COMMONWEALTH OF KENTUCKY
SUPREME COURT
No. 2013-SC-000549

On discretionary review from
COURT OF APPEALS No. 2010-CA-1750 and 2010-CA-1801

HARROD CONCRETE AND STONE CO. APPELLANT

VS. Appeal from the Franklin Circuit Court
Action No. 03-CI-1502

B. TODD CRUTCHER, ET AL. APPELLEES

Brief for Appellees, B. Todd Crutcher, individually, and as Trustee of the B. Todd Crutcher Living Trust and James Donald Crutcher

Submitted by:

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Certificate required by CR 76.12(6)

The undersigned certifies that a copy of this brief was served upon the following named individuals by mail on the 18 day of September, 2014: Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601, Hon. Thomas D. Wingate, Chief Circuit Judge, Franklin County Courthouse, 222 St. Clair St., Frankfort, KY 40601 and Robert Kellerman, Sarah J. Bishop, Stoll, Keenon Ogden PLLC, 201 West Main Street, P.O. Box 5130, Frankfort, Kentucky 40602. The undersigned certifies that the record on appeal was not removed from the Franklin Circuit Clerk's office.

J. Robert Lyons, Jr.
ATTORNEY FOR APPELLEES

INTRODUCTION

This is a case involving a reckless trespass and conversion of limestone by the Appellant, Harrod Concrete and Stone, Inc., on the property of the Appellees, the Crutchers. The main issue before this Court is the proper measure of damages for a reckless trespass and conversion of limestone, which is the market value of the limestone removed by the trespasser.

STATEMENT CONCERNING ORAL ARGUMENT

The Appellees, the Crutchers, believe that this is a matter which has been decided in the Court of Appeals consistently with existing authority. However, an oral argument may be useful in order to clarify the issues before this Court.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

The Appellees, B. Todd Crutcher, individually, and as Trustee of the B. Todd Crutcher Living Trust and James Donald Crutcher (hereinafter "Crutchers") do not accept the Statement of the Case tendered by Appellant, Harrod Concrete and Stone Co. (hereinafter "Harrod").

This case involves a dispute between the Crutchers and Harrod arising out of Harrod trespassing on land owned by the Crutchers and severing and converting over 164,000 tons of marketable limestone. (James Stephen Gardner; TAPE 48-2-10-VCR-16-2-A; Dated: 5-12-10; 10:08:00). This limestone was then processed and sold by Harrod for approximately $902,000.

Harrod's Statement of the Case gives the impression that there are issues of fact remaining in this case concerning Harrod's liability for trespass onto the Crutchers' land and severance and conversion of limestone from the land. To the contrary, Harrod's liability for the trespass and conversion of the limestone has been established by a unanimous jury verdict. (Trial, Verdict and Judgment; T.R. at 626; Appendix 7). Moreover, the jury found that Harrod was liable for punitive damages because, according to the jury instructions, Harrod acted in "reckless disregard" for the property of others. (Instructions to Jury; TAPE 48-2-10-VCR-17-3-A; Dated: 5-13-10; 10:44:05). The testimony outlined in Harrod's Statement of the Case has already been submitted to the jury at trial, and the jury found against Harrod. It is not up to appellate courts to substitute their findings of fact for that of the jury. Harrod's liability for trespass,

severance and conversion of limestone and for reckless disregard of the Crutchers' rights has already been established. That liability is not an issue on this appeal.

The issue on this appeal is how to correct the errors made by the trial court with respect to the measure of damages for Harrod's wrongful actions. The Court of Appeals, in its Opinion (Appendix 1) recognized that the trial court applied an incorrect measure of damages. Therefore, the trial court's alteration of the Trial, Verdict and Judgment, which reduced the punitive damages unanimously awarded by the jury from $902,000.00 to $144,000.00 was an error (Opinion and Order; T.R. at 715; Appendix 2).

The Court of Appeals was correct in determining that the measure of compensatory damages to compensate for Harrod's severing and converting limestone from the Crutchers was the value of the limestone, without reduction for the cost of removal. That measure of damages recognizes the element of conversion associated with the removal and sale of the limestone, which goes beyond mere trespass on land. The evidence at trial indicated the value of the stone sold by Harrod was approximately $902,000 (which was found by the jury as punitive damages because of the trial court's erroneous damage instructions). The Court of Appeals was also correct in determining that punitive damages were also available because of jury's finding with respect to the nature of Harrod's conduct. The liability has been decided by the jury verdict. The only remaining issue relates to damages, both compensatory and punitive.

The Crutchers are brothers who own about 54.5 acres of land in rural Franklin County, Kentucky. The land consists of two tracts bisected by Interstate 64; one tract on

Hanley Lane of approximately 18.5 acres and another tract, with no direct access, of approximately 36 acres. (B. Todd Crutcher; TAPE 48-2-10-VCR-15-1-A; Dated: 5-11-10; 11:16:00 and 11:20:10). This property had been in the Crutcher family since it was first purchased by the Crutchers' great-great grandfather in 1837. (B. Todd Crutcher; TAPE 48-2-10-VCR-15-1-A; Dated: 5-11-10; 11:19:20). Harrod operates an underground limestone mining operation on its land, which is adjacent to the Crutchers' 36 acre tract. (B. Todd Crutcher; TAPE 48-2-10-VCR-15-1-A; Dated: 5-11-10; 11:15:40).

Sometime prior to December 2002, Harrod trespassed on Crutchers' property and severed and converted 164,000 tons of limestone from that property. (David R. Harrod; TAPE 48-2-10-VCR-16-2-A; Dated: 5-12-10; 11:41:00 and B. Todd Crutcher; TAPE 48-2-10-VCR-15-1-A; Dated: 5-11-10; 11:21:09). Harrod processed and sold that limestone for approximately $902,000.

Harrod had no procedures in place to discover the encroachment on its own, but was made aware of the encroachment by the issuance of a citation by the Commonwealth of Kentucky for mining off Harrod's permit. (David R. Harrod; TAPE 48-2-10-VCR-16-2-A; Dated: 5-12-10; 11:28:50). The Crutchers were made aware of the encroachment in December 2002 by a contact from Harrod's President, David Harrod (hereinafter "Mr. Harrod"). (B. Todd Crutcher; TAPE 48-2-10-VCR-15-1-A; Dated: 5-11-10; 11:21:09).

Based on testimony at trial and the various maps of Harrod's mining operations over a number of years (See, Exhibits 13, 15, 16, 17, 19, 21, 22, 23, and 24; Mr. Harrod admitted that these maps were in Harrod's possession in his testimony at TAPE 48-2-

10-VCR-16-2-A; Dated: 5-12-10; 2:23:50), the first map indicating the encroachment was based on measurements taken in April 2002, and indicates that the first encroachment took place prior to April 2002. (Thomas Bailey; TAPE 48-2-10-VCR-15-1-A; Dated: 5-11-10; 2:37:00 and 2:43:30; James Stephen Gardner; TAPE 48-2-10-VCR-16-2-A; Dated: 5-12-10; 10:03:05). Although no property boundary survey had been performed by Harrod at that time, the limits of the excavations on those maps produced by Thomas Bailey of HMB Engineers showed that Harrod had crossed the boundary lines of the plotted deeds and onto the Crutchers' property. (Thomas Bailey; TAPE 48-2-10-VCR-15-1-A; Dated: 5-11-10; 2:37:00 and 2:43:30).

Subsequent measurements based on a boundary line survey performed by American Engineers, Inc., as of May 27, 2004 (Exhibit 12; David Johnson; TAPE 48-2-10-VCR-15-1-A; Dated: 5-11-10; 1:40:50), also indicated that additional mining activities continued under Crutchers' property after April 2002. (B. Todd Crutcher; TAPE 48-2-10-VCR-15-1-A; Dated: 5-11-10; 11:39:20, James Stephen Gardner; TAPE 48-2-10-VCR-16-2-A; Dated: 5-12-10; 10:29:35 and David R. Harrod; TAPE 48-2-10-VCR-16-2-A; Dated: 5-12-10; 11:41:00).

The Crutchers' expert, Mr. Gardner of Engineering Consulting Services, entered the mine on or about April 2002 and again in early 2005 to determine the extent of mining activities under the Crutchers' property. In determining the surface boundaries, Engineering Consulting Services relied upon the survey by American Engineers, Inc. as well as its own survey of the boundary between Harrod and the Crutchers. (James Stephen Gardner; TAPE 48-2-10-VCR-16-2-A; Dated: 5-12-10; 10:01:00).

The calculations by Engineering Consulting Services, Inc. show that Harrod removed 164,000 tons of limestone from Crutchers' property. (James Stephen Gardner; TAPE 48-2-10-VCR-16-2-A; Dated: 5-12-10; 10:08:00). Harrod offered no contrary proof concerning the amount of limestone removed or the extent of the encroachment.

The Crutchers filed a Complaint (T.R. at 1) seeking recovery of damages for trespass on their property and the severance and conversation of the limestone. The Crutchers sought recovery on the basis of no less than the reasonable royalty value of the material removed, but also sought damages for knowing encroachment in the amount of the market value of the material removed, as well as punitive damages.

