KENTUCKY SUPREME COURT
CASE NO. 2007-SC-0818-D CONSOLIDATED
WITH 2006-SC-0763-DG

WOODIE CANTRELL, ET AL — MOVANTS

VS.

On Appeal from
Kentucky Court of Appeals
Action No. 2003-CA-1784-MR and 2003-CA-001865-MR
And Johnson Circuit Court
Civil Action No. 97-CI-00442

ASHLAND OIL, INC., ET AL — RESPONDENTS

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APPELLANTS REPLY AND RESPONSE ON CROSS APPEAL

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RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

This is to certify that a true and accurate copy of the foregoing was this day mailed to: **HON. GEORGE CHANDLER, HON. KIRK MATHIS**, Chandler Law Offices, P. O. Box 430, Lufkin, Texas 75902-0340; **HON. BROADUS SPIVEY,** 48 East Avenue, Austin, Texas 78701-4320, **HON. DARRIN WALKER**, 2054 Parkdale Drive, Kingwood, Texas 77339; **HON. MICHAEL ENDICOTT**, P. O. Box 181, Paintsville, Kentucky 41240; **HON. BRIAN M. JOHNSON, HON. PHILLIP D. SCOTT, HON. ANNE CHESNUT**, Greenebaum, Doll & McDonald, 300 West Vine Street, Suite 1100, Lexington, Kentucky 40507; **HON. RALPH H. JOHNSON, HON. LEON TARANTO, HON. LYNN K. MCKAY,** Blank Rome, LLP, The Watergate Building, 600 New Hampshire Avenue NW, Washington, Washington, DC 20037; **HON. MICHAEL J. SCHMITT**, P. O. Drawer 1767, Paintsville, Kentucky 41240; and the original and nine (9) copies to: **CLERK**, Kentucky Supreme Court, 209 Capitol Bldg., 700 Capital Ave., Frankfort, Kentucky 40601 on this the 22 day of October, 2008.

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STATEMENT OF POINTS AND AUTHORITIES

Arguments

The purpose of this brief is to reply to arguments made by Ashland on Plaintiffs direct appeal and to respond to Ashland's brief arguments regarding its cross appeal.

ARGUMENT

One of the first points that Ashland makes is that the Plaintiffs' spent little time responding to the opinion of the Court of Appeals. First, and most importantly, the real issues in this case are not whether the Court of Appeals legal analysis was correct but whether the Plaintiffs got a fair trial. The real question of whether there was a fair trial can only be analyzed by discussing the actions of the trial court. As a result, the Plaintiffs have properly focused on the trial of this matter in their brief. Second, although Ashland wants to ascribe great scholarly weight to the Court of Appeals opinion, the Plaintiffs do not, and this Court should not, succumb to such a sycophantic view. The whole tone of the Court of Appeals opinion is set out on page three when they say

> As is often the case, the truth lies somewhere between these poles. Nevertheless, we can conclude that Ashland's position has greater support in both fact and law.[1]

In reading this introductory explanation offered by the Court of Appeals one is left with the inescapable feeling that the Court of Appeals had adopted a simple coin flip approach for the whole case rather than actually analyzing the issues separately. In any event, as this Court is well aware the issues in this case are not limited to a rote analysis of the Court of Appeals opinion.

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[1] Court of Appeals slip opinion, p. 3.

I. THE TRIAL COURT ERRED IN EXCLUDING OR LIMITING PLAINTIFFS' EXPERT TESTIMONY.

As the heart of Ashland's defense to this case is the assertion that the Plaintiffs' evidence was unreliable. One particular and appropriate focus for that discussion is the testimony of Dr. Waligora. Contrary to Ashland's position, Dr. Waligora's testimony should have been admitted without restriction, because it is reliable and would have aided the jury in analyzing the issues presented. [2] Dr. Waligora has been qualified to testify multiple times utilizing this same approach. [3] Moreover, the methodology used by Dr. Waligora is the standard approach and is utilized by the Environmental Protection Agency and in CERCLA matters.[4] In fact, the Martha Reclamation Plan utilized the RESRAD computes program in its construction.[5] Thus, Ashland's challenges really go to the weight that should be given to the testimony of Dr. Waligora rather than to their admissibility.

