

*GILBERT WHEELER v. ENBRIDGE PIPELINES*—THE TEXAS SUPREME COURT’S ATTEMPT TO CLARIFY DAMAGES TO REAL PROPERTY

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INTRODUCTION

The basic goal of every damage award “is to make the plaintiff ‘whole.’”<sup>1</sup> Before 2014, Texas law struggled to consistently obtain this goal with damages to real property because the relevant case law was confusing and unclear.<sup>2</sup> In *Gilbert Wheeler v. Enbridge*, the court aimed to simplify and clarify Texas law.<sup>3</sup> However, several of the court’s holdings may have created new issues that will eventually require clarification or modification. This Note examines two areas of the *Gilbert Wheeler* opinion and whether the court’s new rules are practical and workable for the bench and bar.

First, this Note revisits the facts of the case and shows how the facts may have persuaded the court to favor certain holdings. To set the scene—in 2007, the Wheelers entered into a right of way agreement to allow Enbridge to build a pipeline across the Wheelers’ land.<sup>4</sup> The Wheelers agreed to less compensation for the right of way if Enbridge placed the pipe underground.<sup>5</sup> However, after Enbridge completed construction, the Wheelers discovered that Enbridge placed the pipe above ground and destroyed 600 feet of trees

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<sup>1</sup> MICHAEL MORRISON, REMEDIES CASES AND MATERIALS 4 (Winter 2019–20).

<sup>2</sup> See *Gilbert Wheeler, Inc. v. Enbridge Pipelines (E. Tex.), L.P.*, 449 S.W.3d 474, 478 (Tex. 2014).

<sup>3</sup> *Id.*

<sup>4</sup> *Gilbert Wheeler, Inc.’s Brief on the Merits* at 4–6, *Gilbert Wheeler*, 449 S.W.3d 474 (No. 13-0234), 2013 WL 5785857, at \*4–6 [hereinafter Brief for Petitioner].

<sup>5</sup> *Id.* at \*24. This lawsuit was brought by the Wheeler family corporation, Gilbert Wheeler, Inc. The land was placed within this family corporation to help ensure that the land would remain in the family for generations. In this article, however, I refer to the family instead of the corporation in order to maintain uniformity and reduce confusion.

in the process.<sup>6</sup> While Enbridge clearly breached its contract with the Wheelers and trespassed on the land, the proper amount of compensatory damages was unclear.<sup>7</sup>

In Section II, this Note explores the court's holding that the temporary-versus-permanent distinction applied to a breach of contract. Texas law determines the proper measure of damages for destruction to real property by first categorizing the injury as a temporary injury or a permanent injury.<sup>8</sup> Generally, when an injury to real property is temporary, the landowner is entitled to cost-to-repair damages.<sup>9</sup> But when an injury to the same property is permanent, the landowner is entitled to difference-in-value damages.<sup>10</sup> Before the *Gilbert Wheeler* decision, Texas courts were split on whether the temporary-versus-permanent distinction applied to a breach of contract.<sup>11</sup>

This temporary-versus-permanent distinction—together with the economic feasibility exception—is a form of the “lesser of” rule found in most jurisdictions.<sup>12</sup> The “lesser of” rule provides that when the evidence establishes different results under two separate measures of damages, the injured party's recovery should be limited to the lesser amount.<sup>13</sup> This approach for compensatory damages attempts to make the injured party whole while leaving the wrongful party better off.<sup>14</sup>

With compensatory damages, courts want to avoid “over or under compensat[ing] for the harm or loss suffered” by the injured party to ensure that they are placed in the same position as they were before the injury.<sup>15</sup> “This is true whether the wrongful conduct was a violation of a prior agreement (contract) or of a duty imposed by law (tort).”<sup>16</sup> Yet, the goal behind compensatory damages in tort and contract is different, and the “lesser

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<sup>6</sup>Enbridge Pipelines (E. Tex.) L.P.'s Response to Petitioner's Brief at 2, *Gilbert Wheeler*, 449 S.W.3d 474 (No. 13-0234), 2013 WL 6058936, at \*2 [hereinafter Response for Respondent].

<sup>7</sup>See *id.* at 16–17; see also Brief for Petitioner, *supra* note 4, at \*12.

<sup>8</sup>See *Gilbert Wheeler, Inc. v. Enbridge Pipelines (E. Tex.), L.P.*, 449 S.W.3d 474, 478 (Tex. 2014).

<sup>9</sup>*Id.* at 476.

<sup>10</sup>*Id.*

<sup>11</sup>See *id.* at 479.

<sup>12</sup>See *id.* at 482; MORRISON, *supra* note 1, at 79.

<sup>13</sup>MORRISON, *supra* note 1, at 79.

<sup>14</sup>See *id.*

<sup>15</sup>*Id.* at 72.

<sup>16</sup>*Id.*

of” approach is not used as frequently in contract as it is used in tort.<sup>17</sup> Therefore, this Section of the Note explores the reasons behind these differences and analyzes the court’s holding that the temporary-versus-permanent distinction applies in cases involving injury to real property that sound in tort and contract.<sup>18</sup>

In Section III, this Note examines the court’s holding that expanded the intrinsic value of trees exception and analyzes the implications of the decision. The intrinsic value of trees is an exception to the temporary-versus-permanent distinction that allows landowners to recover cost-to-repair damages—even though the proper measure of damages is the loss in the fair market value.<sup>19</sup> Courts developed the exception because the reduction in market value is usually nominal—trees often provide only aesthetic and utilitarian value.<sup>20</sup> In *Gilbert Wheeler*, the court overturned its own precedent and broadened the exception to allow landowners to recover the cost of repair damages when the difference-in-value damages were nominal instead of zero.<sup>21</sup>

#### I. GILBERT WHEELER, INC. V. ENBRIDGE PIPELINES (EAST TEXAS), L.P.

This first Section discusses the facts and circumstances of the Wheelers’ lawsuit and the subsequent appeals leading up to the Texas Supreme Court. In doing so, it places *Gilbert Wheeler*’s legal issues in their proper context to underscore the impact of the court’s decision.

##### A. *The Facts*

For the Wheeler family, the land at issue carried sentimental value—it was not held as an investment property for its economic value.<sup>22</sup> The 153-acre tract of land, known as “the Mountain,” had been in the Wheeler family

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<sup>17</sup> See Juanda Lowder Daniel & Kevin S. Marshall, *Avoiding Economic Waste in Contract Damages: Myths, Misunderstanding, and Malcontent*, 85 NEB. L. REV. 875, 878 (2007).

<sup>18</sup> *Gilbert Wheeler, Inc. v. Enbridge Pipelines (E. Tex.), L.P.*, 449 S.W.3d 474, 479 (Tex. 2014).

<sup>19</sup> *Id.* at 482.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 483.

