COMMONWEALTH OF KENTUCKY
SUPREME COURT
NO. 2007-SC-0818-D AND 2006-SC-0763-DG

WOODIE CANTRELL, et al., **APPELLANTS/CROSS-APPELLEES,**

v.

ON REVIEW FROM COURT OF APPEALS
NO. 2003-CA-1784-MR AND 2003-CA-1865-MR
AND
JOHNSON CIRCUIT COURT
CIVIL ACTION NO. 97-CI-442

ASHLAND INC., et al., **APPELLEES/CROSS-APPELLANTS.**

* * * * *

REPLY BRIEF FOR APPELLEES AND CROSS-APPELLANTS ON CROSS-APPEAL

Phillip D. Scott
Anne A. Chesnut
Brian M. Johnson
GREENEBAUM DOLL & MCDONALD PLLC
300 W. Vine Street, Suite 1100
Lexington, Kentucky 40507
Telephone: 859-231-8500

Michael J. Schmitt
PORTER, SCHMITT, BANKS & BALDWIN
327 Main Street
P.O. Drawer 1767
Paintsville, Kentucky 41240-1767
Telephone: 606-789-3747

COUNSEL FOR APPELLEES/CROSS-APPELLANTS

CERTIFICATION

I hereby certify that on this 7th day of November, 2008, true and correct copies of the foregoing Reply Brief for Appellees on Cross-Appeal were mailed by first class mail, U.S. postage prepaid, to: Samuel P. Givens, Jr., Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; Clerk, Johnson Circuit Court, Johnson County Judicial Center, 908 Third Street, Suite 109, Paintsville, KY 41240; the Hon. John David Preston, Johnson County Judicial Center, 908 Third Street, Suite 217, Paintsville, KY 41240; George Chandler and Kirk Mathis, Chandler Law Office, P.O. Box 340, Lufkin, TX 75902-0340; Broadus Spivey, 48 East Avenue, Austin, TX 78701-4320; Darrin Walker, 2054 Parkdale Drive, Kingwood, TX; 77339; Michael Endicott, P.O. Box 181, Paintsville, KY 41240; and Ned Pillersdorf, Pillersdorf Derossett & Lane, 124 West Court Street, Prestonsburg, KY 41653.

Anne Chesnut
COUNSEL FOR APPELLEES/CROSS-APPELLANTS

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

Page

INTRODUCTION

The purpose of this limited Brief is to Reply to Appellants' Response on the Cross-Appeal, contained at page 16 of the brief filed by them on October 23, 2008.[1]

I. APPELLANTS DO NOT EVEN ADDRESS THE ISSUE RAISED IN THE CROSS-APPEAL.

The issue raised on the Cross-Appeal is whether the trial court erred in allowing the case to go to the jury on a "stigma" claim (claims that the mere presence of naturally occurring radioactive material ("NORM") caused a loss in property value). As set forth at length in Ashland's[2] Combined Brief filed June 30, 2008, such claims are not actionable under Kentucky law. (See id., pp. 43-48 and authorities cited therein.) Because Kentucky law has long rejected stigma claims, the trial court should have granted summary judgment or directed a verdict in favor of Ashland based on such cases as City of Louisville v. Munro, 475 S.W.2d 479 (Ky. 1971) (value of property depreciated immediately when a nearby site was selected for a zoo, but the loss in value was not actionable), or Morgan v. Hightower's Adm'r, 291 Ky. 28, 163 S.W.2d 21 (Ky. 1942) (no recovery for decreased fair market value when a person commits suicide on the owner's property).

Indeed, the rejection of "stigma" claims as a matter of law was explained again just last year by this Court in Smith v. Carbide & Chems. Corp., 226 S.W.3d 52, 56 (Ky. 2007):

---

[1] As in the previously filed briefs, "Appellants" refers specifically to the Cantrells and Wrights who brought this appeal (and are Appellants/Cross-Appellees). "Plaintiffs" is used to refer to the larger group of plaintiffs below, of whom the Cantrells and Wrights are also a part.

[2] "Ashland" refers to both of the Appellees/Cross-Appellants.

> [M]ere damage to the reputation of realty does **not** entitle one to recovery, as that injury is more imaginary than real .... [T]he mere presence of contaminants may only damage the property's reputation and not its use.

Remarkably, Appellants do not discuss or even address this issue or any of these authorities. While they speak in conclusory terms of not "belaboring the point" (Appellants' Reply and Response on Cross-Appeal ("Reply/Response") at p. 16), they never actually get to the point, which is that the trial court should never have let the stigma claims go to the jury at all.

The trial court was more than generous to Plaintiffs in giving them their day in court. The claims should have been rejected as a matter of law.

II. PLAINTIFFS HAD THEIR DAY IN COURT.

While Appellants argue that they presented jury issues (Reply/Response, p. 16), the answer to this is that the jury received the issues and still found against Plaintiffs. To the extent Appellants are suggesting they were not allowed to "fully and fairly present their case" (id.), that complaint has been extensively briefed before this Court and the Court of Appeals. The Court of Appeals wrote a voluminous 35-page Opinion, painstakingly addressing Appellants' claim that they were not able to "fully and fairly present their case." Appellants did not even discuss the Court of Appeals' Opinion in their opening Brief and now accuse the Court of Appeals of employing "a simple coin flip approach." (Reply/Response, p. 1.) The carefully reasoned 35-page Opinion belies that cynical view and gives each of Appellants' points more attention than any deserves.