Mr. Gardner, of Engineering Consulting Services, testified to a loss of reasonable royalty value on the property of $71,832.00. (James Stephen Gardner; TAPE 48-2-10-VCR-16-2-A; Dated: 5-12-10; 10:12:00). This value was reached by computing the amount of limestone that could be removed from the 36 acres multiplied by the existing royalty, and taking into account the 164,000 tons removed by Harrod. (James Stephen Gardner; TAPE 48-2-10-VCR-16-2-A; Dated: 5-12-10; 10:16:15).

There was also evidence to show that the average sales price of the processed material from the mine was approximately $5.50 to $5.65 per ton. (David R. Harrod; TAPE 48-2-10-VCR-16-2-A; Dated: 5-12-10; 2:25:40). Other testimony, and the records of the Kentucky Highway Department for 2002, reflected a range of prices for stone produced by Harrod at that time. Documents from the Highway Department (Exhibit 28) indicate that Harrod had quoted a price for unprocessed material (commonly referred to as shot rock) as of December 2002, of approximately $5 per ton. (James

Stephen Gardner; TAPE 48-2-10-VCR-16-2-A; Dated: 5-12-10; 10:13:40). Mr. Gardner testified that the average price per ton of shot rock was $7.30 per ton. (James Stephen Gardner; TAPE 48-2-10-VCR-16-2-A; Dated: 5-12-10; 10:12:00). The same document also shows a range of prices by Harrod for various types of limestone rock ranging from $4.00 per ton for quarry waste to $6.85 to $12.00 per ton for processed material. (James Stephen Gardner; TAPE 48-2-10-VCR-16-2-A; Dated: 5-12-10; 10:13:40). Needless to say, the 164,000 tons of limestone converted by Harrod was very valuable, and was profitable to Harrod.

Harrod's recklessness with respect to its boundary was also evident from the evidence at trial. Harrod had known of its need for a property boundary survey since at least 1996. Harrod had requested a proposal for such a survey from its engineer, but did not make any progress toward getting such a property boundary survey for six years. In fact, no property boundary survey was made of the Harrod property prior to 2003, after the encroachment on the Crutchers' property became known. (David R. Harrod; TAPE 48-2-10-VCR-16-2-A; Dated: 5-12-10; 11:31:10 and 11:36:20).

Harrod made no effort to locate the extent of its underground activities in relation to its boundaries prior to the time the encroachment on the Crutchers' property became known. Cecil Banta, Harrod's own Quarry Manager at the time of trial, testified that Harrod had no system in place for tying the underground workings to the surface, until he arrived and instituted one in 2003, after the encroachment on the Crutchers' property. (Cecil Banta; TAPE 48-2-10-VCR-15-1-A; Dated: 5-11-10; 3:48:30). Other Harrod employees testified they did not know where they were underground in

relation to the surface. (Donald Lewis; TAPE 48-2-10-VCR-15-1-A; Dated: 5-11-10; 4:14:25 and James L. Smith; TAPE 48-2-10-VCR-15-1-A; Dated: 5-11-10; 4:07:00).

Mr. Harrod was aware that no property boundary survey had been attempted prior to the encroachment on Crutchers' land. He also knew the cost for the survey would range from $80,000 to $120,000 (David R. Harrod; TAPE 48-2-10-VCR-16-2-A; Dated: 5-12-10; 2:30:20). The testimony showed that Mr. Harrod even attempted to deflect Harrod's responsibility by getting the Crutchers to bear the cost of the survey. (B. Todd Crutcher; TAPE 48-2-10-VCR-15-1-A; Dated: 5-11-10; 11:45:40).

Harrod makes claims that the boundary between Harrod's property and the Crutchers' property was "indistinct" (presumably suggesting that as an excuse for Harrod's trespass). The evidence presented at trial showed otherwise. The maps that were available to Harrod showed approximate boundary lines. Harrod even crossed those approximate lines. (David R. Harrod; TAPE 48-2-10-VCR-16-2-A; Dated: 5-12-10; 2:28:20 and David Bailey; TAPE 48-2-10-VCR-15-1-A; Dated: 5-11-10; 2:34:10 and 2:43:30). Harrod simply made no real effort to stay on its property.

Harrod did not even attempt to apply the property description information included in his own deeds to the maps or plan sheets provided annually by the engineer. (B. Todd Crutcher; TAPE 48-2-10-VCR-15-1-A; Dated: 5-11-10; 11:50:08).

Harrod had maintained 7 to 10 "No Trespassing" signs on the boundary with Crutchers for many years, and highway department stakes and a fence post were also on the ground. (B. Todd Crutcher; TAPE 48-2-10-VCR-15-1-A; Dated: 5-11-10; 11:43:30 and 11:45:00). These landmarks were available to locate the boundary.

The most relevant fact concerning Harrod's claim of "indistinct" boundaries was that Harrod did not bother to get a simple surface boundary line survey. For example, Harrod did not make any progress toward getting a property boundary survey until after the encroachment, even though he was aware of the need no later than 1996. (David R. Harrod; TAPE 48-2-10-VCR-16-2-A; Dated: 5-12-10; 11:31:10 and 11:36:20). According to Cecil Banta's testimony Harrod had no system in place for tying the underground workings to the surface until after the encroachment. (Cecil Banta; TAPE 48-2-10-VCR-15-1-A; Dated: 5-11-10; 3:48:30).

Harrod employees did not know where they were underground in relation to the surface. (Donald Lewis; TAPE 48-2-10-VCR-15-1-A; Dated: 5-11-10; 4:14:25 and James L. Smith; TAPE 48-2-10-VCR-15-1-A; Dated: 5-11-10; 4:07:00).

The plan sheets annually prepared for Harrod indicate a constant progression toward the Crutchers' property line up to the time Harrod encroached in 2002. (James Stephen Gardner; TAPE 48-2-10-VCR-16-2-A; Dated: 5-12-10; 10:18:20).

Harrod claims that it ceased operation in the area of Crutchers' line in early 2002. However, the evidence shows that there was additional mining in the area after the encroachment was first noted in March 2002. Measurements based on American Engineers, Inc. survey as of May 27, 2004 (Exhibit 12; David Johnson; TAPE 48-2-10-VCR-15-1-A; Dated: 5-11-10; 1:40:50), also indicated that some additional mining activities continued under Crutchers' property after April 2002. (B. Todd Crutcher; TAPE 48-2-10-VCR-15-1-A; Dated: 5-11-10; 11:39:20, James Stephen Gardner; TAPE 48-

2-10-VCR-16-2-A; Dated: 5-12-10; 10:29:35 and David R. Harrod; TAPE 48-2-10-VCR-16-2-A; Dated: 5-12-10; 11:41:00).

There is more than enough evidence to support the unanimous jury verdict which finds Harrod liable for the trespass and which finds that Harrod acted with reckless disregard for the rights of the Crutchers and that, therefore, the trespass was not inadvertent.

The issue of the proper measure of damages for Harrod's trespass onto the Crutchers' property and severance and conversion of limestone from the Crutchers' property was litigated in the trial court before and during the trial.

After considering pretrial motions in limine on the issue of damages proof, the trial court entered an Order on September 11, 2006 (T.R. at 274; Appendix 5) which overruled the Crutchers' Motion in Limine and entered a similar Order on September 20, 2006 (T.R. at 309; Appendix 4). The result of those two orders was that the trial court determined that the measure of damages for this trespass and conversion of limestone was the difference in value of the surface of the property before and after the trespass.

The Crutchers' position, based on existing Kentucky authorities, was (and still remains) that the measure of damages for Harrod's actions is based on whether the trespass was non-innocent, and must take into account the element of conversion of the limestone. Since the jury has already found that Harrod's trespass and conversion of the limestone was not innocent, damages are not just the amount of royalties for the limestone removed, but the proper measure of damages is the value of the limestone actually removed, without consideration of the costs of removal. (Memorandum of Law

in Support of Motion for Summary Judgment (T.R. at 314); Memorandum of Law Regarding Measure of Damages (T.R. at 569); Response to Defendant's Memorandum (T.R. at 574)). This is consistent with the Court of Appeals Opinion. The Crutchers also sought punitive damages for the trespass and conversion. (Complaint at T.R. at 1). The right of the Crutchers to seek punitive damages is also properly recognized by the Court of Appeals Opinion.

Harrod has taken the position (which the trial court adopted, at least in part, by its Order entered September 20, 2006 (T.R. at 309)) that the measure of damages to which Crutchers are entitled is limited to the difference between the value of the surface before the encroachment and the value of the surface after the encroachment, based on an appraisal of the surface of the Crutchers' property. (Harrod's Response to Plaintiff's Motions in Limine and Harrod's Memorandum Regarding Damages, T.R. at 255).

Harrod offered an appraisal of the property by Mr. Tamplin (who also testified at trial to that effect) indicating that the surface property value as of the date of the encroachment was $27,900. (Philip J. Tamplin, Jr.; TAPE 48-2-10-VCR-16-2-A; Dated: 5-12-10; beginning at 3:28:27). It is Harrod's position that there are no damages, or, at most, the damages are limited to the value of the property as appraised, which is $27,900. The Court of Appeals Opinion recognized that this measure of damages was not consistent with Kentucky law and, in fact, ignores the element of Harrod's wrongful actions relating to the severance and conversion of valuable limestone.

