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SUPREME COURT

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

WOODIE CANTRELL, ET AL

APPELLANTS

VS.

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

ASHLAND OIL, INC., ET AL

APPELLEES

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APPELLANT'S BRIEF

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RESPECTFULLY SUBMITTED,

PILLERSDORF, DEROSSETT & LANE
124 WEST COURT STREET
PRESTONSBURG, KENTUCKY 41653
(606) 886-6090 / FAX: 886-6148

CERTIFICATE OF SERVICE

This is to certify that a true and accurate copy of the foregoing was this day mailed to: **HON. GEORGE CHANDLER, HON. KIRK MATHIS**, Chandler Law Offices, P. O. Box 430, Lufkin, Texas 75902-0340; **HON. BROADUS SPIVEY,** 48 East Avenue, Austin, Texas 78701-4320, **HON. DARRIN WALKER**, 2054 Parkdale Drive, Kingwood, Texas 77339; **HON. MICHAEL ENDICOTT**, P. O. Box 181, Paintsville, Kentucky 41240; **HON. BRIAN M. JOHNSON, HON. PHILLIP D. SCOTT, HON. ANNE CHESNUT**, Greenebaum, Doll & McDonald, 300 West Vine Street, Suite 1100, Lexington, Kentucky 40507; **HON. RALPH H. JOHNSON, HON. LEON TARANTO, HON. LYNN K. MCKAY,** Blank Rome, LLP, The Watergate Building, 600 New Hampshire Avenue NW, Washington, Washington, DC 20037; **HON. MICHAEL J. SCHMITT**, P. O. Drawer 1767, Paintsville, Kentucky 41240; and the original and nine (9) copies to: **CLERK**, Kentucky Supreme Court, 209 Capitol Bldg., 700 Capital Ave., Frankfort, Kentucky 40601 on this the 29th day of April, 2008.

This is to certify that the record was withdrawn from the clerk's office for preparation of this brief, but has been returned to the clerk's office.

Joseph Lane

NED PILLERSDORF
JOSEPH LANE

INTRODUCTION

This is an appeal by the Plaintiffs, Woodie Cantrell, Wathalene Cantrell, Tammy Cantrell, Kathleen Phillips, the Estate of Erma Jean Wright, Luther Wright, Murl Wright and the Estate of Shirley Wright, (hereinafter, "Plaintiffs") from a Judgment entered in favor of the Defendants, Ashland, Inc., formerly known as Ashland Oil, Inc.(hereinafter, "Ashland"), at the conclusion of a truncated jury trial.

STATEMENT CONCERNING ORAL ARGUMENT

The Plaintiffs assert that oral argument will be helpful because the issues in this case are numerous and the relevant legal issues cannot be discussed comprehensively in the limited space permitted in the written briefs.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

This case arises from the comprehensive and continued pollution of the surface property and ground water in the Martha Oil Field by Ashland. The Plaintiffs own property in Johnson County near Martha, an area routinely referred to as the Martha Oil Field, which extends into adjacent areas of Lawrence County. The field was established in the early 1920's by the Swiss Oil Company, and Ashland had obtained control of the entire field by the late 1930's. Although the field was only approximately four square miles in size, Ashland had approximately fifteen hundred (1500) oil wells in it. The field produced large quantities of oil for years, but by the late 1950's and early 1960's, production began to taper off. Ashland sought new ways to maintain and increase production, of which the primary method at issue in this case is referred to as the "water-flood" technique. The water-flood technique introduced pressurized water into the oil-bearing stratum to mobilize petroleum otherwise entrained in the interstitial porous space of the rock. In other words, water is forced in to the oil-bearing areas to squeeze out the last drop of oil. While this method is accepted, there is a right way to do it and a wrong way. The Plaintiffs' proof demonstrated Ashland did it the wrong way.[1] Specifically, Ashland's negligent or grossly negligent conduct, which led to the contamination of surface property and water resources, included failure to case or seal well bores, which pierced aquifers; and over-pressurization, which drew water for flood use from higher aquifers, thereby increasing the pressure gradient.[2] The Plaintiffs' expert identified a number of other problems with the manner in which Ashland

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[1] (Record on Appeal, which will be identified by volume and page number(s); V120, 17484-17494 Appendix Tab 2).

