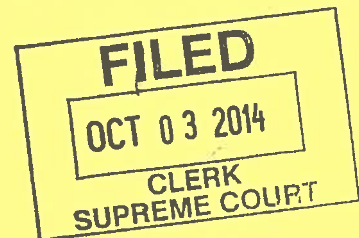

SUPREME COURT OF KENTUCKY
No. 2013-SC-000549

HARROD CONCRETE AND STONE CO. APPELLANT

VS.

Appeal from the Franklin Circuit Court
Action No. 03-CI-1502
Court of Appeals Nos. 2010-CA-001750
and 2010-CA-001801

B. TODD CRUTCHER, ET AL. APPELLEES

REPLY BRIEF FOR APPELLANT HARROD CONCRETE AND STONE CO.

Submitted by:

Robert W. Kellerman
Sarah J. Bishop
STOLL KEENON OGDEN PLLC
201 West Main Street
P.O. Box 5130
Frankfort, KY 40602
Telephone: (502) 875-6220
Facsimile: (502) 875-6235

Certificate of Service

The undersigned certifies that a copy of this Brief was served upon the following persons, by first class mail, postage prepaid, on the 3rd of October, 2014: Hon. Thomas D. Wingate, Circuit Judge, Franklin County Courthouse, 218 St. Clair Street, Frankfort, KY 40601, Hon. Samuel P. Givens, Jr., Clerk, Court of Appeals of Kentucky, 360 Democrat Drive, Frankfort, Kentucky 40601, and J. Robert Lyons, Jr., Esq., Dinsmore & Shohl LLP, 250 West Main Street, Suite 1400, Lexington, Kentucky 40507. The undersigned certifies that the record on appeal was not removed from the Clerk's office for the preparation of this Brief.

Robert W. Kellerman
Attorney for Appellant

STATEMENT OF POINTS AND AUTHORITIES

REPLY BRIEF - ARGUMENT

1. Harrod's Rebuttal of the Crutchers' Counterstatement of the Case 1

2. The Measure of Compensatory Damages 3

Hughett v. Caldwell County, 230 S.W.2d 92 (Ky. 1950) 3

Langhorne v. Turman, 133 S.W. 1008 (Ky. 1911) 3

McKinley v. Nutt, 697 S.W.2d 949 (Ky., 1985) 3

Hammonds v. Ingram Industries, Inc., 716 F.2d 365 (6th Cir., 1983) 3

KRS 143A.020 4

Ellison v. R & B Contracting, Inc., 32 S.W.3d 66, 69 (Ky. 2000) 5

East Kentucky Rural Electric Coop. v. Story, 413 S.W.2d 338 (Ky. 1967) 5

Griffith v. Clark Manufacturing Co., 279 S.W. 971 (Ky. 1926) 5

3. Discussion of The Crutchers' Obfuscation of the Issues that Were Submitted to the Jury 5

4. The Stipulation, which was recognized and affirmed by the Trial Court, should have limited the Crutchers to the presentation of evidence of nominal damages 6

5. The Finding of Liability for Punitive Damages and Willful Trespass Must be Reversed 7

KRS 411.184 7

Gum v. Coyle, 665 S.W.2d 929 (Ky. App. 1984) 7

Lebow v. Cameron, 394 S.W.2d 773 (Ky., 1965) 8

6. The Crutchers cite no authority for converting the jury's punitive damages award, which has been set aside, into an award of compensatory damages 8

King v. Grecco, 111 S.W.3d 877, 881 (Ky. Ct. App. 2002) 9

Hughett v. Caldwell County, 230 S.W.2d 92 (Ky. 1950) 9

CONCLUSION 10

REPLY BRIEF - ARGUMENT

1. Harrod's Rebuttal of the Crutchers' Counterstatement of the Case.

The Crutchers' Counterstatement of the Case contains several inaccuracies and factual embellishments. The Crutchers' legal position in this case relies heavily on these mischaracterizations. Such misplaced reliance diminishes the credibility of several of the Crutchers' arguments. Harrod will outline these mischaracterizations below.