The parties filed cross Motions for Summary Judgment (T.R. at 312 and 456). The trial court denied both Motions (Opinion and Order entered August 27, 2007; T.R. at

505; Appendix 3). This matter went to trial before a jury in May 2010. The instructions on damages permitted by the trial court indicated that the damages were the difference in value of the surface of the property before and after the trespass, but indicated that the jury could also consider the reduction in minable limestone by considering a royalty value. (Instructions to Jury; TAPE 48-2-10-VCR-17-3-A; Dated: 5-13-10; 10:42:50). An instruction on punitive damages was also tendered. (Instructions to Jury; TAPE 48-2-10-VCR-17-3-A; Dated: 5-13-10; 10:43:58).

The Crutchers objected to the instructions as proposed by the Court, because the instructions did not reflect the proper measure of damages for severance and conversion of the limestone, the burden of proof of non-innocent trespass was erroneously placed on the Crutchers rather than Harrod (the trespasser) and because the instructions applied a much stricter burden for finding punitive damages than required by Kentucky law. (Arguments of Counsel; TAPE 48-2-10-VCR-17-3-A; Dated: 5-13-10; 9:48:40).

The jury entered a unanimous verdict in favor of the Crutchers, awarding $36,000 for compensatory damages and granting $902,000 in punitive damages. The compensatory damages award is roughly half of Mr. Gardner's estimate of the loss of reasonable royalty value on the property of $71,832.00. (James Stephen Gardner; TAPE 48-2-10-VCR-16-2-A; Dated: 5-12-10; 10:12:00). The punitive damages award is the value of the limestone removed at an average of $5.50 per ton multiplied by 164,000 tons. At the trial, the Crutchers argued that the jury should grant punitive damages in the amount of the value of the material removed, because that is the amount by which

Harrod prospered by removing Crutchers' property. (Closing Argument; TAPE 48-2-10-VCR-17-3-A; Dated: 5-13-10; 11:45:00 and 12:04:35). It is clear that the jury found $902,000 as the value of the limestone severed and converted by Harrod.

After the entry of Trial, Verdict and Judgment (T.R. at 626) on the basis of the unanimous jury verdict, the trial court granted Harrod's Motion to Alter, Amend or Vacate the verdict by reducing the punitive damages from $902,000 to $144,000 (T.R. at 715; Appendix 2). The Crutchers filed a timely Notice of Appeal (T.R. at 722). Harrod also filed a Notice of Appeal.

Harrod erroneously describes the result of the Court of Appeals Opinion (Appendix 1) as stating that "irregularities in the verdict required reversal." The Opinion actually affirmed that portion of the jury verdict on liability that Harrod committed a trespass and that Harrods trespass exhibited reckless disregard of property rights. The reversal addressed the trial court's errors on the measure of damages.

The Court of Appeals Opinion correctly ruled, in conformity with existing Kentucky law, that the measure of compensatory damages for Harrod's actions is the market value of the 164,000 tons of limestone Harrod wrongfully removed from the Crutchers' property. This rule takes into account the element of conversion of the limestone that Harrod's proposed measure of damages completely ignores. The Court of Appeals also properly ruled that punitive damages were also available, since the value of the limestone was compensatory only. Harrod's claim in its Statement of the Case that the Court of Appeals deviated from existing Kentucky law is not accurate.

ARGUMENT

I. The Court of Appeals was correct in finding that the proper measure of damages for reckless trespass and conversion of limestone is the market value of the limestone, and in finding that there was sufficient evidence to support the unanimous jury verdict that the trespass and conversion was reckless and not inadvertent.

The root of the trial court's error, as recognized by the Court of Appeals, lies in the trial court's failure to instruct the jury as to the proper measure of damages for trespass and conversion of limestone, especially non-innocent or reckless trespass. Harrod bears a great deal of the culpability for this error, by offering up improper instructions on the measure of damages. Harrod erroneously focused its proposed instructions on the surface of the property, which bore no relation to the actual damage done by Harrod and which was inconsistent with existing Kentucky law.

The measure of damages in Kentucky for the removal and conversion of material from real estate has been related to the value of the material taken since at least 1900. In a similar case, Merriwether v. Bell, 58 S.W. 987, 988 (Ky. 1900), the Court ruled that, with respect to sand removed from an adjacent lot, "[t]he measure of damages is not the damage to the lot by the excavation, or what it would cost to fill it up, but the value of the sand converted." This measure of damages based on the value of material severed and removed from real estate has not been limited to coal, although a good deal of the statement and evolution of this measure of damages in Kentucky has been associated with cases of trespass and conversion of coal.

For example, in Hughett v. Caldwell County, 230 S.W.2d 92 (Ky. 1950), the Court reviewed in detail the measure of damages for severing and converting minerals from

the real property of another. The appellate court made a distinction between a non-innocent trespasser and an innocent trespasser:

> Therefore, where minerals have been innocently extracted and sold, the question in each case is whether in the circumstances royalty or the net market value of the mined mineral is the just and due compensation. Where the owner could not extract the minerals himself in any practical or feasible way, or where he is merely holding his property for development in the unforeseeable future, by himself or by a lessee, the value is as it lay in the ground. All he could expect to receive is the usual and customary royalty.
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> We have consistently recognized that the obligation of a wrongful or willful trespasser is compensation in full for the mineral when mined without allowance for the expense, which is the imposition of a penalty.

Hughett recognizes that a non-innocent trespasser is responsible for compensation in full for the mineral converted without allowance for expenses of removal. Since Harrod's liability is established by the jury verdict, it is the value of the limestone removed that applies.

Another example is Jim Thompson Coal Co. v. Dentzell, 287 S.W. 548, 549 (Ky. 1926), ("This court has adopted the rule and it is now well established that where mineral in place is, through the willful act of another, mined and removed without the knowledge or consent of the owner, his measure of damage is the market value thereof at the place where it was taken, without reduction for cost of mining. . . ." Emphasis added.). See also, Elkhorn-Hazard Coal Co. v. Kentucky River Coal Corporation, 20 F.2d 67, 71 (6th Cir. 1927), ("The court below adopted the right measure of damages. The value of the coal at the pit mouth was taken as that measure, without credit for the

labor and expense of mining and bringing to the surface. The law to this effect is well settled." Emphasis added.).

In North Jellico Coal Co. v. Helton, 219 S.W. 185 (Ky. 1920), the land owner suffered damages for injury to her land because the trespasser deposited refuse on the land and also damages for the removal and conversion of coal from the land. The Court allowed damages for injury to the land because of the dumping in the amount of the value of the land damaged. However the Court also allowed damages based on a different measure for the minerals severed and converted. That measure was based on the value of the minerals converted:

> In view of another trial we deem it proper to say that the measure of damages for coal taken from another's land through an honest mistake is the value of the coal taken as it lay in the mine, or the usual, reasonable royalty paid for the right of mining. [Citations omitted] On the other hand, where the trespass is willful, and not the result of an honest mistake, the measure of damages is the value of the coal mined at the time and place of its severance, without deducting the expense of severing it.

The history of the development of the rule of damages for conversion of minerals supports the Kentucky rule. Early English cases did not distinguish between an innocent and a non-innocent trespass. Trespassers in all cases were liable for the full value of the minerals taken without deduction for expenses for removal. E.g., Martin v. Porter, 151 Eng. Rep. 149 (1839). The reasoning is that a landowner is entitled to the same recovery that an owner of a converted chattel would get. This reasoning recognizes that once material, such as minerals, soil, sand, gravel and rock are severed

from the realty, that material has value like any other chattel, for which damages for conversion are appropriate.

Early American courts adopted this rule in cases like U.S. Blaen Avon Coal Co. v. McCullah, 59 Md. 403 (1883). Sometime later, this measure of damages for conversion of material removed from real estate was moderated for cases involving an innocent trespass. However, jurisdictions are virtually unanimous in application of the original measure of damages in non-innocent or reckless trespass cases. (See cases compiled in 21 A.L.R. 2d 380, 391.) Griffith v. Clark Manufacturing Co., 279 S.W. 971 (Ky. 1926), summarizes Kentucky's long-standing rule concerning the measure of damages for non-innocent conversion of marketable minerals from real estate.

Harrod attempts to make a distinction by claiming 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 the removal of other minerals, such as limestone. That position is contrary to Kentucky cases that address minerals other than coal and oil. Merriwether v. Bell, 58 S.W. 987, 988 (Ky. 1900), involved the removal of sand, not coal.

Hughett v. Caldwell County, 230 S.W.2d 92 (Ky. 1950), involved the mining of fluorspar and not coal. In Langhorne v. Turman, 133 S.W. 1008 (Ky. 1911), the Kentucky Court of Appeals ruled that the landowner could recover the value of dirt and rock removed from its property. In McKinley v. Nutt, 697 S.W.2d 949 (Ky. 1985), the Court ruled that the landowner was entitled to recover damages for the removal and sale of subsoil removed by the lessee under a lease for the removal of limestone, sand and gravel. Finally, Hammonds v. Ingram Industries, Inc., 716 F.2d 365, 372-73 (C.A.6 1983),

applied and summarized Kentucky law and ruled that evidence of the sale price of sand wrongfully removed from Hammonds' property by Ingram, was admissible on the issue of damages.

It is also instructive that the jury instructions (which have been used in Palmore's Kentucky Instructions to Juries for a number of years) which apply the distinction between innocent and non-innocent trespass, involve removal of sand and gravel, and not coal. Palmore & Cetrulo, Kentucky Jury Instructions § 32.01.