<sup>22</sup> Brief for Petitioner, *supra* note 4, at \*1.

since the 1930s.<sup>23</sup> They loved their property and the trees that came with it.<sup>24</sup> On top of the Mountain, the Wheelers spent their leisure time within a cabin that overlooked the entire scenery.<sup>25</sup> “The location of the cabin provided the Wheelers a pleasing view of, among other things, a variety of trees on the property.”<sup>26</sup>

When Enbridge approached the Wheelers and advised the family that it wanted to place a pipeline across the Mountain, the Wheelers knew that Enbridge had the power to condemn the easement.<sup>27</sup> Even though Enbridge could have obtained the right to plow down the trees, getting that right would have been costly and time-consuming.<sup>28</sup> Additionally, Enbridge would owe the Wheelers around \$50,000 to compensate them for the easement.<sup>29</sup> Since the Wheelers did not have the power to resist the pipeline, the Wheelers decided to compromise with Enbridge to maintain the beauty of the trees.<sup>30</sup> The family accepted a payment of only \$20,880 on the condition that Enbridge placed the pipe underground and maintained the trees.<sup>31</sup> This win-win situation allowed Enbridge to pay a bargain price for its easement immediately and without the delay, expense, and uncertainty of going through condemnation.<sup>32</sup> Moreover, the Wheelers got what they wanted: an assurance from Enbridge that it would preserve the Mountain’s natural beauty.<sup>33</sup>

Enbridge did not hold up its end of the bargain.<sup>34</sup> Enbridge hired a company to construct the pipeline on the Mountain.<sup>35</sup> Enbridge did not tell any of its contractors about the agreement to construct the pipeline

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<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at \*3.

<sup>25</sup> *Id.* at \*2.

<sup>26</sup> *Enbridge Pipelines (E. Tex.), L.P. v. Gilbert Wheeler, Inc.*, 393 S.W.3d 921, 924 (Tex. App.—Tyler 2013), *rev’d*, 449 S.W.3d 474 (Tex. 2014).

<sup>27</sup> Brief for Petitioner, *supra* note 4, at \*24.

<sup>28</sup> *Id.* at \*18.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at \*24–25.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at \*19.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at \*8.

<sup>35</sup> *Id.* at \*7.

underground.<sup>36</sup> Consequently, the contractors bulldozed the easement and destroyed 600 feet of trees.<sup>37</sup> The 600 feet of destroyed trees were located in an area that could be seen from the cabin's balcony.<sup>38</sup> According to the Wheelers, these trees provided great recreational and aesthetic value to the family, and Enbridge took that away.<sup>39</sup>

The jury found that Enbridge breached the agreement and trespassed on the Mountain.<sup>40</sup> The evidence presented at trial showed that the fair market value of the Mountain dropped at most \$3,000.<sup>41</sup> While the fair market value of the Wheelers' entire 153-acre tract of land was \$383,000, the cost to restore the trees was determined to be between \$636,745 and \$923,589.<sup>42</sup> Despite this evidence, the jury found that "[t]he cost of restoring the Mountain to the condition it would have been in had Enbridge complied with the [agreement] was \$300,000."<sup>43</sup> Additionally, the jury found that the trespass did not diminish the Mountain's fair market value, but "[t]he intrinsic value of the trees that [Enbridge] destroyed was \$288,000."<sup>44</sup> The Wheelers elected to recover the cost-to-restore damages awarded for the breach of contract.<sup>45</sup>

### B. *The Appeal*

The Tyler Court of Appeals reversed the trial court.<sup>46</sup> Enbridge argued that the trial court erred because it failed to submit to the jury whether the injury was permanent or temporary.<sup>47</sup> Enbridge requested the question because it was necessary "to determine whether the jury should award damages [for] the cost to restore the trees . . . or damages [for] the loss in the

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<sup>36</sup> *Id.* at \*7–8.

<sup>37</sup> Response for Respondent, *supra* note 6, at \*2.

<sup>38</sup> Brief for Petitioner, *supra* note 4, at \*8.

<sup>39</sup> *Id.* at \*9.

<sup>40</sup> *Id.* at \*12.

<sup>41</sup> Response for Respondent, *supra* note 6, at \*8.

<sup>42</sup> *Id.* at \*16, \*22.

<sup>43</sup> Brief for Petitioner, *supra* note 4, at \*12.

<sup>44</sup> *Id.*

<sup>45</sup> *Enbridge Pipelines (E. Tex.), L.P. v. Gilbert Wheeler, Inc.*, 393 S.W.3d 921, 924 (Tex. App.—Tyler 2013), *rev'd*, 449 S.W.3d 474 (Tex. 2014).

<sup>46</sup> *Id.* at 929.

<sup>47</sup> *Id.* at 924.

Mountain's fair market value."<sup>48</sup> Additionally, Enbridge contended that the Wheelers could not recover damages for the trees' intrinsic value because that measure of damages was not properly submitted to the jury.<sup>49</sup> The court held that "whether injury to real property is permanent or temporary is a question of fact" and that "the plaintiff must first obtain a finding on whether the injury to the land was permanent or temporary."<sup>50</sup> Because the Wheelers failed to secure a permanent or temporary finding for the property damage, the court found the issue dispositive and did not address the intrinsic value of trees exception.<sup>51</sup> Accordingly, the Tyler Court of Appeals reversed the trial court's judgment and rendered that the Wheelers take nothing.<sup>52</sup>

The Wheelers appealed the case to the Texas Supreme Court. During oral argument, some justices expressed their concerns about the appellate court holding.<sup>53</sup> Justice Boyd pointed out that the appellate court outcome was unjust because the Wheelers received nothing instead of the \$300,000.<sup>54</sup> Additionally, Justice Green expressed a concern that the law would create the incentive for pipeline companies to commit fraud.<sup>55</sup> He posed the following scenario to Enbridge's attorney: what if a pipeline company wanted to negotiate with the landowner?<sup>56</sup> The landowner does not want his property disfigured by a pipeline, so the pipeline company agrees to maintain the land.<sup>57</sup> However, once the landowner agrees, the pipeline company bulldozes the property anyway.<sup>58</sup>

### C. The Texas Supreme Court's Decision

With the holding in the *Gilbert Wheeler* case, the Texas Supreme Court aimed to create more certainty and prevent injustice when compensating

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<sup>48</sup> *Gilbert Wheeler, Inc. v. Enbridge Pipelines (E. Tex.), L.P.*, 449 S.W.3d 474, 477 (Tex. 2014).

<sup>49</sup> *Id.*

<sup>50</sup> *Enbridge Pipelines*, 393 S.W.3d at 925.

<sup>51</sup> *Id.* at 929.

<sup>52</sup> *Id.*

<sup>53</sup> See Transcript of Oral Argument at 8–10, *Gilbert Wheeler*, 449 S.W.3d 474 (Tex. 2014) (No. 13-0234), 2014 WL 883550, at \*8–10.

<sup>54</sup> *Id.* at \*8.