This conclusion has found additional support in the intervening years since the trial. Notably, the BEIR VII Report demonstrate that the scientific community has confirmed the linear- no-threshold model, which underlies Dr. Waligora's testimony, as the appropriate model for analyzing the health risk of ionizing radiation, such as

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[2] See Goodyear Tire and Rubber Company v. Thompson, 11 S.W.3d 575 (Ky. 2000); and Miller v. Eldridge, 146 S.W.3d 909 (Ky. 2004).

[3] 12/06/02 hearing, Exp. 46 p. 43-44

[4] Id. at p. 87

[5] Waligora's Affidavit, p. 3 Tab 64, Plaintiffs' original brief

TENORM. The committee concluded that even the smallest dose of ionizing radiation has the potential to cause an increase in the risk to humans, which is simply the linear-no-threshold model. As developed at length in Plaintiffs original brief, where the scientific community has reaffirmed a scientific tenet, such as the linear-no-threshold model, as valid, the Plaintiffs should not be denied their chance to present their expert testimony to a jury after the trial court in this matter missed the mark on this issue.[6] Here, assuming there was legitimated scientific debate regarding the linear-no-threshold model, the science has now evolved such as to eliminate, or seriously reduce, that debate. Thus, this Court should follow the logic of Ragland and reverse the judgment in this case. The reversal should include appropriate instructions for a remand for a full review all Daubert issues and for an appropriate ruling based upon the best scientific evidence. [7]

Even without regard to the evolution of the scientific communities opinion relating to the linear-no-threshold theory, the trial court's ruling with regard to Dr. Waligora was error. The Plaintiffs note that despite Ashland's assertions to the contrary, that Dr. Waligora did not actually say that the linear-no-threshold theory had no significance in this case. Ashland has quoted out of context a comment made by Dr. Waligora that he

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[6] See Ragland vs. Commonwealth, 191 S.W.3d 569 (Ky. 2006).

[7] A similar situation is presented by Smith vs. Carbide and Chemical Corporation, 226 S.W.3d 52, (Ky. 2007), wherein this Court concluded a "health hazard" is not a requirement for trespass claims. Plaintiffs' assert they can demonstrate a health hazard if their proof is not improperly restricted. But upon remand, Smith will set the appropriate standard, which Plaintiffs met despite the numerous erroneous rulings of the trial court.

did not use the linear-no-threshold theory in his immediate analysis of the data in this case. Instead, as he made clear, on at least two occasions, his methodology relies upon EPA regulations which utilize standards that do rely upon the linear-no-threshold model.[8] Thus, the linear-no-threshold theory does have significance in this case and Ashland cannot avoid the impact of the BIER VII Report by trying to push the linear-no-threshold model out of sight and mind.

Nor is Dr. Waligora's testimony speculation as the trial court erroneously concluded. There is no dispute that the Plaintiffs' properties in this case are contaminated.[9] Even Ashland conceded this critical fact. Dr. Waligora's testimony was designed to provide a valid scientific methodology to assess or qualify the impact of that contamination on the property. In other words, how has the contamination impacted the Plaintiffs' free and unrestricted use of their property. He did this by focusing upon the nature and extent of the clean up that would be necessary, which related to establishing remediation goals and objectives.[10] The "formulas" from the RESRAD are designed to assess the risk to the property, which would then lead to remediation goals.[11] The RESRAD program is based upon reality and is helpful to "qualify the extent of the insult

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[8] 12/06/02 Hearing Exp. 46 pp. 40-41, 76.

[9] Id. at 75

[10] Id. at 65, 74

[11] Id at 78-79

that contamination has caused on property."[12] The RESRAD program is designed to assess the increased risk to humans caused by the contamination, which shows that there is a health hazard. The health hazard is greater with larger doses of radiation and smaller with lesser doses, but never goes away. The amount and extent of remediation is evidence of how significantly each of the Plaintiffs' property has been damaged. It allows the Plaintiffs to present in an organized and systematic way for the jury to consider the extent of the contamination and its impact on their free and unrestricted use of their property.