The law concerning the measure of damages for removal of minerals and other materials from land is purposefully similar to that which is applied to conversion of chattels, which is the value of the property converted. It is the removal and conversion of the minerals that constitutes the tort and causes the damage and not just the trespass on the real estate. Otherwise, there is no incentive to miners to prevent encroachment on other properties. In essence, Harrod would be allowed to take and sell limestone from the Crutchers' property for nearly a million dollars, and suffer only the payment of nominal damages. The Court of Appeals correctly recognized the absurdity of that situation.

Harrod argues, erroneously, that evidence of damages should have been limited to the difference in fair market value of the surface of the property. The trial court recognized to some degree, in ruling during trial on instructions, that this was not the proper rule of compensatory damages in this case. Therefore, the trial court modified its prior rulings on damages and allowed royalty damages to be considered. The trial court's ruling did not go far enough to correct the error in the instructions, because this

modification in the ruling did not take into account controlling precedent that required recovery of the value of the materials severed and converted for a reckless trespass.

Harrod relies on the trial court's September 20, 2006 Order (Appendix 4) in which the trial court erroneously rules that the measure of damages for Harrod's conversion of limestone is the difference in value of the surface of the property before and after the trespass. The trial court's September 20, 2006 Order concerning damages was contrary to another Order (Appendix 6) entered on July 5, 2006 (by the predecessor Circuit Judge who retired from the bench before trial) which indicated that royalty damages were a part of the measure of compensatory damages and that the value of the limestone removed was the measure of damages for non-innocent trespass. At trial, the trial court simply modified its interlocutory Order of September 20, 2006 to correct (although only in part) the measure of damages, by allowing royalty proof. That correction was not an error, except that it did not go far enough. As the Court of Appeals Opinion recognizes, the error was in not going far enough and failing to apply the proper rule of damages for a reckless trespass.

Harrod implies that admitting the evidence of royalties somehow unfairly penalizes Harrod for its "inadvertent" invasion on Crutchers' property. That statement is erroneous on a number of different levels.

The fact that the encroachment was not inadvertent is now an established fact, not an issue to be argued. Despite the error in the instructions that placed the burden of proving that the encroachment was not inadvertent on the Crutchers, rather than on Harrod, the jury still unanimously found that the encroachment was reckless. The

Court of Appeals Opinion correctly found that there was more than sufficient evidence to support that verdict. The jury verdict has foreclosed any further argument on liability. Moreover, Harrod's argument that the trespass was inadvertent relies upon the testimony of its President, David Harrod, who claimed that he did not know that he was approaching the Crutchers' boundary. Kentucky law is clear that such subjective claims of inadvertent trespass are insufficient:

> The burden is always upon the offender to establish his status as an innocent or mistaken invader of another's property. To be sure, the mere testimony of the person affected that he acted in good faith and honestly believed he was right in the position he assumed is not conclusive or, indeed, sufficient of itself to entitle him to the advantage of one occupying the place of innocence or good faith. The test to be applied is that of intent, but, being a state of mind, it can seldom be proved by direct evidence. [Emphasis added.]

See, Swiss Oil Corp. v. Hupp, 69 S.W.2d 1037 (Ky. App. 1934) and Lebow v. Cameron, 394 S.W.2d 773 (Ky. 1965).

Sandlin v. Webb, 240 S.W.2d 69, 70 (Ky. 1951) holds that a finding of reckless disregard (just as in the case of liability for punitive damages) is sufficient for a jury finding that the trespass and conversion was not innocent or inadvertent. Sandlin holds that actual knowledge or intentional action by the trespasser is not required to find that the trespass is intentional, "if the act was done recklessly or wantonly." Id. at 70, citing Griffith v. Clark Mfg. Co., 279 S.W. 971 (Ky. 1926):

> One is presumed to have intended the reasonable and natural consequences of his acts, and his denial of such an intention is not conclusive, if the act was done recklessly or wantonly, or under circumstances warranting a different

> conclusion. It is rarely possible to contradict an affirmed intention otherwise than by the actions of the party, and such actions, where not reasonably consistent with the affirmed intention, are always admissible to contradict it in any character of action. Upon this question, and with reference to the particular kind of action, the United States Circuit Court of Appeals said, in the case of Liberty Bell Gold Mining Company v. Smuggler Union Mining Company [8 Cir.], 203 F. 795, 122 C.C.A. 113:
>
> > 'Intent, being a state of the mind, can but seldom be proven by direct evidence. For this reason the law presumes that a party intended the natural consequence of his acts, and if a person has the means of ascertaining facts, but refuses to use these means, and, reckless of the rights of the true owner, appropriates his property to his own use, the law will presume that he did it intentionally and willfully.'
>
> 'So, also, in Central Coal & Coke Co. v. Penny [8 Cir.], 173 F. 340, 97 C.C.A. 600, the court said:
>
> > 'An intentional or reckless omission to ascertain the rights or the boundaries of land of his victim, for the purpose of maintaining ignorance regarding them, or a reckless disregard of them, is as fatal to the claim of a trespasser to limit the recovery of damages against him to the lower measure, as is an intentional or willful trespass or taking.'

Elk Horn Coal Corp. v. Anderson Coal Co., 223 F. Supp. 746, 750 (E.D. Ky. 1963) also rules that a trespasser claiming status as an unintentional trespasser must prove that the trespass "did not arise intentionally or from a reckless disregard of the location of the boundaries." [Emphasis added].

The standard for finding a non-innocent trespass is exactly the standard used in the punitive damages instruction given to the jury. The jury unanimously found that

punitive damages were justified, thus deciding the fact of reckless disregard required for a finding of non-innocent trespass. Harrod had plenty of opportunity to offer evidence on that issue at the trial, but Harrod's evidence did not persuade the jury. The objective evidence of Harrod's actions and inactions relating to the location of its boundaries shows that the trespass did not qualify as inadvertent.

Harrod's President, David Harrod, admitted that Harrod benefitted by removing marketable limestone from the Crutchers' property. He could hardly deny it. It was admitted that the average sales price of the stone was around $5.50 to $5.65 per ton and, based on the removal of over 164,000 tons, Harrod generated receipts in a sum of at least $902,000. The fact that Harrod was able to sell this limestone at such a substantial price revealed to the jury that Harrod had profited from taking Crutchers' stone.

Harrod implies that applying the measure of damages recognized in the Court of Appeals Opinion is a windfall for the Crutchers. The essence of this claim is that Harrod is being required to compensate the Crutchers for taking something which had no value, and that limestone is not a "mineral." This implication ignores the fact established in the record that Harrod converted and sold (for nearly $1,000,000.00) the limestone that was removed from the Crutchers' property. Harrod's implication that the severed limestone had no value also flies in the fact of Kentucky statutes which tax the value of severed limestone. KRS 143A.020 taxes the privilege of severing or processing natural resources based on the gross value of the natural resource severed or processed. KRS 143A.010 (2) defines natural resources to include "all forms of minerals including but not limited to rock, stone, limestone, shale, gravel, sand, clay, natural gas,

and natural gas liquids which are contained in or on the soils or waters of this state." Clearly the Kentucky legislature not only recognizes that limestone is a mineral, but that it has market value as well.

The evidence at the trial showed that the limestone removed from the Crutchers' property had value, notwithstanding any processing by Harrod. There was evidence to show that the average sales price of the processed material from the mine was approximately $5.50 to $5.65 per ton. (David R. Harrod; TAPE 48-2-10-VCR-16-2-A; Dated: 5-12-10; 2:25:40). However, there was also evidence that the unprocessed material had significant value as well. Documents from the Kentucky Highway Department indicate that Harrod had quoted a price of approximately $5.00 per ton for unprocessed material (commonly referred to as "shot rock") in December 2002. (James Stephen Gardner; TAPE 48-2-10-VCR-16-2-A; Dated: 5-12-10; 10:13:40). Mr. Gardner also testified that the average price of shot rock at that time was $7.30 per ton. (James Stephen Gardner; TAPE 48-2-10-VCR-16-2-A; Dated: 5-12-10; 10:12:00).

Harrod jumps to the conclusion that limestone is not a "mineral" for trespass purposes, based on cases involving the construction of deeds for mineral interests, primarily Florman v. MEBCO Ltd. Partnership, 207 S.W.3d 593 (Ky.App. 2006). Harrod claims that cases like Florman mean that Kentucky law is unequivocal in the interpretation that limestone is not a mineral. That is simply wrong. Cases like Florman must be limited to their specific context, i.e., construction of mineral conveyances in deeds. Those cases have no application to other contexts, including trespass and conversion cases.