[2] Id.

conducted the water flooding.[3] Moreover, Ashland was additionally negligent as it contributed to elevated radiation on the surface as a result of its failure to accurately monitor radiation levels and its failure to remove the known sources of radiation.[4] In addition to squeezing more oil, this water flooding technique forced **T**echnologically **E**nhanced, **N**aturally, **O**ccurring **R**adioactive **M**aterial. ("TENORM") to the surface. TENORM consists of natural radioactive materials, of which the principle element is radon, that is found in small amounts everywhere, but is mostly found well below the earth's surface, causing little harm to people or land. However, this natural material can be "enhanced" or concentrated by human activity such as negligent oil drilling. TENORM cannot be detected by human senses because it is invisible, silent, tasteless and odorless. TENORM does contain material that poses a risk to human health.[5] However, the trial court prevented the jury from hearing such evidence in this case.[6]

At first, the Plaintiffs and their neighbors (many of whom are Plaintiffs in the cases that remain pending in Johnson and Lawrence County), were unaware that Ashland's negligence had damaged their property.[7] While there was some understanding that Ashland's oil drilling had damaged ground-water quality, it was assumed that this was an inevitable result of even the best and cleanest oil-drilling processes, and much less destructive than the more familiar strip-mining. Then, in 1988, TENORM-contaminated pipe in the Martha Oil Field set off a geiger

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[3] Id.

[4] Id.

[5] Vol. 103, 15042-15116, Apx. tab 3.

[6] Vol. 111, 16156-16165, Apx. tab 4; Vol. 115, 16833-16835, Apx. tab 5.

[7] (Trial transcript, which will be identified by "T" with the volume number and the page number(s) 5T 547, 636-37; 6T 732-47; 7T 833-36.

counter at a local scrap yard. Ultimately, the government investigated and Ashland and the EPA entered a consent decree, under which Ashland agreed to perform some remediation (the "Martha Reclamation Plan," or "MRP"). The MRP consisted of primarily digging up the hottest spots and burying the material dug up in a "temporary" land fill in the Martha area. This minimalist approach compelled some landowners in the Martha area to seek relief in court. The Plaintiffs in this case did not join in this initial litigation because Ashland assured them that their land was not contaminated. Subsequently, the property of these Plaintiffs was tested and was determined to be contaminated by TENORM. This litigation, involving approximately sixty (60) parcels of land in both Johnson and Lawrence County, ensued.

At issue in this appeal is a separate trial involving property owned by the Cantrells and the Wright estate. Both these properties were contaminated with TENORM. The Plaintiffs' complaint alleged intentional trespass, nuisance, negligence, gross negligence, and failure to warn; and sought damages for loss of their property values and punitive damages. Unfortunately, the Plaintiffs were denied a fair trial, because the trial court improperly and without justification gutted their cases. Although the appellate record consists of over seventeen thousand (17,000) pages, the Plaintiffs were permitted to put on approximately three and a half days of actual testimony, which was mostly by avowal. Both at the pre-trial and trial, the trial court made numerous rulings that guaranteed Plaintiffs' claims would fail. Although the trial court had overruled Ashland's Motion for Summary Judgment on Plaintiff's groundwater-contamination claims,[8] it then threw out those claims (along with Plaintiffs' claims for non-radiation contamination), ostensibly on limitations grounds, when it ruled on a Motion in Limine

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[8] V.91 13265-13272, Apx. tab 6.

filed by Ashland.[9] In making this ruling, the trial court decided what a reasonable person would have known, or should have known, in this very complicated situation, although it did not have appropriate evidence pertaining to each individual Plaintiffs' circumstances, instead of allowing the jury to decide these fundamental facts for each claim.