<sup>55</sup> *Id.* at \*9–10.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

landowners.<sup>59</sup> The Supreme Court opinion begins by stating: “[The Wheelers’] petition raises broad concerns about the boundaries of the temporary-versus-permanent distinction and its application to the calculation of damages for injury to real property. . . . [W]e take this opportunity to clarify its contours.”<sup>60</sup> In doing so, the court began by addressing “the significance of classifying [an] injury to real property as temporary or permanent.”<sup>61</sup>

The court first reformulated the definitions for temporary and permanent for the sake of clarity.<sup>62</sup> The court said:

An injury to real property is considered permanent if (a) it cannot be repaired, fixed, or restored, *or* (b) even though the injury can be repaired, fixed, or restored, it is substantially certain that the injury will repeatedly, continually, and regularly recur, such that future injury can be reasonably evaluated. Conversely, an injury to real property is considered temporary if (a) it can be repaired, fixed or restored, *and* (b) any anticipated recurrence would be only occasional, irregular, intermittent, and not reasonably predictable, such that future injury could not be estimated with reasonable certainty. These definitions apply to cases in which entry onto real property is physical (as in trespass) and to cases in which entry onto real property is not physical (as with a nuisance).<sup>63</sup>

Because of these new detailed definitions, the court found that the temporary-versus-permanent distinction should be a question of law for the court to decide.<sup>64</sup> With that holding, the court reversed the holding of the appellate court.<sup>65</sup>

The court’s modification of these definitions was vital to creating more clarity and certainty when differentiating temporary and permanent damage

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<sup>59</sup> See *Gilbert Wheeler, Inc. v. Enbridge Pipelines (E. Tex.), L.P.*, 449 S.W.3d 474, 478–79 (Tex. 2014).

<sup>60</sup> *Id.* at 477–78.

<sup>61</sup> *Id.* at 478.

<sup>62</sup> *Id.* at 480.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 481.

<sup>65</sup> *Id.* at 486.

to real property. However, because Enbridge breached their contract, the court was blocked from handing down these new definitions unless it also found that the distinction applied to contract cases.<sup>66</sup> To clarify and create more certainty when dealing with damage to real property, the court needed to reach the temporary-versus-permanent distinction despite having a breach of contract. Therefore, the court held that the “application of the temporary-versus-permanent distinction in cases involving injury to real property is not limited to causes of action that sound in tort rather than contract.”<sup>67</sup>

After the court found that the temporary-versus-permanent distinction applied, it expressly adopted the economic feasibility exception.<sup>68</sup> This exception applies when the damage to real property is considered temporary, but the cost to repair will exceed the reduction in the property’s market value to such a “high degree that the repairs are no longer economically feasible.”<sup>69</sup> In those circumstances, the court deems the injury permanent, and the court awards damages for “loss in fair market value.”<sup>70</sup> Because the court recognized the economic feasibility exception, the damages to the Wheelers’ property became permanent.<sup>71</sup> Therefore, the Wheelers could only recover the reduction in the fair market value of the Mountain (outside of another exception).<sup>72</sup>

The adoption of the economic feasibility exception would prevent the Wheelers from being placed in the same position they would have occupied but for the actions by Enbridge. As such, the court then revisited the exception to the temporary or permanent damage model for the intrinsic value of trees.

In cases involving real property injured by the destruction of trees, even when the proper measure of damages is the loss in the fair market value of the property to which the trees were attached, and the value of the land has not declined, we have held that the injured party may nevertheless recover for the trees’ intrinsic value. This exception was created to

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<sup>66</sup> *See id.* at 479–80.

<sup>67</sup> *Id.* at 479.

<sup>68</sup> *Id.* at 481.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 484.

<sup>72</sup> *See id.*



compensate landowners for the loss of the aesthetic and utilitarian value that trees confer on real property.<sup>73</sup>

In a previous holding, the court determined that the damage must result in zero reduction in market value.<sup>74</sup> However, in *Gilbert Wheeler*, the court expanded the rule to “no diminishment of the property’s fair market value, or in so little diminishment of that value that the loss is essentially nominal.”<sup>75</sup>

The Supreme Court broadened the intrinsic value of trees exception to create more flexibility and to ensure that Enbridge compensated the Wheelers for the damage to their land.<sup>76</sup> By expanding the exception, the court deemphasized the importance of proving zero reduction in market value. When the exception required a finding of zero reduction in market value, parties fought about whether the destruction of trees was zero or some minuscule amount. This dispute required both parties to spend money to provide expert witnesses to fight over minimal dollar amounts.<sup>77</sup>

## II. COMPENSATORY DAMAGES AND THE DIFFERENCE BETWEEN CONTRACT AND TORT

Section II examines the differences between damages in contract and tort and analyzes the Texas Supreme Court’s holding that courts should apply the temporary-versus-permanent distinction to both causes of action. The purpose of this Section is to show how the decision seems to stray away from the general principles of contract law and detract from the benefit of the bargain. First, this Section analyzes how courts use the “lesser of” rule when awarding damages in tort. Second, this Section distinguishes contract law and explains why courts generally avoid using the “lesser of” rule. Lastly, this Section examines the court’s decision to apply the “lesser of” approach to contracts when dealing with damage to real property and explains why this decision is practical and workable for the bench and bar.

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<sup>73</sup> *Id.* at 482.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 483.

<sup>76</sup> *Id.* at 481, 483.

<sup>77</sup> See Response for Respondent, *supra* note 6, at \*47–48.

### A. Tort Law and the “Lesser of” Rule

“[T]he primary purpose of tort law is to provide just compensation to the tort victim.”<sup>78</sup> The remedy for a tort should strive to place the injured party “as close as possible to the same position as . . . before the injury.”<sup>79</sup> “[C]ompensatory damage awards are designed to achieve this purpose.”<sup>80</sup> “Reasonable and proper compensation must be neither meager nor excessive, but must be sufficient to place the plaintiff in the position in which he would have been absent the defendant’s tortious act.”<sup>81</sup> As a result, compensatory damages function as “an instrument of corrective justice, an effort to put the [injured party] in [their] rightful position.”<sup>82</sup>

Compensatory damages within tort law do not function to place the injured party in the position they wish to acquire.<sup>83</sup> “Since the plaintiff is not entitled to be put in a better position than had the wrong not occurred, courts are sensitive to measures of damages that would result in a ‘betterment’ to the plaintiff.”<sup>84</sup> “The cost of a remedy should not exceed the benefit it produces if equal benefits can be achieved more cheaply. A remedy is more desirable or efficient if, as compared to the alternative remedy, it leaves the defendant better off without leaving the plaintiff worse off.”<sup>85</sup> Therefore, like most jurisdictions, Texas applies this “lesser of” rule to limit an injured party’s recovery to the lesser amount of two measures of damages.<sup>86</sup>

The “lesser of” rule is best demonstrated with a simple example of damages in a car wreck case. Suppose a defendant destroys the plaintiff’s truck in a car accident.<sup>87</sup> Before its destruction, the truck’s market value was \$1,000.<sup>88</sup> A replacement truck of equal value and equal performance is available for \$1,000.<sup>89</sup> Alternatively, the defendant could repair the truck at

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<sup>78</sup> *Haines v. Comfort Keepers, Inc.*, 393 P.3d 422, 429 (Alaska 2017).

<sup>79</sup> *Stayton v. Del. Health Corp.*, 117 A.3d 521, 534 (Del. 2015).