In fact, Kentucky law is far from unequivocal on the issue of whether limestone is a mineral. As previously mentioned, KRS 143A.010 (2) indicates that limestone is a mineral for purposes of taxation. In addition, a recent Court of Appeals case, decided after Florman, indicated that there is no reason to consider limestone leases any differently than coal leases. In Coffey v. Kehoe Rock and Stone, LLC, 270 S.W.3d 902 (Ky.App. 2008) the issue was whether the district court had subject matter jurisdiction of a dispute concerning a lease to mine limestone from the landlord's property in the context of district court jurisdiction over forcible detainers. The issue addressed by the Court of Appeals was whether there was a landlord-tenant relationship created by the lease to mine limestone. In coming to the conclusion that there was no subject matter jurisdiction in the district court, the Court of Appeals commented on the nature of limestone leases (Id. at 904):

> It has long been the law in Kentucky that a mineral lease does not result in the creation of a landlord-tenant relationship but instead is a grant of incorporeal interests within the land. Ellis v. Beech Creek Coal Co., 467 S.W.2d 132, 133 (Ky. 1971). While Ellis concerned a lease of coal, we see no difference between the lease of limestone, as a mineral, and the lease of coal, as a mineral. Therefore, a lease of limestone does not create a landlord-tenant relationship but, as in Ellis, an incorporeal interest in land.

Harrod's position that Kentucky courts have stated that limestone is not a mineral is simply wrong. In the context of trespass, Harrod's cases are irrelevant.

Harrod's authorities only make sense in the limited context of deed construction. These cases indicate that there is no presumption in a deed by the use of the word "minerals" that it includes limestone unless "limestone" is specifically mentioned. The

presumption is that limestone is not ordinarily included in a general reference to minerals in a deed, but it can be included in the transfer of a mineral interest if the intention is so expressed in the grant. For example, in Rudd v. Hayden, 97 S.W.2d 35 (Ky. 1936), the conveyance included "all minerals, coal, clays, spars, oil gases and every other kind and character of mineral cement, . . ." The Court ruled in that case that the reference to "mineral cement" included limestone, from which various types of cement might be manufactured.

The same principle applies in the case of Little v. Carter, 408 S.W.2d 207 (Ky. 1966). While there is no presumption that the word "minerals" includes limestone, if the intention of the document expresses that limestone is included, then it can be included in such a grant.

In the bigger picture, this distinction concerning mineral deeds is irrelevant. The issues concerning construction of a contract or deed using the word "mineral" has nothing to do with the fact that Harrod unlawfully trespassed on the land belonging to the Crutchers, severed and removed valuable limestone from that property and converted and sold it for nearly a million dollars. This is a trespass and conversion for which Kentucky law has long provided that the amount of recovery is the value of the property converted.

Harrod's analysis ignores the element of conversion that is involved in cases like this. When minerals, like limestone, are removed from property by trespass, the severed material has value, as evidenced by Harrod's profitable sale of the Crutchers' limestone. If the Crutchers are limited in the measure of damages as argued by Harrod,

one is led to the absurd result that Harrod reaps the benefit of hundreds of thousands of dollars worth of limestone. Kentucky law simply does not permit one who converts the property of another to keep the proceeds of that conversion. Such a result would indeed be a windfall to Harrod.

II. The Trial Court and Court of Appeals were correct in disregarding the conditional stipulation, based on the Trial Court's erroneous measure of damages which was corrected by the Court of Appeals Opinion.

The Crutchers were not prohibited by the stipulation from offering evidence of damages based on loss of royalties. Harrod's reliance on the stipulation ignores the express condition on which the stipulation was based.

In fact, the stipulation strongly indicated that the Crutchers were going to offer evidence of damages based on royalties and limestone values at trial, which is exactly what was done. Paragraph 1 of the stipulation states:

> Plaintiffs propose to present evidence at trial concerning damages of the value of a fair and reasonable royalty for the amount of stone removed by Defendant from Plaintiffs' real property and, in the alternative, the fair market value per ton of the stone removed by Defendant from Plaintiffs' real property.

Harrod's reliance on a misleading reading of the stipulation (implying that the Crutchers stipulated they "will have no evidence at trial of compensatory damages") completely ignores the qualification on that stipulation that limited its application to the damages instruction as proposed by Harrod. The entire paragraph 3 makes it plain that the stipulation was conditional on applying Harrod's proposed (and erroneous) damages instruction:

> Under the compensatory damages instruction proposed by the Defendants, which establishes such damages as the difference in fair market value of the real property before and after the trespass, and which is consistent with this Court's September 20, 2006 Order, the Plaintiffs will have no evidence at trial of compensatory damages. [Emphasis added].

The only stipulation was that Crutchers would not submit evidence of compensatory damages if the Trial Court accepted the instruction on damages proposed by Harrod, as the Trial Court had indicated it would in its September 20, 2006 Order. On the other hand, the Crutchers made it clear that they intended to offer evidence of damages based on royalties and on the value of the limestone wrongfully removed from their property and converted by Harrod.

Ultimately, the trial court recognized, in ruling on instructions during trial, that the September 20, 2006 Order did not reflect the proper rule of compensatory damages in this case. Therefore, the trial court modified its prior rulings on damages and allowed royalty damages to be considered. This was not error (except that it did not go far enough), and in fact, was partially consistent with a prior Order entered in the case on July 5, 2006 (attached as Appendix 6).

III. The Court of Appeals Opinion was correct in determining that the Motion for Directed Verdict was properly overruled.

The Court of Appeals correctly ruled that the trial court did not err in overruling Harrod's Motion for Directed Verdict. There was more than sufficient proof to allow the matter to go to the jury on liability and on damages.

Kentucky law is clear that a trial court should not grant a motion for a directed verdict unless there is a complete absence of proof on a material issue or if no disputed issues of fact exist upon which reasonable minds could differ. Bierman v. Klapheke, 967 S.W.2d 16, 18-19, (Ky. 1998). "The trial court is required to 'consider the evidence in its strongest light in favor of the party against whom the motion was made and must give him the advantage of every fair and reasonable intendment that the evidence can justify.'" Lambert v. Franklin Real Estate Co., 37 S.W.3d 770, 775 (Ky. App. 2000) (citation omitted). Moreover, an appellate cannot substitute its judgment for that of the trial court unless its decision was clearly erroneous. Bierman, 967 S.W.2d at 18.

There was more than enough evidence presented at trial to show at least disputed facts concerning liability. In addition, if a proper measure of damages instruction had been given, there was more than enough evidence to prove the damages suffered by the Crutchers by Harrod's trespass and conversion. Considering the evidence in the strongest light in favor of the Crutchers, as is required by Kentucky law, it would have been error to grant a directed verdict.

IV. The Court of Appeals Opinion was correct in determining that compensatory damages were not capped at the value of the surface of the property ($27,900).

Harrod's claim that the compensatory damages should be capped at the value of the surface of the property has no merit, because it rests solely on Harrod's erroneous measure of damages. The fact is that under the circumstances of this case, the damages for which Harrod was liable are not limited to the difference in the value of the surface of the land before and after the trespass.

Harrod not only unlawfully trespassed on the land belonging to the Crutchers, but also severed and converted valuable limestone from that property and sold it for nearly a million dollars. Kentucky law does not permit one who converts property belonging to another to keep the converted property or its proceeds. This is a trespass and conversion for which Kentucky law has long provided that the amount of recovery is the value of the property converted.

The cases cited by Harrod for its claim that the proper measure of damages is the difference in value of the surface of the property, do not involve trespass and conversion. They are irrelevant for purposes of this case. For example, Ellison v. R & B Contracting, Inc., 32 S.W.3d 66 (Ky. 2000), involved damage to property caused by road construction debris from an adjacent road building project. Burkshire Terrace, Inc. v. Schroerlucke, 467 S.W.2d 770 (Ky. 1971), involved an action by owners against a subdivider for damages inflicted by surface waters flowing from the subdivision. Again this case did not involve removal and conversion of limestone by mining operations. To use these cases completely disregards the damages suffered by Crutchers as a result of Harrod's removal of stone from the property. Elkhorn & B. v. R. Co. v. Martin, 241 S.W. 344 (Ky. 1922), involved a claim that a railroad company, in constructing a railroad bed across the plaintiff's property had constructed culverts and fills which caused surface water to run over and injure the plaintiff's land and that the railroad went outside of its right of way on to plaintiffs' land and dug and removed the dirt and soil which injured plaintiff's land. There was no claim that the railroad converted any of the dirt and soil and sold it for a profit. Schwartz v. Hasty, 175 S.W.3d

621 (Ky. App. 2005) does not even involve trespass to real estate, but addresses the application of the collateral source rule in a case arising from an automobile accident.

Even if the correct measure of damages was the fair market value of the surface of the property (which Crutchers deny), Kentucky law does not automatically require limiting damages to that amount. As ruled in East Kentucky Rural Elec. Co-op. Corp. v. Story, 413 S.W.2d 348, 349 (Ky. 1967):

> Appellant contends that it was patently erroneous for the jury to award more per acre for the easements than the per-acre value of the land in fee simple. This is not a valid argument except as it may be related to the question of excessiveness of the verdicts. We think it is plain that there could be situations in which an easement would result in a diminution in market value greater than the per-acre value of the fee.

In fact, it would have been error for the Court to so limit the damages. In Griffith v. Clark Manufacturing, Co., 279 S.W. 971 (Ky. 1926), the trespasser attempted to limit their liability for damages to the value of the land from which the minerals were removed, which was considerably less than the value of the minerals. The Court ruled that the value of the land was not relevant and evidence concerning that value should not have been admitted.

Harrod consistently ignores its conversion of the limestone from the Crutchers' property and its sale of the converted limestone for approximately a million dollars. The law simply does not permit one who converts another's property to keep the property or its proceeds. The Crutchers' are entitled to compensation for the full value of what Harrod took from their property, including the value of the limestone

converted and sold. Harrod's argument would allow a wrongdoer to profit from trespass and conversion.