It is important to note that with this evidence the Plaintiffs can prove a health hazard, but they do not have to prove a particular injury to any particular person, since this is not a personal injury case. Moreover, "an intrusion (or encroachment) which is an unreasonable interference with the property owners' possessory *use* of his/her property is sufficient evidence of an actual injury (or damage to the property) to award actual damages."[13] In this case, the TENORM contamination on each of the Plaintiffs' property was above "background." [14] As noted, any radiation is a health hazard and the greater the contamination the greater the risk. Thus, Plaintiffs can show the existence of a health hazard if Dr. Waligora was allowed to testify without the erroneous restrictions placed on him by the trial court.

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[12] Id at 81-82

[13] Smith vs. Carbide and Chemicals Corporation, 226 S.W.3d 52, 57 (Ky. 2007).

[14] Waligora Affidavit, Tab 4 pp. 3, 5

Dr. Waligora's testimony was not speculation nor junk science, but at least rose to the level of probability. [15] Dr. Waligora's testimony assessed the consequences in terms of the relative impact of contamination on the property.[16] As noted previously the RESRAD model is the standard approach utilized by the EPA and in CERCLA matters.[17] In fact, linear-no-threshold is the basis for much of the regulations on ionizing radiation, which demonstrates its acceptance in the scientific community.

Ashland has made light of Dr. Waligora's testimony, at various times, because of his so-called use of theoretical future farmers said to be ready to farm directly on radiation hot spots where there is no farming now, as well as houses that might be built on a remote hillside on more radiation hot spots where none exist now. However, these pejorative descriptions mischaracterize Dr. Waligora's testimony, and were apparently significant factors in moving the trial court down the primrose path.

Obviously, people will not build upon a contaminated site, if they will build upon a contaminated piece of property at all. Instead, what Dr. Waligora's testimony vividly demonstrates is that the Plaintiffs cannot use their property without restriction, as is the right of any property owner, because there are places on the property where there are radiation hot spots that are health hazards. In other words, the health hazards restrict the current usage because they foreclose the potential for the safe use of the property. While

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[15] 12/06/02 Hearing Exp. 42 p. 82

[16] Id. at 84

[17] Id. at 87

Ashland's attornies may find a house built on a remote hillside absurd, a trip into almost any hollow in eastern Kentucky will reveal any number of homes built in similar spots. It is for a jury to decide what damage, if any, the Plaintiffs' have suffered because their use of their property has been limited by the contamination caused by Ashland.

The radiation presents a health risk, which Dr. Waligora would have demonstrated through his testimony, if he would have been permitted to do so. As such, it constitutes a trespass because it prevents the unrestricted use of Plaintiffs property. In short, Dr. Waligora testimony, if it had been permitted without restriction would have qualified in a scientific manner the impact that the admitted radiation contamination had on Plaintiffs' use of their property. It demonstrates the health hazard to which Plaintiffs were exposed in any attempt to exercise the unrestricted use of their property. Although the RESRAD model does look forward to risks if property would be utilized in a particular manner, that does not make it a mere speculation as the trial court ruled. Instead, it provides a scientific model to demonstrate that Plaintiffs do not have the unrestricted use of their property at the present time and have not had it since their property has been contaminated.

Thus, it is clear that Dr. Waligora's testimony met the appropriate standards for admission at the time it was excluded and restricted. While Ashland obviously vehemently disagrees with Dr. Waligora's opinions, that does not make them inadmissible. The error of the trial court was to subsume Ashland's weight arguments and comport them into a basis to inappropriately deny admissibility.