The Crutchers' assertion that Harrod used no method of locating its activities underground is false. The Crutchers contend that Harrod Concrete was grossly negligent in identifying its underground property boundary line with the Crutchers. In doing so, the Crutchers repeatedly state in their Appellee's Brief that "Harrod had no system in place for tying the underground workings to the surface until after the encroachment", relying on the testimony of Harrod's mine foreman, Cecil Banta, who began in 2003. This is an inaccurate statement.

As Harrod detailed in its Brief beginning at p. 9, Banta actually said was that Harrod determined its underground mining location through a manual "straight line" methodology that "everyone" used and although imperfect, was "pretty typical" of that used by most in the mining industry at that time. Furthermore, Glen Stone, the mine foreman before 2002, when the encroachment occurred, testified that Harrod Concrete used maps, "measurement tapes" and a protractor to determine its approximate location underground in relation to surface property boundaries. Stone testified that he thought Harrod Concrete was "well within our boundary," that they did not think they were getting close to the property lines, and that they did the best job they could.

The Crutchers also cite the fact that the maps used by Harrod did not depict a boundary line. Unmentioned by the Crutchers is the fact that no regulatory authorities required boundary

maps for quarries, and that the maps used by Harrod were typical of what was used in the industry. Harrod argued in its Appellant's Brief (at p. 32) that compliance with industry standards is strong evidence that a defendant did not act carelessly. The Crutchers' Brief does not address the legal authority in Harrod's Brief on this point.

Next, the Crutchers emphasize the testimony of Harrod Concrete underground laborers that they did not know their location underground in relation to the surface when they performed limestone blasting activities. (Crutcher Brief, page 5). Again, as specified in Harrod's Brief beginning at p. 10, these laborers had no responsibility or obligation to determine their location in the quarry. They simply took directions from the mine foreman. Similarly misleading is the Crutchers' discussion of the unknown number of dated "No Trespassing" signs on the rocky hillside surface. As previously stated, there is no evidence that the signs correspond with the boundary line. There is not even any evidence that the mining underground extended horizontally beyond the location of the signs above ground.

The Crutchers' Brief also asserts that Harrod, in order to "deflect responsibility" sought to have the Crutchers bear the $80,000.00 to $120,000.00 expense of a survey of Harrod's underground quarry (Crutcher Brief, p. 7). This mischaracterizes the testimony of Todd Crutcher, who actually testified that Harrod suggested that Crutcher could survey his own surface property line where it adjoined Harrod (VR No. 15, 5/11/10; 11:45:50). Crutcher never testified that Harrod asked him to pay for an underground survey of the entire 500 acre mining operation, which is to what the $80,000 to $120,000 estimate referred. Again, the Crutchers' credibility suffers.

The Crutchers also suggest that Harrod is at fault for the defective jury instructions because it focused the instructions on the "surface of the property" (Crutcher Brief, p. 13). This

is inaccurate. Harrod's proposed instructions, and its evidence presented through its real estate appraiser, focused on the value of the property as a whole, rather than just the surface. Harrod's expert, James Tamplin, testified concerning the value of the surface and the "underground property rights" of the Crutcher property (Tamplin 3:37:30). Tamplin's testimony is sound and uncontradicted by the Crutchers. The Crutchers' problem is that they introduced no evidence concerning the diminution of value of their property. They rely solely on their improvised and irrelevant evidence introduced at trial over Harrod's objection concerning royalty value and list prices for "shot rock."

2. The Measure of Compensatory Damages

The Crutchers assert that Harrod makes an invalid distinction that "the measure of damages based on removal of minerals from real property applies only to the removal of coal and oil, and not to removal of other minerals such as limestone" (Crutcher Brief, p. 16). In characterizing it as such, the Crutchers ignore Harrod's Brief at p. 16 that distinguishes natural resources that are valuable in their natural state or have special value versus those that have no value in their natural state, such as limestone. The Crutchers cite several cases arguing that recovery was allowed for the value of fluorspar, sand, gravel, subsoil.