V. The Court of Appeals Opinion was correct in determining the measure of compensatory damages, based on existing precedent, and it was not appropriate to consider alternative measures of damages with no precedent.

No authority is offered for the alternative measures of damages proposed by Harrod. There is no reason to consider these speculative alternative measures of damages, where the measure applied by the Court of Appeals has been used in Kentucky at least since the early 1900s, and is well established.

There is ample precedent for applying the measure of damages adopted by the Court of Appeals. There is no reason to deviate from that measure of damages in this case. From Merriwether v. Bell, 58 S.W. 987, 988 (Ky. 1900) to McKinley v. Nutt, 697 S.W.2d 949 (Ky. 1985), Kentucky courts have consistently ruled that the measure of damages where the trespass and conversion of property is not inadvertent is the value of the material converted at the time and place of its severance, without deducting the expense of severing it.

Harrod's arguments for an alternative measure of damages are based on several misconceptions.

First, Harrod inaccurately claims that the Court of Appeals is deviating from precedent by establishing this measure of damages. The cases cited in this Brief show that this is not the case.

Second, Harrod implies that its trespass and conversion were inadvertent. That issue was placed before a jury and the jury unanimously found that Harrods actions were in reckless disregard of the Crutchers' rights.

Third, Harrod argues that his methods of mining his property were not negligent. Even assuming that a negligence analysis applies to this case, the evidence was against him. Harrod's own Quarry Manager, Mr. Banta, testified that Harrod had no system in place to track whether Harrod's activities stayed on Harrod's boundaries until after the encroachment on the Crutchers' property. There was also testimony at trial that the encroachment on the Crutchers' property was not the first encroachment by Harrod.

Fourth, despite Harrod's claims to the contrary, it is beyond dispute that limestone is valuable. This Kentucky legislature recognized this by assessing a severance tax on limestone based on its market value. In addition, Harrod received nearly one million dollars from the sale of the Crutchers' limestone.

If one appeals to reason, there is no legitimate policy that would allow Harrod to keep its ill-gotten gains from the sale of the Crutchers' limestone. The established Kentucky measure of damages clearly recognizes this. No alternative measure of damages is required or justified.

VI. The Trial Court and Court of Appeals were correct in validating a punitive damages instruction in this case, and, in fact, the instruction on punitive damages given by the Trial Court required a higher burden of proof by the Crutchers than controlling law required.

The trial court made no error in submitting a jury instruction on punitive damages. There was more than sufficient evidence to justify the submission of an instruction on punitive damages.

The only error in the punitive damages instruction was that it put an excessive burden of proof on the Crutchers, to the advantage of Harrod. Even so, the jury still found unanimously that Harrod's actions were in reckless disregard of the rights of the Crutchers.

The Trial Court submitted a punitive damages instruction which placed a much heavier burden on the Crutchers than is required by law, in that the instructions placed the burden on the Crutchers to prove that Harrod's trespass was not inadvertent. Swiss Oil Corp. v. Hupp, 69 S.W.2d 1037 (Ky. App. 1934) and Lebow v. Cameron, 394 S.W.2d 773 (Ky. 1965) both rule that "[t]he burden is always upon the offender to establish his status as an innocent or mistaken invader of another's property." In the case before this Court, the burden of proof of non-innocent trespass was erroneously placed by the trial court on Crutchers. Despite this error in favor of Harrod, the jury still found that punitive damages should be assessed.

The trial court's instructions also applied a much stricter burden for finding punitive damages than required by Kentucky law, by restricting the instructions to KRS 411.184, and failing to instruct on the common law gross negligence standard. In

Williams v. Wilson, 972 S.W.2d 260, 264 (Ky. 1998), the Supreme Court ruled that the punitive damages statute (KRS 411.184 et. seq.) was unconstitutional to the extent that it prohibited punitive damages based on gross negligence under common law:

> While the concept was not expressed in the same language in every opinion rendered prior to adoption of our Constitution, and while the language has not remained perfectly constant in this century, there is no doubt that unintentional conduct amounting to gross negligence, as that concept is well defined in Horton, was sufficient to authorize recovery of punitive damages. As the new statute requires proof of a subjective awareness that harm will result, it amounts to a vastly elevated standard for the recovery of punitive damages and a clear departure from the common law.

This standard has been reiterated by subsequent, published cases, such as Peoples Bank of Northern Kentucky, Inc. v. Crowe Chizek and Co. LLC, 277 S.W.3d 255, 267-68 (Ky.App. 2008), which summarized the status of Kentucky law on punitive damages:

> However, the Kentucky Supreme Court has held that, under the common law, punitive damages may be awarded on a showing of gross negligence, and that KRS 411.184 cannot constitutionally exclude recovery of punitive damages on this basis. Williams v. Wilson, 972 S.W.2d 260, 264 (Ky. 1998). "Gross negligence" is a wanton or reckless disregard for the lives, safety or property of others. See Phelps v. Louisville Water Co., 103 S.W.3d 46, 51-52 (Ky. 2003).

See, also, Phelps v. Louisville Water Co., 103 S.W.3d 46, 53 (Ky. 2003)("In Williams v. Wilson, Ky., 972 S.W.2d 260 (1998), we held KRS 411.184(1)(c) unconstitutional because it, in effect, abolished the common law right to punitive damages by requiring the defendant to have a subjective awareness that his conduct would result in death or

bodily harm. Williams, supra, held that the correct standard to be applied was once again common law gross negligence, as defined in Horton, supra.").

There was more than sufficient evidence provided to the jury for a finding that Harrod's conduct was outrageous, which supported the jury's verdict that Harrod's actions were in reckless disregard of the Crutchers' property rights and justified punitive damages.

A few of the matters proven at trial to show this outrageous conduct are:

1. Harrod had no property line survey made from 1996 to 2002, even though Harrod's President knew he was heading toward Crutchers' property (David R. Harrod; TAPE 48-2-10-VCR-16-2-A; Dated: 5-12-10; 11:36:20, Orville Glenn Stone; TAPE 48-2-10-VCR-15-1-A; Dated: 5-11-10; 4:29:00 and Cecil Banta; TAPE 48-2-10-VCR-15-1-A; Dated: 5-11-10; 3:55:40);

2. The encroachment was significant and extended over 1.8 acres and resulted in removal of 164,000 tons of limestone (James Stephen Gardner; TAPE 48-2-10-VCR-16-2-A; Dated: 5-12-10; 10:08:00 and 10:32:10);

3. Harrod let the Crutchers bear the burden of determining the amount of the encroachment, and tried to pass off onto Crutchers the cost of doing a proper survey (B. Todd Crutcher; TAPE 48-2-10-VCR-15-1-A; Dated: 5-11-10; 11:45:40);

4. Harrod had no method of tying the underground mining to the property lines on the surface until after the encroachment in 2002 (Cecil Banta; TAPE 48-2-10-VCR-15-1-A; Dated: 5-11-10; 3:48:50);

5. Harrod encroached in another area prior to 1991 (David R. Harrod; TAPE 48-2-10-VCR-16-2-A; Dated: 5-12-10; 11:41:50);

6. Harrod knew that the available maps stated that the property lines were only approximate and not certified, but did not obtain a boundary survey for six years and even crossed over the approximate property lines shown on the maps (David R. Harrod; TAPE 48-2-10-VCR-16-2-A; Dated: 5-12-10; 2:28:20 and David Bailey; TAPE 48-2-10-VCR-15-1-A; Dated: 5-11-10; 2:34:10 and 2:43:30);

7. Harrod's employees did not know where they were underground in relation to the surface (James L. Smith; TAPE 48-2-10-VCR-15-1-A; Dated: 5-11-10; 4:07:00, Donald Lewis; TAPE 48-2-10-VCR-15-1-A; Dated: 5-11-10; 4:14:25 and Orville Glenn Stone; TAPE 48-2-10-VCR-15-1-A; Dated: 5-11-10; 4:24:30, 4:29:00 and 4:31:00);

8. Harrod maintained "No Trespassing" signs on its property line with Crutchers since the 1990s. (B. Todd Crutcher; TAPE 48-2-10-VCR-15-1-A; Dated: 5-11-10; 11:43:30 and 11:45:00).

Harrod implies that its conduct is excused because maps prepared by engineers hired by Harrod did not certify boundary lines.

First, if the maps did not certify boundary lines it is because Harrod failed to authorize a boundary survey for over six years. The maps indicated, repeatedly, the need for a boundary survey. Mr. Harrod admitted that he knew for over six years that a boundary survey was needed, but failed to get it done. Harrod cannot rely on its own recklessness as an excuse.

Second, the testimony at trial showed that those maps did show an approximation of the boundary line. The evidence also showed that Harrod's mining activities went beyond even those approximate boundary lines. Harrod simply chose to ignore the information that was available.

Third, there was testimony, substantiated by photographs entered into evidence by Harrod, that the boundary line was marked by no trespassing signs placed by Harrod.

Harrod's recklessness is not excused by the lack of a boundary survey. Harrod caused those circumstances to exist and cannot use its own malfeasance as an excuse.