<sup>80</sup> *Haines*, 393 P.3d at 429.

<sup>81</sup> *J & D Towing, L.L.C. v. Am. Alt. Ins. Corp.*, 478 S.W.3d 649, 655 (Tex. 2016).

<sup>82</sup> *Id.* (quoting 1 DAN B. DOBBS, *Law of Remedies: Damages-Equity-Restitution* § 3.1, at 281 (2d ed. 1993)).

<sup>83</sup> *Id.* at 677.

<sup>84</sup> MORRISON, *supra* note 1, at 72.

<sup>85</sup> 1 DAN B. DOBBS, *Law of Remedies: Damages-Equity-Restitution* § 1.9, 43 (2d ed. 1993).

<sup>86</sup> MORRISON, *supra* note 1, at 78.

<sup>87</sup> DOBBS, *supra* note 85, § 1.9, at 43.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

the cost of \$2,000.<sup>90</sup> Courts will probably grant the plaintiff the cost of a replacement truck because repairing the truck would give the plaintiff the same benefit at a higher price.<sup>91</sup> Additionally, the \$2,000 repair to the truck could enhance the truck's value beyond its original \$1,000 value. If the repair increases the truck's value, the plaintiff is in a better position than before the accident.

Courts use this same "lesser of" rule when awarding damages for injury to real property.<sup>92</sup> In the Texas Supreme Court case of *Pacific Express*, a landowner sought to recover damages from the defendant because of the injury to his house.<sup>93</sup> The cost to repair the house was \$750, but the plaintiff produced no evidence to determine the reduction in its fair market value.<sup>94</sup> As the court pointed out, if the house was old and deteriorating, the cost to reconstruct the house in its same form would probably result in a betterment for the plaintiff.<sup>95</sup> Today, courts use the temporary-versus-permanent distinction to determine whether the court should award the reduction in value or the cost to repair.<sup>96</sup>

### B. Contract Law and the 'Lesser of' Rule

Unlike tort law, parties contract with each other to place themselves in the position they wish to acquire.<sup>97</sup> "A contract. . . is an attempt by market participants to allocate risks and opportunities."<sup>98</sup> "[B]oth parties have weighed the pros and cons of entering into the transaction beforehand," so "[t]he bargain . . . is supposed to reflect their assessment of the costs and benefits of doing exactly what they agreed to do."<sup>99</sup> Thus, damages in

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<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 43–44.

<sup>92</sup> Pa. Dep't. of Gen. Servs. v. U.S. Min. Prods. Co., 898 A.2d 590, 596 (Pa. 2006); *In re Sept. 11 Litig.*, 802 F.3d 314, 329 (2d Cir. 2015); *J & D Towing, L.L.C. v. Am. Alt. Ins. Corp.*, 478 S.W.3d 649, 656 n.27 (Tex. 2016).

<sup>93</sup> 16 S.W. 792, 793 (1891).

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> See *Gilbert Wheeler, Inc. v. Enbridge Pipelines (E. Tex.), L.P.*, 449 S.W.3d 474, 478–79 (Tex. 2014)63.

<sup>97</sup> See *J & D Towing, L.L.C. v. Am. Alt. Ins. Corp.*, 478 S.W.3d 649, 655 (Tex. 2016).

<sup>98</sup> 11 SAMUEL WILLISTON & RICHARD A. LORD, *Williston on Contracts* § 31:5, 457 (4th ed. 2012).

<sup>99</sup> Daniel & Marshall, *supra* note 17, at 878.

contract law “aim at protecting the plaintiff’s expectation or expectancy interest.”<sup>100</sup> Expectancy damages strive to give the aggrieved party the benefit of its bargain by placing it in the same economic position it would have occupied if the breaching party performed the contract.<sup>101</sup>

Contract law has been and should be reluctant to use some form of the “lesser of” rule found in tort law. The “lesser of” rule in contracts denies the aggrieved party the benefit of its bargain.<sup>102</sup> Thus, if a court uses the “lesser of” rule for contract damages, the breaching party receives a windfall.<sup>103</sup> “[T]he aggrieved party is not given the equivalent of the benefit of her bargain, and the breaching party is in a better position than he would have been had he fully performed.”<sup>104</sup> “[The court’s role] is not to redistribute these risks and opportunities as [it sees] fit, but to enforce the allocation the parties have agreed upon.”<sup>105</sup>

One exception where courts use this “lesser of” approach is construction contracts. In construction contracts, “completion or repair may require ‘undoing’ work already done” and “destroy[] its economic value.”<sup>106</sup> This work may be costly without adding much value to the project.<sup>107</sup> Thus, courts strive to impose economically efficient remedies that avoid this unnecessary waste.<sup>108</sup> The most famous example is Judge Cardozo’s opinion in *Jacob & Youngs, Inc. v. Kent*. In this case, a home builder failed to install the correct brand of piping.<sup>109</sup> The cost required to undo the work already done to install the correct brand was high.<sup>110</sup> However, the difference in market value between the house with the wrong pipe and the house with the correct pipe

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<sup>100</sup>3 DAN B. DOBBS, *Dobbs Law of Remedies: Damages-Equity-Restitution* § 12, 6 (2d ed. 1993).

<sup>101</sup>*Range v. Calvary Christian Fellowship*, 530 S.W.3d 818, 831 (Tex. App.—Houston [14th Dist.] 2017, pet. denied).

<sup>102</sup>*See* WILLISTON & LORD, *supra* note 98.

<sup>103</sup>*See* Daniel & Marshall, *supra* note 17, at 878.

<sup>104</sup>*Id.*

<sup>105</sup>WILLISTON & LORD, *supra* note 98, at 457.

<sup>106</sup>DOBBS, *supra* note 100, at 436.

<sup>107</sup>*Id.*

<sup>108</sup>*See id.*

<sup>109</sup>*Jacob & Youngs, Inc. v. Kent*, 129 N.E. 889, 890 (N.Y. 1921).

<sup>110</sup>*Id.*

was nominal.<sup>111</sup> Therefore, the court held that the appropriate measure of damages was the difference in value.<sup>112</sup>

The circumstances of the *Jacob & Youngs, Inc.* case forced Cardozo to choose between economic waste and windfall. If Cardozo allowed for the cost of repair, the allotted damages would add no economic value to the house.<sup>113</sup> Conversely, if Cardozo allowed difference-in-value damages, the builder would receive a windfall since they breached the contract.<sup>114</sup> After weighing the facts of the case, Cardozo favored granting the defendant a windfall over awarding the plaintiff the benefit of its bargain.<sup>115</sup>

Texas courts have followed Cardozo's logic when faced with the same dilemma in construction cases.<sup>116</sup> For example, in *Greene*, the defendant sold a townhouse to the plaintiff which deviated from the construction plans.<sup>117</sup> The court stated that a "plaintiff is entitled to recover . . . the lesser of [the] reasonable cost of remedying . . . [the] deviations from the contract, or the difference in value of the structure contracted for and the value of the structure in its defective condition."<sup>118</sup> In determining which approach to use, the court considered economic feasibility as the main factor to consider when determining the proper measure of damages.<sup>119</sup>

### C. Contract Law, Damage to Real Property, and the "Lesser of" Rule

The same dilemma from construction cases appears in contracts that result in damage to real property. In *Groves*, the defendant agreed to remove sand and gravel from Groves's land and then return it to uniform grade.<sup>120</sup> The defendant deliberately breached the contract by neglecting to return the

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<sup>111</sup> *Id.* at 891.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *See id.* at 891–92.