The Crutchers' arguments fail for two reasons. First, the fluorspar in *Hughett v. Caldwell County*, 230 S.W.2d 92 (Ky. 1950) was at one time considered to be a valuable mineral that exists only in certain locations and is used in many industrial processes. For this reason, *Hughett* is inapplicable. *Langhorne v. Turman*, 133 S.W. 1008 (Ky. 1911) had to do with the value of subsoil as subsurface support that was removed. *McKinley v. Nutt*, 697 S.W.2d 949 (Ky., 1985) addresses the proper measure of damages in view of a lease agreement. There is no lease language to interpret in the present situation. Finally, the Crutchers cite *Hammonds v.*

Ingram Industries, Inc., 716 F.2d 365 (6th Cir., 1983). It is also inapplicable, because it dealt with riparian rights and the dredging of sand in a saleable condition from an island.

The common thread in the cases relied on by the Crutchers is that the sand and topsoil had value in its natural state without further extensive processing, unlike limestone which is a solid mass with no inherent value. Limestone is not coal or fluorspar; nor is it a valuable grade of sand or river gravel that is marketable in its existing condition. Instead, limestone must be removed at great expense, and reduced to aggregate in order to create a valuable commodity. [1]

The Crutchers' reference to KRS 143A.020 is not pertinent. This statute, which exempts coal and valuable minerals but also includes vague and non-specific categories such as rock and stone, defines "natural resources" only for purposes of the severance tax. It does not relate to the damages to real property as a result of removal of limestone. If anything, the applicability of a severance tax to the removal of limestone confirms Harrod's contention that solid limestone in the earth has no value until it is severed from the ground, and that the "value added" to such product is attributable entirely to the activities of the quarry operator in the removal of the limestone.

The Crutchers' argument is flawed in yet another manner. Opinions cited by them in this appeal dealt with temporary damage to real property which can be repaired, as opposed to permanent damage as in the present case.

Where damage to real estate is temporary, the monetary award is determined by the cost of replacing the sand or subsoil and restoring the property to its original condition. The same opinions hold that the measure of permanent damage is the difference in the value of the real

---

[1] Crutcher attempts to argue that limestone does have value in its unprocessed state by referring to the list value of "shot rock" (Brief, p. 22). Shot rock is not limestone its natural state – an operator still had to bear the administrative, equipment and personnel costs to remove the limestone and convert it from its valueless underground solid state to crushed form. Also, Cecil Banta, on whose testimony Crutcher relies so heavily, testified that quarry operators "try not to sell" shot rock and that "nobody uses it."(Banta at 3: 59).

estate before and after a trespass, but that the measure of damages for a temporary condition is the cost of repair as long as it does not exceed the diminution in the value of the property. See *Ellison v. R & B Contracting, Inc.*, 32 S.W.3d 66, 69 (Ky. 2000). Had the removal of limestone affected the value of the Crutcher property, they certainly could have recovered for the cost of repair or restoration – however, the Crutchers introduced no such evidence. The only evidence presented at trial was that the value of the property as a whole was unaffected, either temporarily or permanently.

Furthermore, none of the cases cited by the Crutchers address the fundamental rule that the amount of an award cannot exceed the total value of the real property as a whole, which in the case of the Crutcher property is $27,900.00.

East Kentucky Rural Electric Coop. v. Story, 413 S.W.2d 338 (Ky. 1967), cited by the Crutchers, does not address the relationship of an award to the value of a real property tract as a whole, but rather the per acre value of the limited tract of property that was affected by an easement in a condemnation action. In any event, this opinion set aside the jury award as excessive. The 1926 *Griffith v. Clark Manufacturing Co.*, 279 S.W. 971 (Ky. 1926) opinion, also cited by the Crutchers, did not analyze any due process issues.