Harrod's claim that it was not possible for it to keep track of its progress underground without using a state of the art process defies logic and history, as well as the evidence at trial. Underground mining has taken place in Kentucky for generations, and miners have utilized methods for tracking their activities for generations. This argument is simply a thinly veiled attempt by Harrod to take attention from the fact that Harrod did not so much as obtain a surface boundary survey, even though Harrod's President knew one was needed for more than six years.

This implication of impossibility is contrary to the evidence at trial, given by Harrod's own Quarry Manager. Mr. Banta testified that Harrod had no system in place to tie underground mining to the surface when he came in 2003 (after the encroachment in 2002). (Cecil Banta; TAPE 48-2-10-VCR-15-1-A; Dated: 5-11-10; 3:48:30). Mr. Banta quickly established a grid map system when he arrived at Harrod, based on the American Engineers boundary survey. (Cecil Banta; TAPE 48-2-10-VCR-15-1-A; Dated:

5-11-10; 3:49:30). This was the same method Banta had in place at his previous place of employment (Cecil Banta; TAPE 48-2-10-VCR-15-1-A; Dated: 5-11-10; 3:50:35). Of course, Mr. Banta's system required a boundary line survey, which Harrod did not even have in place until the American Engineers survey, after the encroachment (Cecil Banta; TAPE 48-2-10-VCR-15-1-A; Dated: 5-11-10; 3:55:40). Mr. Banta testified that the grid map method he used was available as early as 1993 or 1994 (Cecil Banta; TAPE 48-2-10-VCR-15-1-A; Dated: 5-11-10; 4:00:30). This is simply another weak excuse by Harrod for its blatant failure to do anything to monitor its underground mining until after it encroached onto Crutchers' property.

Similarly, Harrod's unsupported claim of a due process issue arising from the potential imposition of punitive damages cannot stand. This Court of Appeal Opinion correctly notes that compensatory damages for the trespass and conversion and punitive damages serve different purposes. The damages for the trespass and conversion are for compensation, based on the value of the limestone which Harrod wrongfully severed and converted from the Crutchers' property. Punitive damages are allowed to punish Harrod for those reckless acts.

The Court should respect the unanimous verdict of the jury, and not replace the jury's verdict on this factual issue with its own determination.

VII. The Trial Court erred in reducing the award of punitive damages, but the Court of Appeals was correct in sending back the case to determine punitive damages after allowing for compensatory damages to be properly determined based on the value of the material severed and converted from the Crutchers' property.

The jury's punitive damages award is reasonable in that the computation of the amount is based on the actual benefits received by Harrod as a consequence of its wrongful acts against the Crutchers. That is a rational basis for the punitive damage award and is not arbitrary in any respect. Nevertheless, the Court of Appeals did not err in sending the case back for additional proceedings on punitive damages as an alternative. If this Court is not going to reinstate the punitive damages award, then remanding to the trial court on the issue of damages alone is a viable alternative.

The standard for considering the amount of punitive damages is more than just a mathematical formula. The United States Supreme Court has set forth a three part analysis (as noted in Phelps v. Louisville Water Co., 103 S.W.3d 46, 53 (Ky. 2003)):

> (1) the degree or reprehensibility of the defendant's conduct; (2) the disparity between the harm (or potential harm) suffered by the plaintiff and the amount of the punitive damages award; and (3) the difference between the punitive damages and the civil penalties authorized or imposed in comparable cases.

The amount of punitive damages awarded by the jury verdict certainly was not outside of these constitutional parameters. In fact, if one takes into account that compensatory damages under a proper damages instruction should have been $902,000, then an award of an additional $902,000 in punitive damages would have been modest under the circumstances. It should be pointed out, again, that it has been the Crutchers' position from the beginning that compensatory damages in this case should have

included the value of the material removed, which averaged $902,000, without regard to the expense of removal, as noted in cases cited herein, such as Jim Thompson Coal Co. v. Dentzell, 287 S.W. 548, 549 (Ky. 1926); Elkhorn-Hazard Coal Co. v. Kentucky River Coal Corporation, 20 F.2d 67, 71 (6th Cir. 1927); Hughett v. Caldwell County, 230 S.W.2d 92, 96 (Ky. 1950) and McKinley v. Nutt, 697 S.W.2d 949 (Ky. 1985).

The degree of the reprehensibility of Harrod's conduct has already been summarized in part in the eight points mentioned in previous sections of this Brief. Harrod had engaged in more than one instance of encroachment. Harrod did not take any steps to avoid encroaching on the Crutchers' land, and admittedly failed to take any reasonable step to get a survey of the property for six years. Harrod even tried to throw off the costs associated with the encroachment (such as survey costs and costs to determine the amount of encroachment) onto the Crutchers' land. Harrod failed to put in place a method for monitoring the extent of its mining operations relative to the surface until after the encroachment, even though Mr. Banta testified that such methods were available since at least the early 90's.

Harrod does not articulate a basis for the trial court setting aside the jury verdict on due process grounds. Proper application of due process requires reinstatement of the jury award of punitive damages or affirmation of the Court of Appeals' remand for further proceedings on that issue.

VIII. The Court of Appeals Opinion is correct in determining that the case should be remanded for a trial on damages only, because liability is already established by unanimous jury verdict, and any claim that this would lead to an arbitrarily excessive award is purely speculative.

There is no reasonable basis for requiring a new trial on liability, and the Court of Appeals did not err in limiting any retrial to damages only. The jury verdict is clear that Harrod's trespass and severance and conversion of the Crutchers' limestone was not inadvertent, and was in fact due to Harrod's recklessness.

There is no factual issue on Harrod's liability for trespass and conversion of limestone. The jury unanimously found (in answering Questions No. 1 and 2 of the Instructions) that Harrod has trespassed and that the Crutchers suffered injury as a result.

In Instruction No. 4, the jury was instructed to award punitive damages if Harrod "acted in reckless disregard for the property of others, including" the Crutchers. In answer to Question No. 4 the jury, acting under the terms of Instruction No. 4, unanimously found that Harrod should pay punitive damages to the Crutchers. It is clear that the jury found that Harrod did not innocently or inadvertently trespass on the Crutchers' property. Harrod had more than enough time, over a trial that lasted two and one-half days, to put on evidence defending its culpability, and in fact, put on evidence on that issue. It was an active issue at the trial, and Harrod should not be allowed to ignore a unanimous jury verdict. The jury verdict could not be clearer.

Harrod should not be given a new trial on liability based on erroneous jury instructions that Harrod procured at trial. The Crutchers' position from the beginning

was that compensatory damages depended upon the finding of whether or not the trespass and conversion was innocent or reckless. The Crutchers offered instructions to that effect for trial. It was Harrod that insisted on the use of erroneous instructions that put a higher burden on the Crutchers than was required by applicable law with respect to the issue of recklessness. For example, the burden of proof of non-innocent trespass was erroneously placed on the Crutchers and the trial court placed a heavier burden for proving recklessness than is required by applicable law. Harrod cannot complain about the instructions, because the instructions redounded to Harrod's benefit, and were brought about by Harrod's improper insistence on applying the wrong standards for this case. Sears v. Frost's Adm'r, 279 S.W.2d 776, 780 (Ky. 1955) states that: "It is a universal rule that a party will not be heard to complain of an instruction which is as favorable or more favorable to him than that to which he was entitled, and an instruction which requires the jury to find an unnecessary fact in order to award a recovery to the plaintiff is not prejudicial to the defendant."

Harrod's liability for recklessness was established as a fact by the jury verdict. Even with the burden of proof of recklessness erroneously placed on the Crutchers, the jury still awarded punitive damages, finding as a fact that Harrod acted with "reckless disregard" of Crutchers' rights. It would be a miscarriage of justice to allow Harrod a new trial on liability because of instructions that Harrod procured.

The jury's factual finding of reckless disregard is sufficient to award compensatory damages based on the value of the limestone taken. Actual knowledge or intentional action is not required to find that the encroachment is intentional, "if the

act was done recklessly or wantonly." Sandlin v. Webb, 240 S.W.2d 69, 70 (Ky. 1951), citing Griffith v. Clark Mfg. Co., 279 S.W. 971 (Ky. 1926):

> An intentional or reckless omission to ascertain the rights or the boundaries of land of his victim, for the purpose of maintaining ignorance regarding them, or a reckless disregard of them, is as fatal to the claim of a trespasser to limit the recovery of damages against him to the lower measure, as is an intentional or willful trespass or taking. Id.

This is exactly what the jury found on the issue of liability, even though the jury was inhibited in finding damages for the Crutchers because of the erroneous limitations placed on the jury by the instructions. There was more than enough evidence presented at the trial to support the verdict that Harrod acted with reckless disregard, and there is no basis for a new trial on the liability issue. The Court of Appeals Opinion on the issue of liability should be affirmed.

Harrod's claim that it will be subject to excessive damages is purely speculative and is based on Harrod's insistence on applying a measure of damages for reckless trespass and conversion that is not supported by law.

Without repeating arguments already presented in this Brief, the measure of compensatory damages for a reckless trespass and conversion, based on the value of the limestone severed and converted, is consistent with well established law and takes into account compensation to the landowner for property removed and converted by the trespasser. The value of the after severance from the real estate is the proper measure of damages. These damages serve an entirely compensatory purpose, and do not involve a punitive purpose. This measure of compensatory damages is rationally related to the

value of the material that was taken and converted by the trespasser, and returns the value of that property to the rightful owner. There is no reasonable policy that Harrod can articulate to allow it to retain the proceeds of property that did not belong to it.