At the trial itself, crucial expert testimony was excluded, such as that of the Plaintiffs' expert Stanley J.Waligora, regarding the health consequences of exposure to TENORM [10]. Another expert, Clay Kimbrel, who readily qualified to testify regarding industry standards for operations such as those of Ashland, had his testimony stricken, and the jury was instructed to disregard it, because he uttered the words "negligent" and "reckless" during his description of Ashland's practices.[11] Another qualified drilling expert, Bob Grace, was only allowed to testify regarding the methods used on the Cantrell and Wright properties, even though Ashland's negligent actions throughout the oilfield contributed to the contamination problems on these properties.[12] And while these improper exclusions of Plaintiffs' experts' testimony were alleged to be intended to protect the jury from what was said to be "junk science," no such scrutiny was applied to the exotic testimony of Ashland's experts. They testified there was a safe threshold of exposure to radiation even though current regulatory schemes and scientific consensus are based upon the conclusion that exposure to ionizing radiations such as radium that is contained in the TENORM creates a level of risk associated with the risk of exposure to any level of this

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[9] Exp. 50; V115, 16836-39, Apx. tab 7.

[10] 12T 1569-1590.

[11] 12T, 1586-872, 1511-12?

[12] 8T 998-1000.

carcinogen. In fact, in the BEIR VII Report, which was initially published in 2005, a Committee assembled by the National Academy of Sciences reaffirmed the consensus that the linear-no-threshold model for that (applied by Plaintiffs' experts and rejected by Ashland's) analyzing exposure to radiation was the appropriate scientific model. BEIR VII confirmed earlier scientific consensus on the linear-no-threshold model, such as BEIR V (1990) Health Effects of Exposure to low levels of ionizing radiation BEIR V. Washington: National Academy Press and NRPD (1995); Risk of Radiation Induced cancer at Low Dosages and Low Dose Rates for Radiation Protection Purposes Documents of the National Radiological Protection Board Vol 6 No 1 Chilton UK: NRPB. The BEIR VII Report was not released until after the trial of this matter, and Plaintiffs requested that the Court of Appeals take judicial notice of it, but the Court of Appeals declined to do so.

Even where the Plaintiffs had direct evidence of Ashland pumping contaminated water into a creek that borders one of the Plaintiffs' properties, this evidence was excluded. Specifically, Chris Dawson's 1996 video of Ashland pumping contaminated sludge into the creek bordering the Wright property was improperly excluded as evidence of a remedial measure and because it did not take place directly on the Wright's property.[13]

It was uncontradicted that TENORM was present on the Plaintiffs' properties at levels higher than normal, although there was conflicting testimony of how much higher than normal it was. The trial court having improperly excluded all evidence as to the dangers of TENORM, it is little surprise that the jury answered "no" to the improper instruction given by the trial court as to whether "there is a basis and reason in experience for fear of NORM above-background

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[13] 13T, 1703-1726; Plaintiffs' exhibit hereinafter, PX, 7.

readings found" on Plaintiffs' property.[14] Nonetheless, from the minimal evidence that it was allowed to hear, the jury did conclude that the contamination had, in fact, diminished the fair market value of the Plaintiffs' properties.[15] The Plaintiffs had requested instructions on intentional trespass, nuisance, and nominal damages, all of which were refused.[16] Moreover, since the trial court had excluded all evidence of Ashland's flagrant disregard for Plaintiffs' rights, it refused Plaintiffs' request for a punitive damage instruction.[17]

Throughout the course of the trial, the trial court made numerous incorrect evidentiary rulings, and injected itself into the trial in an inappropriate fashion, restricting both the manner and order of Plaintiffs' proof.[18] Proof presented by Ashland was subject to no such scrutiny, including Ashland's flagrant disregard of the trial court's in limine ruling that precluded Ashland from mentioning other sources of radiation, because there was no proof that such sources caused elevated radiation for levels on Plaintiffs' property.[19]

After the verdict, which was a foregone conclusion by that point, was reached by the jury in this case, a timely notice of appeal was filed. Ashland filed a cross-appeal.