<sup>115</sup> *Id.*

<sup>116</sup> *See, e.g., Greene v. Bearden Enters., Inc.*, 598 S.W.2d 649, 652–53 (Tex. App.—Fort Worth 1980, writ ref'd n.r.e.), *disapproved of on other grounds by McKinley v. Drozd*, 685 S.W.2d 7 (Tex. 1985).

<sup>117</sup> *Id.* at 651.

<sup>118</sup> *Id.* at 652.

<sup>119</sup> *Id.* ("In most circumstances the main factors to be considered are the physical and economic feasibility of correcting defects or bringing the structure into compliance with the contract.")

<sup>120</sup> *Groves v. John Wunder Co.*, 286 N.W. 235, 236 (Minn. 1939).

property to uniform grade.<sup>121</sup> If the defendant had left the premises at the uniform grade required by the lease, the value would have only been \$12,160.<sup>122</sup> The court held that the defendant was liable for the reasonable cost of returning the land to uniform grade.<sup>123</sup> While *Groves*'s reasoning may not find much support,<sup>124</sup> the facts present an interesting scenario which does not come with an easy answer.

Suppose that the going rate for the sand and gravel rights was \$165,000, but the landowner agreed to take a \$60,000 pay cut if the defendant regrades the land after removing the gravel.<sup>125</sup> If these were the underlying facts, then the defendant would be unjustly enriched by nearly \$48,000 if the court only awarded the \$12,161 difference-in-value damages.<sup>126</sup> Alternatively, suppose that the going rate for the sand and gravel rights was \$200,000, but the landowner agreed to take an even larger pay cut of \$95,000 to have the defendant regrade it.<sup>127</sup> In this instance, "the price would reflect a strong subjective preference to have the land restored and would also provide an objective value for that preference."<sup>128</sup> Because the subjective value of the repair to the land is clearly shown in the substantial pay cut by the landowner, the cost-to-repair measure is justified.<sup>129</sup> Overall, both hypothetical scenarios show that the court needs to consider the bargain in their damages analysis. Like in *Greene*, the court must weigh the appropriate factors to choose between waste and windfall.

Through this lens, we can analyze the *Gilbert Wheeler* opinion. In *Gilbert Wheeler*, the court lumped contract damages and tort damages together by applying the temporary-versus-permanent distinction to cases involving injury to real property.<sup>130</sup> However, the court noted that parties can specify

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<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 238.

<sup>124</sup> See DOBBS, *supra* note 100, at 441 (The *Groves* court came to its holding based on the fact that the defendant willfully breached the contract. "Contract damages are normally compensatory; punitive damages are normally not permitted.").

<sup>125</sup> *Id.* at 442.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> 449 S.W.3d 474, 479 (Tex. 2014).

how to calculate damages for breach in their agreement.<sup>131</sup> If the parties do not include this stipulation in their agreement, courts will apply the general principles used to assess real property damage. The court found that the injury “under either cause of action [was] the same,” and “[it saw] no reason to compensate [the parties] differently because the wrongful conduct that caused the identical injury [stemmed] from breaching a contract rather than committing a tort.”<sup>132</sup>

Because the court applied the temporary-versus-permanent distinction, it considered the damages permanent.<sup>133</sup> They were permanent because the cost to repair exceeded the diminution in the property’s market value to such a high degree that the repairs were not economically feasible.<sup>134</sup> Therefore, by applying this “lesser of”-type rule, the Wheelers would not recover the benefit of their bargain under the contract.<sup>135</sup>

The court came to this conclusion because they wanted damages to real property to become more predictable. Previously, some lower courts held that calculating damage to real property required general principles, while other lower courts were more flexible in evaluating damage awards.<sup>136</sup> To become more predictable, the Texas Supreme Court chose to apply the general principles found within the permanent-versus-temporary distinction. Whether dealing with a breach of contract or tort, courts are still dealing with an injury to real property.<sup>137</sup> Both contract and tort utilize these two methods of measuring damages (the cost to repair and the reduction in market value).<sup>138</sup> If the parties want to emphasize the importance of their bargain, the general rule allows parties to stipulate damages in their contract.<sup>139</sup> This ability to stipulate damages allows landowners to protect their expectations and ensure that they receive their side of the bargain.

The problem with this ruling is that the court undermines the significance of the contract and the benefit of the bargain. Let us revisit the hypothetical

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<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 484.

<sup>134</sup> *Id.*

<sup>135</sup> Absent the intrinsic value of trees exception.

<sup>136</sup> *Gilbert Wheeler, Inc. v. Enbridge Pipelines (E. Tex.), L.P.*, 449 S.W.3d 474, 479 (Tex. 2014)63.

<sup>137</sup> *See id.*

<sup>138</sup> *See id.* at 476.

<sup>139</sup> *See id.* at 479.

above from the *Groves* case where the landowner agreed to a large pay cut to have the defendant regrade the land.<sup>140</sup> If the landowner did not stipulate how the court should calculate damages, the court would apply the general rules found within the permanent-versus-temporary distinction. As a result, the landowner would only receive \$12,161 instead of the \$60,000 or \$95,000 he gave up by bargaining for the defendant to regrade the land. This windfall would not occur if the law allowed courts to look at the contract and weigh the benefit of the bargain against the economic waste produced from regrading the land.<sup>141</sup> The facts created by this scenario gives companies like Enbridge the opportunity to exploit landowners who want to preserve the beauty of their land.

However, it is important to take into account the impact that more certainty and predictability will have within this area of remedies. While companies like Enbridge still have the opportunity to exploit landowners, the law becomes much clearer for landowners' attorneys. These attorneys would know to plead unjust enrichment or restitution in the alternative.

Plaintiffs are entitled to an election of remedies for recovery on a single injury.<sup>142</sup> While the "lesser of" rule with the temporary-versus-permanent distinction applies within contract and tort claims, the rule does not also require that the plaintiff recover the "lesser of" between the damage to real property claim and the unjust enrichment claim. In fact, plaintiffs are allowed to elect the cause of action that awards the highest recovery.<sup>143</sup> As a result, by pleading unjust enrichment, landowners could recover the defendant's gain or benefit rather than the landowner's loss.<sup>144</sup> In both the *Groves* hypothetical and the *Gilbert Wheeler* case, both landowners could have pled unjust enrichment because the parties agreed to less money to have their land maintained.<sup>145</sup> With this gained clarity from the *Gilbert Wheeler* decision, landowners' legal counsel can ensure that landowners are better compensated

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<sup>140</sup> See DOBBS, *supra* note 100, at 442.