In fact, the Crutchers should be given the benefit of the jury verdict on damages, by remanding this case back to the trial court with instructions to enter a judgment for the Crutchers for $902,000.00, with interest, as compensatory damages, and conducting a new trial only on the amount of punitive damages.

The punitive damages awarded by the jury in the sum of $902,000.00 was based on the average value received by Harrod for the limestone ($5.50 per ton) multiplied by the number of tons removed by Harrod (164,000 tons x $5.50 per ton = $902,000), as was presented to the jury in final argument. Had the trial court presented the correct instruction concerning damages for non-innocent trespass to the jury, this would have constituted proper compensatory damages as established by Kentucky law. In effect, the jury, in reaching a formula for applying punitive damages in this case, clearly and undeniably, used the formula for awarding compensatory damages for non-innocent trespass, namely the value of the limestone without deducting the expense of severing it. Were it not for the error in instructions procured by Harrod, this would have been the jury verdict on compensatory damages, and the jury could have considered an amount for punitive damages.

The Crutchers should not be deprived of the jury verdict because of errors procured by Harrod and Harrod should not be given a second trial on liability or compensatory damages, when the jury verdict is clear. The Crutchers should get the

benefit of the jury verdict of $902,000 for compensatory damages, and the case should be remanded for a trial on the amount of punitive damages only. A finding of reckless disregard is sufficient to award compensatory damages based on the value of the limestone taken, as the jury did in this case, through the vehicle of punitive damages, which was their only means of making that award due to the erroneous instructions.

Punitive damages are intended as a means to discourage further wrongful acts. This serves a purpose entirely separate from compensatory damages. While the amount of punitive damages are constrained by due process and must therefore, bear a reasonable relationship to compensatory damages, punitive damages do not serve a compensatory purpose, but a punitive purpose. Because these two species of damages serve different purposes in the law, they are not duplicative.

Harrod misinterprets the reasoning behind the measure for compensatory damages. It is important to remember that historically there was no reduction in damages for a trespass and conversion based on inadvertence of the trespasser. It is not that compensatory damages are enhanced because of intentional or reckless trespass, but that ordinary compensatory damages may be decreased if the trespasser can prove innocent trespass.

Harrod has no basis for claiming that there is a danger of an arbitrarily excessive award.

IX. It was proper for the court to admit the testimony of the Crutchers' expert, Steven Gardner.

Much of Harrod's complaint about the testimony of Mr. Gardner relies on the erroneous argument that evidence of royalty damages is not admissible. Because the foundation for that argument is faulty, the whole argument falls. Moreover, since the jury found that Harrod's trespass was reckless and not inadvertent, even if the admission of that testimony had been erroneous, it was harmless error.

To the extent that Harrod makes other attacks on Gardner's testimony, those attacks are based on a misapplication of the Daubert analysis, and are likewise unavailing. Mr. Gardner was an engineer. He also testified that his background and experience included appraisal of mining properties and appraisal of the economic viability of mining properties. His testimony based on the loss of royalties and the value of limestone was proper with that foundation.

Kentucky law concerning the application of Daubert in state court cases is well-established by Kentucky appellate courts. The Daubert determination is left to the sound discretion of the trial court, and there is a strict burden for setting aside that exercise of discretion:

> The decision whether to admit evidence is vested in the sound discretion of the trial court and will not be reversed absent a showing of an abuse of discretion. Welsh v. Galen of Virginia, Inc., 128 S.W.3d 41, 51 (Ky.App. 2001).

R.T. Vanderbilt Company, Inc. v. Franklin, 290 S.W.3d 654, 664 (Ky.App. 2007).

> Moreover, "[t]he trial court must have the same kind of latitude in deciding how to test an expert's reliability . . . as it enjoys when it decides whether or not that expert's relevant

> testimony is reliable." Kumho Tire, 526 U.S. at 152, 119 S.Ct at 1176. "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." Goodyear Tire & Rubber Co. v. Thompson at 581.

West v. KKI, LLC, D/B/A Six Flags Kentucky Kingdom, 300 S.W.3d 184 (Ky. App. 2008).

In addition, a full blown hearing is not required for every Daubert determination:

> A Daubert hearing is not required every time an expert's testimony is offered. If the record is complete enough to measure the proffered testimony against the standards of reliability and relevance, a hearing is not required. Commonwealth v. Christie, 98 S.W.3d 485 (Ky. 2002).

R.T. Vanderbilt Company at 664-65.

Harrod does not cite any persuasive authority for the generalized claims that Mr. Gardner's testimony is inadmissible and certainly provides nothing showing that the trial court's decision was "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." Harrod simply makes general claims about the alleged unreliability of Gardner's testimony, without providing any authorities to support that claim.

Moreover, Harrod did not provide any contrary expert testimony that indicated that Gardner's testimony was not appropriate or reliable. Harrod had sufficient opportunity at trial to offer expert testimony that Gardner's testimony was not appropriate or reliable, but did not. Harrod only made broad and general criticisms without providing any authorities or expert testimony to support its claims.

Gardner testified that the information that he relied upon in making his analysis is of the kind upon which he reasonably relies for making those valuation calculations in the course of his business. Harrod did not provide any testimony to the contrary.

Even a brief review of the Kentucky Rules of Evidence shows that there was no error in admitting this testimony under these circumstances.

First, KRE 703(a) permits an expert to rely on facts or data even though it may not be admissible, as long as it is of a type reasonably relied upon by experts in the field. Mr. Gardner indicated that what he relied upon was reasonably relied upon by experts in the field and was of the kind upon which he relied in his business in appraising the economic viability of mining properties. Harrod did not provide any evidence to the contrary, but simply made unsupported claims of unreliability.

Second, part of the information relied upon by Mr. Gardner was data compilations prepared by the Commonwealth of Kentucky Department of Highways which outlined the price of various stone products at and after the time of the encroachment by Harrod. KRE 803(8) indicates that unless there are circumstances that indicate a lack of trustworthiness, records, reports, statements or other data compilations of a public office or agency are admissible. Since Harrod offered no evidence challenging the trustworthiness of that compilation, it was appropriate for Mr. Gardner to rely upon it.

Simply put, in challenging Mr. Gardners' testimony, Harrod is applying a standard that is not allowed by the Kentucky Rules of Evidence or by a proper Daubert analysis. What Harrod is in effect claiming is that all of the information and data upon

which Mr. Gardner relied must, itself, have been admissible. That is completely contrary to what the Rules of Evidence provide. In fact, Kentucky law provides that an expert can rely on what a third party told him or her. Brown v. Com., 934 S.W.2d 242, 247 (Ky. 1996) ("[A]n expert may testify as to what a third party said as long as that expert customarily relies upon this type of information in the practice of his or her profession."). It would be error to have denied Mr. Gardner's testimony and there is no basis for setting aside the unanimous jury verdict.

At most, the complaints made by Harrod about Mr. Gardner's testimony went to credibility rather than admissibility. Harrod had more than adequate opportunity to cross examine Mr. Gardner and establish the strengths and weaknesses of his testimony for consideration by the jury (or, for that matter, to introduce expert testimony of its own to contradict Mr. Gardner's testimony, which Harrod did not do).

> [T]he credibility of every witness presented to testify in a legal proceeding, including expert witnesses, is subject to attack and cross-examination, this being the primary means by which trial counsel can attempt to persuade jurors of the weight or significance to be attached to the testimony of the witnesses. Brown at 247.

The credibility of Mr. Gardner and the weight of his testimony, as with any other witness, are uniquely and peculiarly within the province of the jury. The Daubert function of the trial court is restricted to keeping out unreliable expert testimony, not to assessing the weight of the testimony. This role of assessing weight or credibility is assigned to the jury.

Kentucky courts have stressed this distinction in roles, noting with approval that a trial court "was aware of the difference between its role as gatekeeper and the jury's role in determining the weight evidence should have." Sand Hill Energy, Inc. v. Ford Motor Co., 83 S.W.3d 483, 489-90 (Ky. 2002), vacated on other grounds by Ford Motor Co. v. Smith, 538 U.S. 1028, 123 S.Ct. 2072, 155 L.Ed.2d 1056.

It would have been error for the Court to refuse Gardner's testimony.

CONCLUSION

In conclusion, the Appellees request this Court to affirm the determination of the Court of Appeals on the issue of liability, and on the issue of damages to remand this matter to the trial court with instructions to enter a judgment for compensatory damages of $902,000, with interest at the maximum legal rate and to retry the case on the issue of the amount of punitive damages, or in the alternative, to affirm the Court of Appeals Opinion remanding the matter to the trial court for a new trial on the amount of compensatory and punitive damages.

Respectfully submitted,

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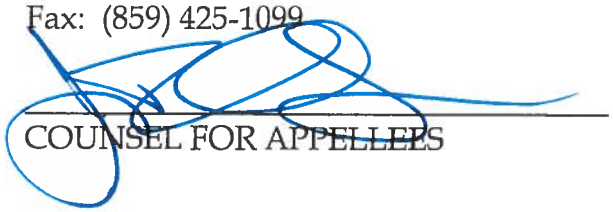

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