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[14] V120, 1746, 17496 Apx. tab 2.

[15] V120, 17485, 17495, Apx. tab 2.

[16] V116, 16936-?, Apx. tab 8.

[17] 1T, 89.

[18] 1T, 121-29; 6T, 673-84.

[19] V108, 15672-82, Apx. tab 9; 10T, 1245-46.

ARGUMENT

I THE TRIAL COURT COMMITTED NUMEROUS ERRORS IN EXCLUDING OR LIMITING THE TESTIMONY OF PLAINTIFFS' EXPERTS, WHILE FAILING TO APPROPRIATELY EXCLUDE OR LIMIT ASHLAND'S EXPERTS

A. The Trial Court erroneously excluded or limited testimony of Plaintiffs' expert Stanley Waligora, while not applying a similarly strict reliability standard to Ashland's expert's unreliable opinion.

This issue is preserved for Appellate review by pretrial pleadings and by avowal.[20]

The rules of evidence liberalized the admission of expert testimony, leaving to the jury the weight to be assigned to expert's opinions.[21] Thus, most attacks on an expert's opinion go to weight rather than the admissibility, of the testimony.[22] The seminal decision with regard to the proper analysis regarding admission of expert opinions is Daubert[23], which has been adopted in Kentucky.[24]. Daubert, and its progeny, describe the trial court as a "gate keeper," which is charged with keeping out unreliable pseudo-scientific evidence.[25] Thus, a trial judge must determine whether an expert is proposing to testify to scientific knowledge that will assist the

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[20] D103, 15, 42-116, 12T 1569.

[21] First Tennessee National Bank NBA vs. Barreto, 268 F.3d 319, 334 (6th Cir. 2001).

[22] Id. at 333.

[23] Daubert vs. Merrell Dow Pharmaceuticals, Inc., 509 US 579, 13 S.Ct. 2786, 125L.Ed. 2nd 469 (1993).

[24] See Goodyear Tire and Rubber Company vs. Thompson, 11 S.W.3d 575, (Ky. 2000).

[25] Daubert, 509 US at 592-93, 113 S.Ct. at 2796; Miller vs. Eldridge, 146 SW3d 909, 913 (Ky. 2004).

trier of fact to understand or determine facts at issue in the case.[26] As a result, a trial court must make a preliminary assessment of whether the methodology is scientifically valid and whether it can be properly applied to the facts at issue.[27] The purpose of this analysis is to determine whether proffered scientific testimony or evidence is both relevant and reliable.[28] Therefore, a trial judge must first assess the reliability of an expert's testimony, which is a factual determination, and then evaluate its relevance.[29] In assessing the reliability of expert testimony, Daubert set forth certain factors that may be considered: (i) whether the theory or technique can be or has been tested; (ii) whether the theory or technique has been subjected to peer review; (iii) whether the particular technique is known to have a high rate of error and whether there are appropriate standards controlling the technique's operation; and (iv) whether the theory or technique enjoys general acceptance within the scientific community.[30]

As Daubert specifically stated, and as has been made clear by this Court, a trial court need not rely solely on the listed factors in making the reliability determination.[31] The purpose of the factors is to distinguish between scientific and pseudo-scientific methodologies, not to exclude a novel methodology.[32] The trial court cannot lock the gate simply because a method is

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[26] Id.

[27] Id.

[28] Daubert, 509 US at 589, 113 S.Ct. At 2795; Miller 146 S.W.3d at 914.

[29] Miller 146 S.W.3d at 914.