II. THE TRIAL COURT ERRONEOUSLY GRANTED SUMMARY JUDGMENT ON PLAINTIFFS WATER CONTAMINATION CLAIMS

One of the major errors committed by the trial court in granting summary judgment on water contamination claims was that the trial court did not actually consider each Plaintiffs' claim individually. Instead, it treated all the Plaintiffs the same despite the significant individual differentiations between them, since its order granted summary judgment as to all Plaintiffs but did not discuss any of the individual Plaintiffs.

Plaintiffs affidavits are attached to Plaintiffs original brief under tab 12. Even a cursory review of them demonstrates the Plaintiffs knowledge with regard to water contamination claims and the timing of that knowledge differ significantly. By contrast, Ashland's evidence demonstrated that some Plaintiffs were aware of incidents of bad water or incidents of oil spilling onto their land and even some contamination as to one of the wells on the Cantrell's land containing benzane in the 70's.

Importantly, Plaintiffs presented testimony by affidavit controverting the key issues and explaining why they were unaware of the contamination of their water more than five years prior to filing suit. For example, the Cantrells were aware of bad water on certain parts of their property, but attributed it to weather or the natural effects of living in an oilfield, and noted that other water on their properties still looked pretty good.[18] Thus, a jury should have been allowed to decide if a reasonably prudent person under all

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[18] Woodie Cantrell Depo Vol. II, Exp. 1, pp. 52-55; Wathalene Cantrell Depo. Vol. II, Exp. 2, pp. 73, 90; Cantrell Affidavits, in Appellants original brief Apx. Tab. 12

these facts and circumstances would have learned of their claims more than five years before this action was filed. This was a fact question for a jury. It was not a question of law for the trial court to decide. As a result, this Court should reverse the trial court's grant of summary judgment on Plaintiffs' water claims.

Additionally, Ashland continues to assert that this issue should not be reviewed because the Plaintiffs offered no avowal. It is important to note that the ruling in this case was made pursuant to summary judgment, which eliminates the issue for trial. Moreover, the trial court prohibited the Plaintiffs from making any comprehensive avowals based upon the summary judgment and other pretrial rulings excluding such testimony.[19] The Plaintiffs did try to make some avowal, but were severely limited.[20] As such, Ashland's suggestion that review of this issue is precluded by the failure to make an avowal is completely unfounded.

III. ASHLAND'S FIELD WIDE CONDUCT IS RELEVANT TO PLAINTIFFS TRESPASS AND NUISANCE CLAIMS

The trial court erred in excluding all evidence of "activities on other properties."[21] At the very least, Ashland's activities on the other properties were clearly relevant for a jury to consider as to whether Ashland's activities throughout the oilfield were ultrahazardous, innocent, negligent or intentional. More importantly, it was necessary to

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[19] 1T 114 8T 1020-42

[20] 8T 1020-42

[21] V108 15 672-82 (Appellants Original Brief, Apx. Tab. 9)

allow Plaintiffs' to present a coherent picture of Ashland's activities to fairly show what had happened to these particular Plaintiffs. Plaintiffs experts testified that it was necessary to look at the filed line activities in order to explain and understand what happened to these particular Plaintiffs.

As an example, Bob Graces's testimony, which was improperly excluded as addressed in Plaintiffs' original brief, would have shown Ashland's negligence in fracturing the rock strata below the entire Martha Oilfield upon which each of the Plaintiffs property sat. His testimony would have demonstrated that Ashland violated industry standards, and was, in fact, a gross deviation, from these standards. In simplest terms, although not an expert on NORM, his testimony would have shown how the NORM located in the rock strata well below the surface became TENORM on the surface. Therefore, it was error to exclude Bob Grace's testimony, *inter alia*, because it was highly relevant to Plaintiffs' claims in order to show how their properties were contaminated. Additionally, it was also relevant to show a gross deviation from industry standards by Ashland in its water flooding recovery program to support Plaintiffs' claims for punitive damages. Thus, it was reversible error to exclude Bob Grace's testimony.

