RCW 7.48.010

A CAUSE OF ACTION FOR MAINTAINING A NUISANCE, RECOVERY MAY BE HAD FOR INCONVENIENCE, PHYSICAL DISCOMFORT, AND ILLNESS TO THE OCCUPANT OF THE PROPERTY RESULTING FROM THE NUISANCE

The recent EPA findings of naturally occurring asbestos on Burlington Hill, and the ongoing lawsuits associated with the EPA findings appear to have had an impact on market activity. As indicated above there is evidence of a slowdown. The disclosure of the EPA's findings by sellers and by appraisers, would be expected to greatly reduce the availability of conventional bank financing. To date the responses of the Burlington city and Skagit county governments and corresponding health departments have been limited. As a result there is a significant amount of uncertainty regarding the future for residents and property on Burlington Hill. Without a "clean bill of health" based on additional environmental testing, the level of uncertainty would be expected to continue. Based in part on interviews with Burlington area realtors, the general public perceives asbestos to be a health hazard and it is currently not clear as to what level of health hazard exists on Burlington Hill.

Accordingly the expectation is that properties on Burlington Hill will most likely continue to show a decline in market interest. Given the evolving nature of the market, and the current level of uncertainty regarding the naturally occurring asbestos and the potential health hazard, it is doubtful that the subject could in fact be sold at or near this value going forward. In order to sell the subject property with the current climate of uncertainty the seller may have to deeply discount the property.

While it is very difficult to predict the amount of a discount required, the potential health hazard will greatly restrict conventional bank financing. As such, the only buyer would most likely be an all cash buyer. Given the nature of the potential health hazard a discount of 50% or more may be required to sell the subject property. While it is reasonable to assume that perhaps one or two buyers out of 100 may disregard the potential health hazard and consider buying the property at a discount, it is more reasonable to believe that most buyers will stay on the sidelines until that time when further testing results in a more clear understanding of the risks associated with living on Burlington Hill. If the results of further testing were to determine little to modest risk, market interest might increase and sales activity may rise. On the other hand if further

testing were to provide a more clear picture of significant health risk involved with living on Burlington Hill, then the market activity would be expected to continue to decline. If no further testing is conducted, it is reasonable to expect that the market will continue to be hesitant to accept property on Burlington Hill and sales activity will remain very limited. Based on the extraordinary assumption that the naturally occurring asbestos found on Burlington Hill does in fact pose a significant health risk, the subject's market value is expected to rapidly decline.

REFERENCE NUISANCE CASES

In the instant case, the cement dust was the cause of both the depreciation in the use or rental value of the property and the personal discomfort and annoyance suffered by the occupants. As stated in ***Millet v. Minnesota Crushed Stone Co***., 145 Minn. 475, 477, 478, 177 N.W. 641, 179 N.W. 682 (1920):

> "A property owner, whose property is injured by a nuisance may recover for the property damage sustained. This is generally the diminished rental value, if the property be rented, or the diminished value of the use if the property be used by the owner.

It is well settled that in an action for damages for maintaining a nuisance, recovery may be had for inconvenience, physical discomfort, and illness to the occupant of the property resulting from the nuisance. ***Pierce v. Wagner***, 29 Minn. 355, 13 N.W. 170; 3 Sedgwick, Dam. § 948.

This element of damages is something additional to the element of diminished rental value. ***Berger v. Minneapolis Gaslight Co***., 60 Minn. 296, 62 N.W. 336. Decisions to the contrary, such as ***Swift v. Broyles***, 115 Ga. 885, 42 S.E. 277, 58 L.R.A. 390, are out of harmony with our decisions.

"We think, too, it is something additional to diminished value of the use, as that term is ordinarily understood. The value of the use is the value not to particular persons, who may be of peculiar susceptibility to injury, or who may be subject to peculiar conditions or situations, but is general value to ordinary persons for the legitimate uses to which it may be adapted, including, in this case, use as a homestead. That value is determined by taking into account the various facts and circumstances which make the use more or less desirable and in determining the extent to

which a nuisance may have diminished such value, facts that naturally or reasonably tend to cause discomfort, annoyance or illness may be taken into account. ***Gempp v. Bassham***, 60 Ill. App. 84; ***Cohen v. Bellenot*** (Va.) 32 S.E. 455; *Emery v. Lowell*, 109 Mass. 197. But the actual discomfort, annoyance or illness, which has resulted in damage or injury to the particular occupant involved, is another and distinct element of damage. This distinction is not clearly brought out in the decided cases, but we think it is recognized and it seems to us logical and just."

We are also convinced that the trial court erred in finding that there was insufficient evidence on which an award for damages for personal discomfort and annoyance could be based. Although the fall of cement dust usually was imperceptible, not being detected by sight, smell, or sound, as is usually the case when nuisance involves dust, gas, smoke, noise, etc., its effects soon became apparent to the physical senses. One cause of discomfort was the need to keep the windows of the sleeping rooms closed because the sleepers' "nostrils would be kind of filled up in the morning," and, as Mr. Riblet testified, "We just had a feeling that our nostrils were breathing dust." We think, too, that it can be inferred, even if not testified to in explicit terms that cement dust on tables, chairs, automobiles, etc., was an annoyance. Sludge on the bottom of the swimming pool, which caused Mr. Riblet to slip and slide and made it impossible to walk in the pool on the rare occasions when he used it in 1948 and 1949, created both a discomfort and an annoyance. The testimony reveals that drawings in Mr. Riblet's drafting room were constantly covered with cement dust, and when he was inking a drawing dust would collect on the pen and blur the drawing, which clearly constituted an annoyance.