3. Discussion of The Crutchers' Obfuscation of the Issues that Were Submitted to the Jury

The Crutchers' Brief is also replete with references to the tort of conversion, and the unfounded insistence that the jury found Harrod liable for conversion. The Crutchers mistakenly equate trespass with conversion. Conversion necessarily includes a finding of wrongful intent, which of course is absent in the instance of innocent trespass and removal of limestone. The instruction given to the jury did not address conversion, therefore, the jury made no finding of conversion. Nor did the instruction address willful trespass, therefore the jury made no finding

of willful trespass. The Crutchers are confusing distinct and discrete legal theories and contending that one can easily be substituted for another.

The Crutchers also argue that the evidence was sufficient to support a finding of non-innocent trespass and the punitive measure of compensatory damages, however, these issues were not contained in the jury instructions. If this Court affirms the diminution of value of the real estate as proper, then the Crutchers' arguments regarding a non-innocent trespass are not applicable and irrelevant. A verdict must be directed for Harrod because there was no diminution in the value of the Crutchers' property as a whole. If on the other hand this Court determines that a different measure of damages is applicable under an instruction on non-innocent trespass, the entire matter must be remanded for a new trial. It would be a travesty to hold that Harrod is liable as a non-innocent trespasser measure of damages when the prior jury was instructed on a different theory.

4. The Stipulation, which was recognized and affirmed by the Trial Court, should have limited the Crutchers to the presentation of evidence of nominal damages

The Crutchers incongruously argue that their stipulation did not prevent the presentation of royalty and market value evidence at trial. They argue that the stipulation contained an "exception" for them to introduce evidence contrary to their stipulation. The Crutchers' argument ignores that the trial court recognized in its June 11, 2008 Order that the Crutchers would be unable to prove any compensatory damages. They also overlook that they represented to the trial court and to Harrod's counsel in its July 22, 2008 response that "there will, at best, be only nominal damages." (See Harrod Brief, page 12). Yet, at trial, the court permitted them to "throw it all on the table" and to introduce testimony concerning royalty value and the market value of limestone despite the measure of damages relating to the real property as a whole. Furthermore, the court at the close of evidence changed its September, 2006 ruling on damages

and permitted the jury to consider these factors in its verdict. As argued in its Brief, Harrod was prejudiced by this sudden reversal concerning the admission of royalty and limestone value evidence at trial and the alteration of the jury instruction concerning compensatory damages.

5. The Finding of Liability for Punitive Damages and Willful Trespass Must be Reversed

With respect to the absence of evidence supporting the finding of liability for punitive damages under KRS 411.184, Harrod implores the Court to again review its discussion of this point beginning at page 30 of its Brief. Further research has revealed a timber case, which although not analogous on all issues, aptly confirms Harrod's contention that the submission of a punitive damages instruction to the jury was erroneous. In *Gum v. Coyle*, 665 S.W.2d 929 (Ky. App. 1984), Gum logged his own property but also logged trees from an adjacent property owned by Coyle. Gum was unable to confirm and locate his <u>surface</u> boundary line prior to logging but nevertheless proceeded to do so, ultimately cutting trees on Coyle's property. Upon discovery of the encroachment and the notification by Coyle, Gum stopped the loggers. The evidence was that Gum knew there was a boundary issue but proceeded logging even though he could not locate the boundary line.

These facts must be compared with Harrod's actions concerning the Crutchers' boundary line. In the *Gum* opinion, the Court of Appeals stated "there is absolutely no evidence that the Appellant did anything other than innocently." Still, the Court of Appeals in the present action berated Harrod for not knowing with exactness the location of its boundary <u>hundreds of feet underground</u>, calling its actions "reprehensible."

The inconsistency of the Court of Appeals opinions in *Gum* and the Harrod case are irreconcilable. Gum is "innocent" for breaching a surface boundary when he is aware of the proximity of the boundary line, yet Harrod is criticized as "reckless" and "reprehensible" when it

believes it is within its boundaries based on its use of a location method widely used by the industry at the time. Again, as stated in Harrod's Brief, "A willful trespasser *knows he is wrong*; an innocent trespasser *believes he is right*." *Lebow v. Cameron*, 394 S.W.2d 773 (Ky., 1965).

