, claimants should submit a detailed mediation brief on both legal and factual matters, and exchange that brief with the opposing side. Although the parties are sometimes reluctant to

exchange briefs, doing so is much more productive than not. By providing the brief to counsel in advance, the parties can home in on the critical issues right away and make the most of the session. If there are confidential matters that the parties wish to share with the mediator, those can be set forth in a separate brief.

Claimants should also come to mediation ready to address legal principles that are open to interpretation or weak factual circumstances that may lead to a rift in negotiations. Building a strong demand package is very important to advance a claimant's position in mediation, as specific, tangible evidence can prove that a claimant would be entitled to repair costs or annoyance and discomfort damages at trial. As discussed above, successful claimants demonstrate a genuine desire to repair and/or return to the property.

In addition, good demand packages contain expert reports from qualified, local contractors and landscapers showing the reasonable cost of repair. Pre- and post-fire photos are important to show the extent of property damage and the claimants should also include materials establishing their ownership and/or occupancy of the property, such as deeds, leases or property taxes. Finally, video or written testimonials describing a claimant's experiences on the day of the fire and life following the fire support mental suffering, annoyance and discomfort damages.

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