A similar analysis is applicable to the exclusion of Clay Kimbrell's testimony. Mr. Kimbrell testified regarding water testing done on the Plaintiffs' property. He tested wells that had not been plugged.[22] He noted that the wells on the Cantrell property had

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[22] 11T 132-30

been plugged, which precluded testing produced water from them, as is obvious to all.[23] Instead, he obtained samples where he could get them from creeks, water wells, and wells that did go down to the relevant rock strata on properties throughout the Martha Oil Field.[24] All of this relevant testimony was excluded under the trial court "no other properties" mantra. This was error because it was evidence from which a jury could have, at least, inferred there was contamination in the Cantrells' water caused by Ashland. It is also relevant as further evidence of how the Cantrells' property was contaminated by Ashland. As with Bob Grace, the trial court erroneously excluded evidence which prevented Plaintiffs' from presenting a complete and coherent picture to the jury.

Thus, it is clear that the trial court's improper exclusion of the testimony Plaintiffs' experts Bob Grace, Clay Kimbrell, and others because it involved "other property" than that owned by Plaintiffs' in this appeal is reversible error. It precluded Plaintiffs' from presenting vital evidence to establish a clear, and coherent picture to the jury of Ashland's contamination of their property.

IV. THE TRIAL COURT COMMITTED NUMEROUS OTHER ERRORS

A. Bobby Alexander

The trial court also erroneously excluded the testimony of Bobby Alexander. His testimony would have gone to a number of different issues. The first would be that

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[23] Id.

[24] Id.

Alexander telling Plaintiffs that radiation was harmless was probative regarding Ashland's limitation defense. It also demonstrates Ashland's attempt to conceal the danger of radiation, which is relevant to gross negligence and punitive damages. Further, Alexander's testimony about precautions taken by Ashland employees would have been admissible to contradict Ashland's trial theme that radiation is harmless.

B. Chris Dawson

With regard to the testimony of Chris Dawson and the video tape that he took of actual acts of trespass by Ashland, one pellet in Ashland's shot gun attempt to justify the exclusion of this damning evidence, is that Chris Dawson is not an expert. Obviously, Chris Dawson was not offered as an expert nor is his testimony in the nature of an expert. Instead, his testimony and the video tape depicted Ashland pumping material from a waste pit into a creek which adjoins the Wright property (one of the Plaintiffs in this case). The pit contained oil, oil patches, and radiation. The tape depicted Ashland personnel using a geiger counter to check radiation readings. The video depicted orange/red paint markings identifying radiation material, and showed all of this pollution being intentionally dumped into the creek on the Wright property.[25] Although Dawson may not be able to specifically testify that there was radiation moved from the waste pit into the creek, a jury could certainly draw that inference from all the facts available. Moreover, the creek in the video is Keaton Creek, which Murl Wright testified was his

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[25] 13T 1700-66

boundary line.[26] As such, it is direct evidence of trespass and supports a punitive damage instruction, which was improperly refused.

Another shot by Ashland is KRE 403. However, the testimony and videotape are not more prejudicial than probative because they simply show what happened. This situation is directly analogous to the introduction of autopsy pictures at a murder trial. They may be difficult to look at, but since they simply show what happened they are admissible.[27] Thus, the exclusion of Chris Dawson's testimony and the videotape he took was reversible error.

C. **Costs of Remediation**

It was error to exclude remediation costs in this case. Although damages are capped at the lesser of cost of repair or diminished value, it does not make the costs of repair inadmissible where it is greater than the diminution in value. [28] Plaintiffs further note that nothing in the Martha Reclamation Plan, wherein Ashland agreed to "remediate" certain properties, operates to prohibit the Plaintiffs from proving that Ashland's "remediation" was inadequate, which would leave Plaintiffs with property damage even after the purported cleanup of their properties. [29] Additionally, Plaintiffs

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[26] 6T 766

[27] See Adkins vs. Commonwealth, 965 S.W.3d 779, 794 (Ky. 2003)

[28] Ellison vs. R&B Contracting, Ky., 32 S.W. 3d 66, 74-75 (2000).