<sup>141</sup> Economic waste for trees is much more subjective than the fact pattern of *Groves*. For example, if a pipeline company destroys the beauty of a landowner's property by clear-cutting an easement path, the pipeline company might think it economically wasteful to pay to restore the view. However, the landowner would think the opposite. Therefore, analyzing the "economic waste" factor to the damage model is much more difficult for trees because of their intrinsic value.

<sup>142</sup> See, e.g., *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 303 (Tex. 2006).

<sup>143</sup> *Id.* at 314.

<sup>144</sup> See MORRISON, *supra* note 1, at 25.

<sup>145</sup> See DOBBS, *supra* note 100, at 442; see Brief for Petitioner, *supra* note 4, at 24.



for damage to their land and that defendants do not receive a windfall for their wrongful acts.

Lastly, parties can avoid this situation altogether if they stipulate how to calculate damages in the contract. In *Chaparral*—a district court case following the *Gilbert Wheeler* holding—the plaintiff brought suit against the defendant because the defendant failed to restore the land to normal after drilling for oil.<sup>146</sup> Because the contract between the plaintiff and defendant specifically addressed the methodology for calculating damages, the court held that it was proper for the court to enforce the contract and not treat the property damages as permanent or temporary.<sup>147</sup> This case demonstrates how easily parties can address the issue ahead of time to avoid the distinction if problems develop down the road.

Overall, while the court's decision in *Gilbert Wheeler* appears to detract from contract law and the benefit of the bargain, the added clarity and predictability from the change greatly benefit this area of remedies. The decision allows parties to stipulate the calculation of damages upfront. If parties do not utilize this option, then the law provides predictability for parties who need to litigate within this area of the law. With the added predictability, the law favors a possible windfall for defendants, but landowners still have the opportunity to prevent the defendant from retaining any benefit that would be unjust. This new solution created by the court seems to be the ideal balance between (1) dealing with injury to real property and (2) the tension created between contract law and the "lesser of" approach. As such, this new rule from the Texas Supreme Court is something that is practical and workable for the bench and bar.

### III. THE NEW INTRINSIC VALUE OF TREES EXCEPTION

Section III examines the intrinsic value of trees exception and analyzes the Texas Supreme Court's holding that the exception can apply when the reduction in value to the land is essentially nominal. This Section aims to show the policy reasons behind the change and the implications that the change will have on Texas law moving forward. First, this Section breaks down the general principles behind the exception. Second, this Section traces the history of the exception through Texas case law. Third, this Section

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<sup>146</sup>Chaparral Energy, L.L.C. v. Dudley, No. 4:13-CV-3540, 2015 WL 12942050, at \*1 (S.D. Tex. Nov. 3, 2015).

<sup>147</sup>See *id.* at \*3.

breaks down the policy reasons that favored the change to the exception and the possible implications those changes will have on Texas law. Lastly, this Section suggests some limitations that the law can place on this new exception to limit the downsides that the Texas Supreme Court created.

### A. *The Exception*

The intrinsic value of trees is an exception to the general rules for damage to real property.<sup>148</sup> While the temporary-versus-permanent distinction and the economic feasibility exception strive to award the injured party the “lesser of” amount, this intrinsic value exception allows landowners to recover the cost to repair—even though the law considers the injury permanent.<sup>149</sup> This exception focuses on the trees’ “ornamental (aesthetic) value and its utility (shade) value” to the landowner.<sup>150</sup>

Typically, when a plaintiff seeks damages for the destruction to shade or ornamental trees, the landowner may have no economic harm to the overall value of the land.<sup>151</sup> “If that is the case, the diminution measure would give the [landowner] no more than nominal recovery.”<sup>152</sup> However, the ornamental or utility value that landowners place with their trees does not necessarily translate into the reduced economic value of the land.<sup>153</sup>

When choosing between two measures of a single remedy, “courts usually attempt to choose a remedy that will approximately vindicate the plaintiff’s right.”<sup>154</sup> As an example, suppose the defendant negligently cuts down a landowner’s large tree.<sup>155</sup> The defendant’s injury only reduces the

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<sup>148</sup>*Gilbert Wheeler, Inc. v. Enbridge Pipelines (E. Tex.), L.P.*, 449 S.W.3d 474, 482 (Tex. 2014)63.

<sup>149</sup>*Id.*

<sup>150</sup>*Strickland v. Medlen*, 397 S.W.3d 184, 190 (Tex. 2013). This exception does not apply to sentimental value.

<sup>151</sup>See Kristine Cordier Karnezis, J.D., Annotation, *Measure of Damages for Injury to or Destruction of Shade or Ornamental Tree or Shrub*, 95 A.L.R.3d 508 § 2 (1979); DOBBS, *supra* note 85, at 715.

<sup>152</sup>DOBBS, *supra* note 85, at 715.

<sup>153</sup>See *Gilbert Wheeler*, 449 S.W.3d at 483.

<sup>154</sup>DOBBS, *supra* note 85, at 35; see *Pac. Express Co. v. Lasker Real Estate Ass’n*, 16 S.W. 792, 793 (Tex. 1891) (“The purpose, in every case, is to compensate the owner for the injury received, and the measure of damages which will accomplish this in a given case ought to be adopted.”).

<sup>155</sup>See DOBBS, *supra* note 85, at 45.

total value of the land by \$500, but the cost to replace the tree is \$5,000.<sup>156</sup> In this hypothetical, the landowner personally values the utility that the tree provides.<sup>157</sup> She will replace the tree from her personal funds if the defendant is not found liable for the replacement costs.<sup>158</sup> If the court only awarded the landowner the \$500, then the court would not have vindicated her right to legal protection of the tree.<sup>159</sup> Therefore, if the court wishes to vindicate the landowner's rights, the replacement cost is the appropriate measure because the landowner values the tree at \$5,000 or higher.<sup>160</sup>

### B. History of the Exception

The roots of the exception in Texas can be seen as early as 1918 in *Stephenville v. Baker*. In that case, a railroad negligently burned down the landowner's trees, which provided both fruit and shade to the landowner.<sup>161</sup> The court recognized that while the general rule would only compensate the landowner for the difference in market value for the loss of the trees, the general rule was also flexible.<sup>162</sup> "General rules laid down for particular classes of cases may and should be modified whenever it becomes necessary to do so, in order to afford fair and just compensation."<sup>163</sup> Thus, the court allowed the plaintiff to provide evidence of the value of the trees and the amount of money that it would take to compensate him for being deprived of their use.<sup>164</sup>

With this idea of awarding fair and just compensation in mind, the San Antonio Court of Appeals formally recognized the intrinsic value of trees exception in *Lucas v. Morrison*. In *Lucas*, the defendant destroyed a landowner's hackberry tree.<sup>165</sup> The hackberry tree provided the only shade spot for the landowner's milk cows.<sup>166</sup> "[M]ilk cows need shade and fall off

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<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *See id.* at 46.

<sup>160</sup> *Id.*

<sup>161</sup> *Stephenville, N. & S.T. Ry. Co. v. Baker*, 203 S.W. 385, 386 (Tex. App.—Austin 1918, no writ).