Once the Crutchers' mischaracterizations are disregarded, there is simply no evidence that Harrod believed anything other than it was mining on its own property. Being wrong, or even being careless, does not equate to non-innocent or reckless behavior, or justify the imposition of punitive damages. See discussion beginning at p. 34 of Harrod's Brief.

It is incomprehensible that Crutcher asserts "Harrod does not articulate a basis for the trial court setting aside the (punitive damages) jury verdict on due process grounds." (Crutcher Brief, p. 39). First, this is untrue. The record discloses Harrod's arguments to the trial court and the Court of Appeals. Harrod also briefed the issue for this Court for background purposes (Harrod Brief, at p. 40-41). Second, this is not an issue on appeal. The trial court reduced the punitive damages verdict. The Court of Appeals set aside the monetary award for punitive damages. The Crutchers did not seek this Court's review of that decision and cannot now argue that the jury award should be reinstated.

6. The Crutchers cite no authority for converting the jury's punitive damages award, which has been set aside, into an award of compensatory damages

The Crutchers, without citing any authority, also assert that this Court should remand this case with directions to enter a judgment for $902,000 in compensatory damages.

The trial court jury instructions were defective, according to both Harrod and Crutcher (for different reasons obviously), and the Court of Appeals agreed that the instructions were improper. The Court of Appeals correctly observed that it was erroneous to award the Crutchers the market value of the limestone as punitive damages (Opinion, p. 20).

It would simply be improper to saddle Harrod at re-trial with a determination of liability that was based on defective jury instructions and improperly admitted evidence. It would be even more improper to "convert" a punitive damages award, already recognized as violating due process, into a compensatory damages award. If remanded, one can only speculate at this point what a jury would decide under proper jury instructions based only on properly limited evidence. If this case is re-tried, Harrod should be given the benefit of a fresh start under whatever law this Court decides is applicable.

The Crutchers give short shrift to Harrod's assertion that it cannot be subjected to a compensatory damages award that is punitive in nature simultaneously with a separate punitive damages award, as ordered by the Court of Appeals. The Crutchers' response to this argument is simplistic. They assert only that the two measures of damages are not duplicative and that Harrod misinterprets the reasoning behind the measure of compensatory damages (Crutcher Brief, p. 44). The Crutchers do not address the due process concerns of in *King v. Grecco*, 111 S.W.3d 877, 881 (Ky. Ct. App. 2002). Instead they simply insist that such damages are compensatory, ignoring that the acknowledged policy of an award of the market value of removed coal was designed to serve as a punitive sanction for an intentional or willful trespasser in valuable mineral cases. See *Hughett v. Caldwell County*, 230 S.W.2d 92 (Ky. 1950). Crutcher's glossing over this point would seem to demonstrate that Harrod is correct – Harrod would be punished twice if a jury was permitted to award damages for non-innocent trespass and punitive damages. If this Court does not direct that judgment be awarded in Harrod's favor, as requested, and a jury is permitted to consider a non-innocent trespass instruction, Harrod cannot be exposed to both the non-innocent "coal" measure of damages and punitive damages.

CONCLUSION

Harrod Concrete respectfully requests that this Court reverse the Court of Appeals and dismiss the Judgment against Harrod in its entirety, with instructions to the trial court to dismiss the Complaint. In the alternative, if this action is remanded for any reason, the only issue to be retried should be for innocent trespass and Mr. Gardner's testimony should be excluded. Further in the alternative, the jury cannot be instructed to consider both damages for willful trespass under the "coal rule" and punitive damages.

Respectfully Submitted,

Robert W. Kellerman
Sarah J. Bishop
STOLL KEENON OGDEN PLLC
201 West Main St., Suite A
P. O. Box 5130
Frankfort, KY 40602
Telephone: (502) 875-6220
Facsimile: (502) 875-6235

Attorney for Appellant
Harrod Concrete and Stone Co.