[29] See In Re: Paoli vs. Railroad Yard PCB Litigation, 35 F.3d 717, 796 (3rd Cir. 1994).

expert. Mark Turnbough had relevant testimony to offer about costs estimates regarding cleanup. They would have provided the jury a basis to assess the measures and expenses required to effectively remediate the contamination, would have provided other evidence regarding the extent of contamination, and would have provided evidence with regard to the diminution in property value.[30]

D. **Jury Instructions**

It is well settled that every unauthorized entry upon the land of another person results in some damage, although that damage may be only nominal.[31] An instruction for nominal damages is warranted even where a juror believes there has been no damage to the property's fair market value.[32] Thus, at the very least the trial court committed error by failing to instruct upon nominal damages.

Of course, as was set out more fully in Appellants original brief, there were other significant instructional errors. Specifically, the trial court should have instructed on trespass, since the Plaintiffs demonstrated actual harm to their property, because they could not enjoy the full unrestricted use of their properties as a result of contamination caused by Ashland.[33] Additionally, there should have been a punitive damage instruction

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[30] See Ellison, 32 S.W.3d at 74-75

[31] Hughett vs. Caldwell County, 313 Ky. 85, 230 S.W. 2d 92, 96 (1950)

[32] Ellison, 32 S.W.3d at 71

[33] See Smith vs. Carbide and Chemicals Corporation, Ky., 226 S.W.3d 52, 57 (2007)

based upon at a minimum, Chris Dawson's testimony, and the video highlight of it. Additional support for a punitive damage instruction would have come from Bob Grace's improperly excluded testimony regarding Ashland's gross negligence in the execution of its water flooding program that directly lead to the contamination of Plaintiffs' properties. These failure by the trial court are reversible error.

E. **The Earl Arp Memo**

The Earl Arp memo should have been admitted. It is not hearsay, because it an admission by a party opponent either directly or by adoption. KRE 801A(b). This "exception" applies to all of the proffered document. The memo should not have been excluded as being somehow a "regulatory" matter. Any "regulatory" matters contained therein could have easily been redacted to avoid even the possibility of juror confusion. It was highly probative of Ashland's knowledge of the harmful effect of NORM, which Ashland ignored for years. As such it was relevant, at least, on the issue of punitive damages, and to refute Ashland's harmlessness defense

F. **Michael Jarrett**

The issue of the exclusion of Jarrett's testimony was raised in Plaintiffs' brief before the Court of Appeals. It was not the subject of a separately headed argument, but was included in the discussion of errors relating to Dr. Waligora's testimony. As such it is preserved. More importantly, the exclusion of Jarrett's testimony is really part and parcel of the errors committed regarding Dr. Waligora, because the Jarrett ruling cascaded

over into the Waligora ruling. As discussed in Plaintiffs' original brief and herein, that ruling was error.

V. CUMULATIVE ERROR

As was set out in full in Plaintiffs' original brief, the cumulative impact of all of these errors clearly denied Plaintiffs' a fair trial. The trial court's many errors ballooned and cascaded throughout the case preventing Plaintiffs' from a full and fair opportunity to present their case to the jury.

V. ON ASHLAND'S CROSS APPEAL, ASHLAND WAS NOT ENTITLED TO SUMMARY JUDGMENT OR DIRECTED VERDICT

With regard to the cross appeal, it is important to note that the jury found that Ashland had contaminated Plaintiffs' property. They did this despite the numerous errors committed by a trial court addressed in Plaintiffs' original brief and herein. Based upon those arguments already made, it is abundantly clear that once Plaintiffs are allowed to fully and fairly present their case that they have raised jury issues with regard to their claims against Ashland.

Without belaboring the point, the evidence established that there was contamination of Plaintiffs' land that that contamination did constitute a health hazard and did interfere with their unrestricted use of their property. This presents jury issues on Plaintiffs' claims from trespass and nuisance, at the very least. It also clearly shows that Plaintiffs presented a case establishing damages which should be submitted to a jury for its decision.

CONCLUSION

For all the reasons set forth, Plaintiffs respectfully request this Court to reverse the Judgment entered against them and remand for a new trial.

JOSEPH LANE