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> 286 S.W.2d 190, 191 (Tex. App.—San Antonio 1956, no writ).

<sup>166</sup> *Id.*

in their production when they do not have shade.”<sup>167</sup> Despite the value of the hackberry tree to the landowner, the tree was of small economic value when compared to the value of the entire tract of land.<sup>168</sup> As a result, the destruction of the tree did not change the market value of the land.<sup>169</sup> The court understood that if the general rule of damages was followed, the law would permit the defendant to wrongfully enter the landowner’s farm and cut down his shade tree and not be required to pay any damages.<sup>170</sup> Thus, the court recognized the exception to the general rule of damages concerning the destruction of trees and allowed the landowner to recover their intrinsic value.<sup>171</sup>

The Texas Supreme Court recognized the exception in 1984 in *Porras v. Craig*. In *Porras*, the plaintiff owned twenty-four acres of land next to the defendant, who owned 2,600 acres of land.<sup>172</sup> The defendant negligently cut down several trees on two acres of the plaintiff’s land.<sup>173</sup> Because the injury to the land was permanent, the measure of damages should be the difference in the fair market value.<sup>174</sup> Instead of applying the general rule, the court remanded the case for a new trial and held that the plaintiff could attempt to prove intrinsic value damages if the destruction of trees did not reduce the value of the land.<sup>175</sup>

Thirty years after the Texas Supreme Court first recognized the exception, they broadened its reach in *Gilbert Wheeler v. Enbridge*.<sup>176</sup> In *Porras*, the court held that the exception only applied if the reduction in market value was zero.<sup>177</sup> However, in *Gilbert Wheeler*, the court added that “when a landowner can show that the destruction of trees on real property resulted in . . . so little diminishment of that value that the loss is essentially

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<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* (citing *Stephenville, N. & S. Tex. Ry. Co. v. Baker*, 203 S.W. 385 (Tex. App.—Austin 1918, no writ); *Shell Pipe Line Corp. v. Svrcek*, 37 S.W.2d 297, 299 (Tex. App.—Austin 1931, no writ)); see also *Hamilton v. Fant*, 422 S.W.2d 495, 498 (Tex. App.—Austin 1967, no writ).

<sup>172</sup> 675 S.W.2d 503, 504 (Tex. 1984).

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* at 506.

<sup>176</sup> 449 S.W.3d 474, 483 (Tex. 2014).

<sup>177</sup> See *id.*; *Porras*, 675 S.W.2d at 506.

nominal, the landowner may recover the intrinsic value of the trees lost.”<sup>178</sup> So, what changed over the thirty years since *Porras* for the Texas Supreme Court to shift their stance?

### C. Benefits from the New Exception

First, broadening the exception helps award fair and just compensation.<sup>179</sup> Since 1891, Texas courts are guided by the principle that the appropriate measure of damages is the amount that compensates the owner for the injury received.<sup>180</sup> In *Gilbert Wheeler*, the parties disagreed on whether the reduction in the market value of the property was \$3,000 or \$0.<sup>181</sup> This “essentially nominal” amount is insignificant compared to the total value of the land, \$383,000—or the amount the jury found appropriate to compensate the Wheelers, \$300,000.<sup>182</sup> If the court only permitted the application of the exception when the property suffered zero loss in fair market value, the law would “controvert the purpose of a damage award” by limiting the Wheelers to recovering an “essentially nominal” amount.<sup>183</sup>

Second, the requirement of zero reduction in market value causes unnecessary litigation expenses. At trial, the Wheelers hired a real estate appraiser as their expert witness to establish that the change in fair market value was zero.<sup>184</sup> On the other side, Enbridge provided three different witnesses to testify that the market value of the land was reduced by as much as \$3,000.<sup>185</sup> This dispute between the experts over \$3,000 drives up the attorneys’ fees for both parties. Additionally, the use of these expert witnesses opens up the door for challenges to the sufficiency of the evidence that supports the expert’s findings.<sup>186</sup>

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<sup>178</sup>449 S.W.3d at 483.

<sup>179</sup>See *id.* at 478; see also *Stephenville, N. & S. Tex. Ry. Co. v. Baker*, 203 S.W. 385, 386 (Tex. App.—Austin 1918, no writ) (stating the correct measure of damages is the sum of money, and no more, necessary to make fair and just compensation for the injury).

<sup>180</sup>See *Pac. Express Co. v. Lasker Real Estate Ass’n*, 16 S.W. 792, 793 (Tex. 1891).

<sup>181</sup>449 S.W.3d at 484–85.

<sup>182</sup>*Id.* at 485; Response for Respondent, *supra* note 6, at \*3–4, \*17.

<sup>183</sup>*Gilbert Wheeler*, 449 S.W.3d at 48363.

<sup>184</sup>Response for Respondent, *supra* note 6, at \*47.

<sup>185</sup>*Id.* at \*48; *Gilbert Wheeler*, 449 S.W.3d at 485.

<sup>186</sup>See *Gilbert Wheeler*, 449 S.W.3d at 485 n.5; see also *Porras v. Craig*, 675 S.W.2d 503, 504 (Tex. 1984) (where the primary complaint was sufficiency of the evidence to support the award of actual damages).

While parties pony up to pay these necessary expert fees, the overall insight gained from these experts is minimal. Whether zero or \$3,000, the damage in *Gilbert Wheeler* accounted for a reduction of less than one percent of the property's total value.<sup>187</sup> Nevertheless, parties must spend their time and resources on this aspect because the findings make or break the plaintiff's chances at a worthwhile recovery. By expanding the exception, the law places less importance on the reduced property value. Therefore, this expansion allows parties to save money and focus their resources elsewhere.

#### *D. The Unintended Consequences from the New Exception*

Despite these added benefits from the broadening of the exception, the change may come with unintended consequences that the court must address in the future. Let us revisit the facts of the *Gilbert Wheeler* case and draw out a few hypothetical situations. Instead of a maximum of \$3,000 in lost market value, say Enbridge caused a reduction of \$5,000. Now the decline in market value exceeds one percent. At what point does “essentially nominal” end? In their opinion, the court stated that a reduction of less than one percent was a “negligible reduction in fair market value” and “essentially nominal.”<sup>188</sup> So should “essentially nominal” equate to less than one percent? The decision to institute a bright-line cutoff at one percent would create the same problem that the court tried to solve when they backed away from the zero-reduction requirement. A “reduction of less than one percent” rule would incentivize parties to present expert witnesses to fight over whether the reduction in the value of the land was greater or less than \$3,830. The courts must give more insight and guidance into what “essentially nominal” means and how parties can determine how to measure for it.

Alternatively, suppose that courts just use their best judgment to decide if the reduction is “essentially nominal” or not. While this avoids the ‘battle-of-the-experts’ problem, we may have incentivized the fraudulent or careless behavior contemplated by Justice Green during the *Gilbert Wheeler* oral argument. In the hypothetical, Justice Green envisioned these pipeline companies agreeing not to destroy trees, but then bulldozing them down anyway because the cost of damages would be insignificant compared to the cost of a buried pipeline.<sup>189</sup> Under the Texas Supreme Court's new rationale,

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<sup>187</sup> See 449 S.W.3d at 485.