[30] Miller, SW3d at 914 (quoting Goodyear Tire, 11 S.W.3d at 578-79 (citing Daubert, 509 US at 592-94, 113 S.Ct. At 2796-97)).

[31] Miller, 146 S.W.3d at 918.

[32] Miller, 146 S.W.3d at 919.

innovative.[33] The question of reliability is analyzed on appeal as to whether there is clear error in the factual findings of the trial court.[34]

Not every factor listed in Daubert has to be successfully resolved in favor of admission for an opinion to be admissible.[35] Thus, it has been held that a court's "gate keeping" function does not supplant cross-examination as the appropriate means of attacking shaky, but admissible evidence.[36] Consequently, the trial court must not weigh the credibility of the opposing expert's opinions or make a determination of which view of the facts underlying the expert's opinions is correct.[37] Therefore, where an expert uses time-tested principles with which he is familiar and addresses both the general properties at issue and the specific questions at issue, then that expert's testimony is relevant.[38]

As an initial matter, part of the trial court's rulings excluding or limiting Dr. Waligora's testimony was based upon the conclusion that there must be a showing of a health hazard. However, at least as it relates to Plaintiffs' claims for intentional trespass, it is now clear that no health-hazard showing is needed.[39] This Court has specifically held that "property owners are

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[33] Id.

[34] Miller, 146 S.W.3d at 915.

[35] Daubert, 509 US at 595-96; Miller, 146 S.W.3d at 921.

[36] Miller, 146 S.W.3d at 921.

[37] Pipitone vs. Biomatrix, Inc., 288 F.3d 239, 249 (5th Cir. 2002); Jahn vs. Equiline Services, Inc., 233 F.3d 382, 393 (6th Cir. 2000);

[38] Miller, 146 S.W.3d at 921.

[39] Smith vs. Carbide and Chemical Corporation, 226 S.W.3d 52 (Ky. 2007).

not required to prove contamination that is an actual or verifiable *health* risk ...."[40] Thus, to the extent that the trial court's ruling relating to Dr. Waligora and other of Plaintiffs' experts was based upon some alleged inability to show a health hazard, the trial court's ruling was in error and on remand the appropriate standard should be applied. (Of course, Plaintiffs assert that they can demonstrate a health hazard if a proper Daubert ruling is made regarding Dr. Waligora and other Plaintiffs' experts, as will be shown).

Another significant development since the trial of this matter is that the scientific community has confirmed that the linear-no-threshold model is the appropriate model for analyzing the health risk of ionizing radiation, such as TENORM. The Plaintiffs sought to bring this report, generally called the BEIR VII Report, before the Court of Appeals by way of a motion requesting that the Court of Appeals take judicial notice of the report. However, the Court of Appeals declined to do so and struck the movant's motion with the attached report. Of course, the conclusion in BEIR VII that linear-no-threshold is the appropriate scientific model is by no means novel. The BEIR V Report issued in 1990 reached the same conclusion, as did the NRPD study in 1995.

It is the Plaintiffs' position that where a scientific issue is finally and conclusively confirmed, as with the BEIR VII Report, and that issue was appropriately preserved for appeal, the appealing party should not be denied the chance to present its expert testimony to a jury after the trial court made the wrong guess about the scientific issue. Such an approach was taken by this Court recently.[41] Where the scientific acceptance of comparative bullet lead analysis had

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[40] Id. at 56.

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

changed dramatically while the Ragland case had been on appeal, this Court took into account the ongoing and developing nature of scientific understanding. Comparative bullet lead analysis had been called into serious question because subsequent scientific studies completely rejected both the reliability and relevancy of such testing.[42] As a result, this Court concluded that there was no need for a new Daubert hearing with regard to the issues raised in Ragland, because the scientific evidence established that it would be clearly erroneous to rely upon any comparative bullet lead analysis.[43] The current case presents the converse situation, where Plaintiffs' expert Stanley Waligora was excluded by the trial court, but the scientific consensus conclusively shows that Mr. Waligora's methodology and testimony are both generally accepted and would have assisted the jury. Although it is the flip side, the result in this case should be the same as in Ragland. As a result, this Court should reverse the jury's verdict and remand for a new trial, in which Stanley Waligora's testimony will not be improperly limited.