III. APPELLANTS MISREPRESENT THE RECORD AND OFFER NO CITATION TO IT.

Appellants state at page 16 of their Response, without any citation to the record, "the evidence established that there was contamination of Plaintiffs' land that that [sic]

contamination did constitute a health hazard . . . ."[3] There was no such evidence offered by Plaintiffs. Plaintiffs' own expert, Stan Waligora, testified that he **could not** state whether the presence of NORM posed a health hazard because that was beyond the scope of his review. (Waligora Daubert Opinion, VIII, p. 16,159.)[4] Waligora did not calculate any risk to the Plaintiffs because the low levels and discrete locations of NORM did not create any concern regarding actual exposure to the Plaintiffs. (Waligora depo., Exh. 48, p. 116). Waligora attempted to use (or, as found below, misuse)[5] a computer program, RESRAD, to speculate as to what might, maybe, someday possibly occur on other properties.[6]

---

[3] As noted in Ashland's June 30 Brief, Plaintiffs had insisted they would show property damage by showing that a health hazard existed on the properties, but then failed in that proof. (See Ashland's Combined Brief, pp. 5-8.) While this Court (in Smith v. Carbide & Chems. Corp., 226 S.W.3d 52 (Ky. 2007)) has indicated there may be injury even in the absence of a health hazard, Appellants did not preserve that issue for appeal. (See Ashland's Combined Brief, pp. 40 n.33, 44.) Instead, they wanted to prove a health hazard but could not do it. In any event, the Court of Appeals used the same standard as employed in Smith and expressly found that Appellants "have not shown that the mere presence of low levels of radiation would unreasonably interfere with their use and enjoyment of the properties." (Court of Appeals Opinion, p. 25.)

[4] Appellants refer to their expert repeatedly and incorrectly as "Dr. Waligora." Waligora testified that is not a medical doctor, does not have a doctorate of any kind, nor even a master's degree in any subject. (Waligora deposition, p. 138.)

[5] This case is not the only time Waligora's misuse of the RESRAD program has been rejected. The Court of Appeals for the Eleventh Circuit found that the "choices made and utilized by [Waligora] differ from a situation in which an expert inputs 'hard data arrived at by unassailable methods.' . . . ." Finestone v. Florida Power & Light Co., 272 Fed. Appx. 761, 768 (11th Cir. 2008) (affirming the exclusion of Waligora's testimony and false assumptions based on RESRAD).

[6] This was properly rejected at every level for the reasons discussed at pp. 12-15 of Ashland's Combined Brief filed June 30, 2008.

Appellants suggest that Waligora's excluded testimony based on RESRAD would have provided evidence that contamination on Appellants' properties created a health hazard or unreasonable interference needed to overcome summary judgment. (Reply/Response, pp. 4-7, 16.) But **no RESRAD calculations were even offered** for the properties involved in this appeal (the Cantrell and Wright properties) **because Waligora did not perform RESRAD calculations on these properties**. (12/06/02 hearing, Ex. 46, pp. 67-69.) Nor did Appellants offer any other type of evidence whatsoever of any past, present, or future "health hazard" or interference with the "unrestricted use of [Plaintiffs'] properties."[7] These failures of proof account for the lack of any record references.

Waligora also acknowledged that the fact that a property is contaminated with NORM does not mean that any health hazard necessarily exists. (12/06/02 hearing, Exp. 46, p. 88.) Waligora testified that where a contaminated area was approximately 1 square meter, the dose from contamination would be insignificant, and "not even worth running the [RESRAD] code." (Id., pp. 62-63.) There was no NORM-impacted soil on the Wright property, just a few pieces of pipe in different locations. (17T 2203 and 2212.) The affected area on the Cantrell property was smaller than the size of the counsel table in the courtroom. (17T 2217-2218.) Waligora testified that for areas, such as the one on the Cantrell property, where the elevated radiation levels existed over no more than 1 square meter of soil, the dose and attendant risk for NORM for such a "tiny area . . . is not even worth pursuing." (12/06/02 hearing, Exp. 46, pp. 63-64.)

---

[7] Appellants also misstate the standard on this point, which should be "unreasonable interference with use" instead of "unrestricted use" as stated in their Reply/Response, p. 16.

The only evidence in the record regarding hazard or interference with use of Plaintiffs' properties is the uncontested expert testimony of Dr. John Frazier that NORM on those properties did not interfere with Plaintiffs' use and enjoyment of the land. Dr. Frazier explained that "[a]ll soil has radium in it . . . . We have radium in us naturally. Almost everything has a little bit of radium in it . . . . It's all around us. It's been with us since the earth was formed." (17T 2182.) Dr. Frazier also explained that gamma rays from NORM are all around us, too, "passing through you or me where we're sitting. That happens all the time. That's part of the natural background radiation that we live in. We are in it all the days of our lives, nothing to do with anything man has done. It's been here since the earth was formed." (17T 2185-2186.) Dr. Frazier testified that the radiation dose from oil field NORM-impacted areas on Appellants' properties were within the range of doses that we all receive from background radiation sources, and that there was no hazard from the oil field NORM found on either of the Appellants' properties. (17T 2207-2208, 2210-2213, 2221-2225.) Appellants could offer no evidence to refute this testimony.

CONCLUSION

Appellants have failed to address or brief the Cross-Appeal and that issue should thus be decided against them. Their conclusory references (without record support) are not accurate and should be disregarded.

Respectfully submitted,

Phillip D. Scott
Anne A. Chesnut
Brian M. Johnson
Greenebaum Doll & McDonald PLLC
300 West Vine Street, Suite 1100
Lexington, Kentucky 40507
Telephone: (859) 231-8500
Facsimile: (859) 255-2742

Michael J. Schmitt
Porter, Schmitt, Banks & Baldwin
327 Main Street
P.O. Drawer 1767
Paintsville, Kentucky 41240-1767
Telephone: (606) 789-3747
Facsimile: (606) 789-3790

COUNSEL FOR APPELLEES/
CROSS-APPELLANTS

3087521_2.doc