<sup>188</sup> *Id.*

<sup>189</sup> Transcript of Oral Argument, *supra* note 53, at \*9–10.

Enbridge would have been much better off if the loss of the trees had reduced the market value by \$50,000 rather than \$3,000. The law must strive to provide the right deterrence by measuring the costs and benefits.<sup>190</sup> However, this court's decision incentivizes companies like Enbridge to inflict more damage on people's land to avoid the exception altogether.

In like manner, the exception may incentivize this type of behavior, not because defendants save money, but because defendants want to avoid the risk of a disproportionate judgment against them. In *Gilbert Wheeler*, the Wheelers asked the jury to award nearly one million dollars in damages even though the value of their land was less than \$400,000.<sup>191</sup> A risk-averse company may be better off becoming more careless with its work and causing more damage to ensure that its liability is determined from the reduction in fair market value. In this instance, the law does not lead Enbridge and other companies in similar situations to take the desired amount of precautions when building the pipeline.<sup>192</sup> Instead, the law incentivizes companies to become more careless.

The public gas and electric companies within Texas expressed their concerns with the new exception in an amici curiae brief.<sup>193</sup> These companies own and operate thousands of miles of infrastructure to provide gas and electric service on land they own in fee and land where they have easement rights.<sup>194</sup> They are often litigants in cases involving the removal of trees and cases involving wildfires that result in tree loss.<sup>195</sup>

As they see it, “[t]he unfair, windfall damage award found permissible by the [c]ourt would have a dangerous impact on the cost of providing utility service in Texas.”<sup>196</sup> One of their concerns is the lack of a cap on the amount of damages available under the exception.<sup>197</sup> With the broadening of the exception in *Gilbert Wheeler*, the Texas Supreme Court's decision has opened the door for more landowners to recover from these deep pockets because the need to prove zero reduction in market value has been

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<sup>190</sup> See DOBBS, *supra* note 85, at 48.

<sup>191</sup> See Response for Respondent, *supra* note 6, at \*16–17.

<sup>192</sup> See DOBBS, *supra* note 85, at 49.

<sup>193</sup> See Brief for Aep Tex. Cent. Co. et al. as Amici Curiae Supporting Respondent, *Gilbert Wheeler, Inc.*, 449 S.W.3d 474 (No. 13-0234), 2013 WL 5785857, at \*vii.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> *Id.* at \*vii–viii.

<sup>197</sup> *Id.* at \*2.

removed.<sup>198</sup> More landowners without a cap on damages greatly enhance the risk to these companies, creating a more challenging legal landscape to operate their businesses.<sup>199</sup>

### *E. Practical Solutions for the New Exception*

The new intrinsic value of trees exception is not something that Texas law can live with moving forward. The pendulum has swung in favor of landowners, leaving a class of defendants at a severe disadvantage. In order to rebalance this paradigm shift, the law must adopt limitations on how much landowners can recover in damages when using the exception. In *Gilbert Wheeler*, the Wheelers were able to recover 75% of the market value of the 153-acre tract of land for the destruction of several hundred feet of trees.<sup>200</sup> The Wheelers “could have recovered even more than the value of [their] entire tract, yet still own the property, which according to [their] own expert appraiser did not lose even a dollar of value.”<sup>201</sup> The Wheelers were able to recover this amount purely because of the ornamental value of the trees.<sup>202</sup>

Landowners can exploit the new exception. For example, in *Ortega*—a case following the *Gilbert Wheeler* decision—the plaintiff purchased 36 acres of land for \$70,000.<sup>203</sup> Their neighbor, the defendant, cut down about thirty trees on the plaintiff’s property.<sup>204</sup> The plaintiff testified that, “without the trees, he had no seclusion or privacy from his neighbors and that the beauty previously provided by the destroyed trees was ‘completely gone.’”<sup>205</sup> While the plaintiff estimated the cost of damages was between \$50,000 and \$185,000, the jury only awarded \$45,000.<sup>206</sup> With the jury’s \$45,000 award, the plaintiff received one half of the value of his land because of the lost

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<sup>198</sup> See *id.* at \*1.

<sup>199</sup> See *id.*

<sup>200</sup> See *Gilbert Wheeler, Inc. v. Enbridge Pipelines (E. Tex.), L.P.*, 449 S.W.3d 474, 484–85 (Tex. 2014).

<sup>201</sup> Brief for Aep Tex. Cent. Co. et al. as Amici Curiae Supporting Respondent, *Gilbert Wheeler, Inc.*, 449 S.W.3d 474 (No. 13-0234), 2013 WL 5785857, at \*2–3.

<sup>202</sup> See DOBBS, *supra* note 85, at 43; see Brief for Petitioner, *supra* note 4, at 9.

<sup>203</sup> *Ortega v. Chesier*, No. 11-13-00002-CV, 2015 WL 581736, \*1 (Tex. App.—Eastland 2015, no pet.).

<sup>204</sup> *Id.*

<sup>205</sup> *Id.* at \*4.

<sup>206</sup> *Id.* at \*5.



beauty and privacy.<sup>207</sup> Yet, the plaintiff sought—and the jury had the opportunity to award—two times the value of their land.

These shockingly high damage awards derive from two different damage methodologies utilized by experts.<sup>208</sup> In *Ortega*, the plaintiff's expert witness first used the depreciated replacement cost method.<sup>209</sup> The depreciated replacement cost method calculates the cost to install or replace a tree, less depreciation on adjustments for any undesirable species characteristics for the original tree.<sup>210</sup> This method estimated the cost of damages at over \$185,000.<sup>211</sup> Second, the court used the cost-of-cure method.<sup>212</sup> The cost-of-cure method calculates the cost of going back in with smaller trees and reforesting the area so that eventually, the landowner would enjoy the benefits they lost.<sup>213</sup> This method estimated the cost of damages at over \$50,000.<sup>214</sup>

Texas law should implement two restrictions on the new intrinsic value of trees exception. First, the law should limit landowners' use of the depreciated replacement cost method. This restriction allows the parties to focus on the presumably cheaper cost-of-cure method when determining the appropriate amount of damages. Second, the exception should cap damages based on the total value of the damaged land. Texas law should not allow landowners to seek damages from the intrinsic value of trees exception if the amount sought exceeds the total value of the land. Rather than setting a bright-line cap, the exception should impose a reasonableness standard in comparison to the total value of the land and the usefulness of the trees lost.

#### IV. CONCLUSION

The Texas Supreme Court's holding in *Gilbert Wheeler v. Enbridge* is a step in the right direction, but it is not a perfect solution. The clarity that the court added to this area of Texas law will bring substantial benefits to landowners who seek damages for injury to their land. However, the decision

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<sup>207</sup> *See id.* at \*1, \*5.

<sup>208</sup> *See id.* at \*4.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

to expand the intrinsic value of trees exception will create problems in the Texas law down the road. The exception needs more restrictions in the form of damage caps and restrictions on damage methodology.