This issue is one of importance not just to these litigants, but to all litigants. Scientific knowledge is ever expanding and evolving. The law cannot turn a blind eye to this fact. When an issue is properly preserved, the law must allow a proper decision based upon the actual science even where a trial court made the wrong call initially.

Nor should the appropriate and normal deference to a trial court's fact finding abilities preclude a reversal in this case. As BIER VII shows, the trial court was wrong on its facts and its ruling must perforce fall on the same ground.

Moreover, allowing the real science to control will not open a Pandora's box regarding

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[42] Id. at 530.

[43] Id.

finality. By its very terms Ragland and the issues presented here only relate to issues properly preserved and thus do not support any reopening of cases long final based upon new science. Thus, any court's rulings that are made and finalized will remain so. Consequently, the scope of Ragland and this case will introduce no more uncertainty regarding finality than any case that is on appeal and only for the time it is on appeal.

In short, this Court should follow logic of Ragland and reverse the judgment in this case. Then, it can be remanded for full review of all Daubert issues and for an appropriate ruling based upon the best scientific evidence.

As noted, the trial court, even without regard to the BEIR VII Report, committed error in limiting Mr. Waligora's testimony. He is a certified health physicist with over 43 years of experience in applied health physics and industrial hygiene, whom Plaintiffs identified as an expert for trial testimony regarding the health effects of radiation contamination on Plaintiffs' property. Although the trial court allowed Waligora to testify that the Plaintiffs' properties were contaminated TENORM, it would not allow him to testify as to the extent of the contamination or that radioactive contamination constituted a danger to human health.[44] A debate among the parties as to what was meant by the word "extent" in this context resulted in a Supplemental Order explaining:

> 1. The word "extent", as used in the *Daubert* ruling of March 5, 2003 means that Waligora cannot testify as to the effect of radiation on the properties. He can testify that there is contamination, but he cannot state that this contamination constitutes a danger.
> 2. Waligora can testify that the properties at issue are contaminated or impacted with NORM.

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[44] Vol. III, 16,156-65, Appendix Tab 4; Vol. III, 16,833-35, Appendix Tab 5.

3. Waligora can testify as to the Court-approved definition of NORM/T-NORM and elements that make up NORM.
4. Waligora cannot testify as to whether or not certain levels of NORM on the properties in question equate to a health hazard – he is specifically prohibited from such opinion testimony.
5. Waligora cannot testify that the levels of radiation are dangerous in terms of impacting the property and/or present/potential users of the property.
6. Waligora can testify as to levels of measurement, be they above or below background levels, but he cannot testify or conclude that such readings create damage/danger to the property or present/future users.[45]

So, the court permitted Waligora to testify only that above-background radiation was found on Plaintiffs' properties, but prohibited Waligora from explaining what "above-background" meant or what effects such radiation would have on human health. The court even limited Plaintiffs' ***avowal testimony***, cautioning that it did not want Waligora "to testify for five minutes or for ten minutes and then an hour's worth of an avowal...."[46] The judge obviously knew where the meat of this expert's testimony was.

There are several examples in the record that demonstrate what testimony Mr. Waligora would have offered if he had been permitted to discuss the health effects (including an increased risk of cancer) of radiation contamination on the Plaintiffs' properties.[47] [48] In fact the June 27, 2003, Supplemental Order states, "Waligora...submitted over, 1,005 pages of opinions...up to and including the Daubert hearing." If permitted to testify fully, Waligora would have explained

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[45] V115 16.833-35, Appendix Tab 5.

[46] 12T 1479-80.

