

Supreme Court of Kentucky Holds Plaintiff Can Recover for Stigma Damages in Addition to Repair Costs Resulting From Property Damage

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In *Muncie v. Wiesemann*, 2018 K.Y. LEXIS 257, the Supreme Court of Kentucky considered whether stigma damages [1] in a property casualty case are recoverable in addition to the costs incurred to remediate the actual damage. The court held that stigma damages are recoverable in addition to repair costs, but the total of the stigma damages and repair costs cannot exceed the diminution in the fair market value of the property. The court's decision establishes that if the repair costs are insufficient to make the plaintiff whole, a recovery for stigma damages up to the amount of the diminution in the market value of the home is appropriate.

Appellants Cindy and Jim Muncie incurred significant property damage to their home as a result of an oil leak originating from a neighboring property owned by the Estate of Martha Magel. In 2011, Auto Owners Insurance Company (Auto Owners), the liability carrier for the Estate's testatrix, Patricia Weisman, filed an impleader complaint in federal court to discharge its obligation to settle the third-party liability claims on behalf of Ms. Weisman. Auto Owners reached a settlement with the Muncies for \$60,000 which represented the remediation costs for the actual damage to the property. The settlement release reserved the Muncies' right to pursue a claim for stigma damages associated with the oil leak.

Shortly after the settlement, the Muncies sued Ms. Weisman in Kentucky's Oldham Circuit Court for stigma damages resulting from the incident. Ms. Weisman filed a motion for summary judgment, arguing that the settlement in the federal court case barred the state court action because the Muncies were fully compensated for their damages. Ms. Weisman argued that stigma damages can only be recovered when paired with actual damages. The Circuit Court agreed that, in light of the settlement for actual damages, no further claim existed. The Muncies filed an appeal. The Court of Appeals held that, while stigma damages can be included in the claim for actual damages, there is no independent right of recovery available for stigma damages. The Muncies then filed a Petition for Review with the Supreme Court of Kentucky, which the court granted.

The Supreme Court of Kentucky acknowledged that stigma damages are recoverable when a plaintiff incurs actual damages. The Supreme Court held that stigma damages can be recovered in addition to, and separately from actual damages, as long as the total of the remediation costs and stigma damages do not, collectively, exceed the diminution in the market value of the property before and after the loss. The court explained that, if the repair costs were less than the diminution of market value, then the plaintiffs' property would be permanently deprived of significant value without compensation if they could not recover their residual loss due to stigma.

The court's decision establishes that, sometimes, the cost of repairing the damages incurred is insufficient to fully reflect the diminished value of the property due to the stigma caused by long term negative perceptions. The court further held that, if a property casualty claim settles for remediation cost damages but claims for stigma damages are reserved, the plaintiff may be awarded stigma damages regardless of the partial settlement. As such, the court remanded the case back to the lower court for a determination as to whether or not the plaintiffs suffered stigma damages, in addition to repair cost damages that, when combined, did not exceed the diminution in the market value of the property.

The *Muncie* decision sheds light on several important factors that must be considered when handling a subrogation case. First, the amount paid to an insured pursuant to the applicable insurance policy may be a different measure of damages than what is legally recoverable in the subject jurisdiction. Secondly, the legally recoverable damages could exceed the amount paid by the carrier if the policy does not account for stigma damages. Lastly, the subrogation handler must consider whether the insured has an uninsured loss for stigma damages. In Kentucky, absent contractual language to the contrary, the insured may have the right of first recovery for uninsured losses pursuant to the insured made whole doctrine.

[1] The court defined stigma damages as compensation for loss to the property's market value caused by long term negative perceptions of the property that are in excess of any recovery obtained for the temporary injury itself.

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