Admittedly, no one testified to damages in consequence of personal discomfort and annoyance in terms of dollars and cents, but the fact that no one has placed a monetary value on personal discomfort and annoyance does not make the damage speculative or conjectural. It is recognized that the determination of the extent of the discomfort and annoyance to plaintiffs, and the amounts which will reasonably compensate them for such injuries, rests largely in the discretion of the jury. ***Baltimore & Potomac R. Co. v. Fifth Baptist Church***, 108 U.S. 317, 27 L.Ed. 739, 2 S.Ct. 719 (1883); ***Frick v. Kansas City***, 117 Mo. App. 488, 93 S.W. 351 (1906); ***Oklahoma City v. Tytenicz***, 171 Okla. 519, 43 P. (2d) 747 (1935); 2 Wood on Nuisances (3d ed.) 1314, Damages, § 866. Since the record contains evidence of personal discomfort and annoyance

suffered by the appellants, it was the duty of the trial court, when sitting without a jury, to determine the damages sustained in consequence thereof. As said by the supreme court of California in ***Judson v. Los Angeles Suburban Gas Co***., 157 Cal. 356*356 168, 172, 106 Pac. 581 (1910), where smoke, odors, and noise disturbed the plaintiff:

> "In the very nature of things the amount of detriment sustained is not susceptible of exact pecuniary computation. It is for the court to say what sum of money the plaintiff should receive in view of the discomfort or annoyance to which he has been subjected."

When this case was first before the court, we distinguished the case of ***Powell v. Superior Portland Cement, Inc***., 15 Wn. (2d) 14, 129 P. (2d) 536 (1942), and held that it was not controlling. It should in all fairness be noted that, on this phase of the damages, we arrive at a conclusion seemingly at variance with the views expressed by the judges who joined in a concurring opinion in that case. This has not been done without a careful weighing of the reasons given.

In ***Bainbridge Power Co. v. Ivey***, 41 Ga.App. 193, 152 S.E. 306, cited by Prosser (Handbook of the Law of Torts, 2nd ed., p. 410), the court said:

> "A permanent nuisance is not necessarily one which can never, under any circumstances, be abated; but it is one whose character is such that, from its nature and under the circumstances of its existence, it presumably will continue indefinitely."

In ***Haveman v. Beulow***, 36 Wn. (2d) 185, 217 P. (2d) 313, 19 A.L.R. (2d) 763 (1950), wherein this court said:

> "The court was of the opinion that the damage to the land should be regarded as permanent, and that, by reason of the destruction of the wells for domestic uses, their respective farms had been depreciated in value. An injury of the kind in question may be permanent in a legal sense, though not coextensive with perpetual, unending or unchangeable. ***Union Oil & Mining Co. v. Bowman***, 144 Okla. 54, 289 Pac. 296."
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> "The problem whether an occupant (owner or tenant) of real estate may recover damages for what may be regarded as personal injuries (consisting of inconvenience, discomfort, sickness, etc., actually experienced by him) in addition to, or separate from, damages to his property interests (such as diminution in rental or use value, or in market value, of the premises he occupies) presents interesting and perplexing questions. The plausibility of the argument that to allow both the property and the personal damages is to

> give double damages appears chiefly to arise from the circumstance that the same proof of discomfort, annoyance, etc., which has been actually experienced, and which tends to show that a nuisance exists, is relied upon to establish the injury to the plaintiff's property interests, as well as his claim for damages for personal discomfort, annoyance, etc. It seems, however, that there is a fallacy in disallowing the personal damages, the error perhaps arising in part from failure to bear in mind that the gist of a cause of action to recover damages for nuisance rests, not on the acts or omissions which produce the nuisance, but on the resulting damages to the plaintiff."

The annotator states the majority rule (p. 1322):

> "The question whether an occupant of real estate (whether owner or not) may recover damages for discomfort, annoyance, etc., personally resulting to him from a nuisance, in addition to, or separate from, any sort of property damages, is most distinctly presented in cases where the claim for the personal damages is accompanied by a claim for depreciation in rental or use value of premises. In most jurisdictions the rule is that the personal damages are recoverable in addition to, or separate from, damages for diminution in rental or use value. This rule seems clearly to involve the idea that the law will not presume that one responsible for a temporary nuisance will continue it, and will not require the occupant of premises to abandon them to avoid consequences to his person."

This court has recognized that recovery may be had for "sickness, suffering, mental anguish and bodily infirmities" resulting from nuisance, in addition to property damage. ***Champa v. Washington Compressed Gas Co***., 146 Wash. 190, 262 Pac. 228 (1927). While we have never passed upon the precise question involved in the instant case, we believe that the majority rule as stated in the foregoing quotation from the A.L.R. annotation is sound and logical,…to apply it in the instant case.