[47] V103 15,042-116, Appendix Tab 3.

[48] 8T 1567-90 (avowal).

that the level of radiation on Plaintiffs' properties would present significant health risks to humans assuming various future land-use scenarios.[49]

In severely restricting Waligora's testimony, the court made several erroneous determinations. First, it wrongly determined that Waligora's opinions were based solely on the readings of Plaintiffs' expert Michael Jarrett.[50] The erroneous exclusion of Jarrett's testimony is discussed in more depth subsequently, but for this argument it is enough to note that the trial court compounded that error by then limiting Waligora's testimony that was based, in part, on Mr. Jarrett's findings. A correct ruling would have permitted Waligora to testify as to his full opinions, subject to cross- examination on the bases of those opinions. This is error because the trial court was effectively deciding the question of whether Waligora's factual underpinnings were in fact true. Ironically, Waligora's opinions were, in fact, based not only on readings performed by Mr. Jarrett, but also on his own observations, and on ***data collected by Ashland***.[51] [52] Nevertheless, at trial the court exacerbated the error of its pretrial rulings by refusing to permit Waligora to even state his opinion of the danger present on Plaintiffs' properties ***based on Ashland's own readings***, ostensibly because Waligora was identified as an expert rather than a fact witness.[53]

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[49] Exp. 46.

[50] V115 16.833-35, Appx. Tab 5.

[51] 8T 1540-41, 1559-61; 1585-87.

[52] Exp. 46.

[53] 8T 1540-42; 1550-54; 1560-62; 1587-90 (avowal testimony).

Second, the court determined that the RESidual RADiation computer model ("RESRAD") utilized by Waligora to identify dangerous future land-use scenarios on Plaintiffs' properties was too speculative to permit his unrestricted testimony.[54] In fact, RESRAD is a methodology typically relied upon by experts in this field; is commonly used by the pertinent governmental agencies; and was even used by Ashland in preparing its proposed Martha Reclamation Program.[55] The judge wrongfully excluded this testimony because RESRAD presumes certain future property uses that could lead to dangerous exposures as compared to current uses. Although the RESRAD methodology is the appropriate scientific and legal approach, it did not fit with the judge's preconceived opinion of how the case should be resolved, so he excluded this proof, even though it related to harm that any prudent purchaser of the land would consider before buying the property. In other words, the trial court inappropriately made a determination of the credibility of the Waligora's testimony rather than whether it based upon valid science.

Finally, the court wrongfully rejected a scientific construct that forms the underpinning of Waligora's testimony. Under the "Linear-No-Threshold" construct, human exposure to radiation presents a linear risk of harm -- small amounts of radiation present small risks; larger amounts present larger risks -- and there is no "threshold amount" below which all risk is avoided.[56] Even though the linear-no-threshold construct forms the basis of all existing

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[54] V115 16,836-39, V117 17,026-79.

[55] Exp. 46.

[56] Exp. 46.

governmental regulatory schemes.[57] the court rejected it and excluded Waligora's testimony. Yet:

> The guidance and the standards that have been provided through the U.S. Environmental Protection Agency are based upon the scientific and technical promulgation of information sampling, in other words, from the International Commission on Radiological Protection, the National Academy of Sciences[']biological effects of ionizing radiation, those committees. And those committees have decided that the best approach to controlling radiation dose and risk is to use or assume the linear no threshold theory.[58]

By excluding Waligora's testimony, the court rejected the methodology of the E.P.A., the International Commission on Radiological Protection, the National Academy of Sciences, and Waligora, and accepted Ashland's contrary methodology. That is not the court's prerogative.[59]

As if that error were not harmful enough, the court permitted Ashland's expert John Frazier to testify over Plaintiffs' Daubert objection[60] that there is a threshold below which radiation exposure is perfectly safe to human health and that the level of radiation on Plaintiffs' properties fell below that threshold.[61] While there was a debate in the scientific community regarding the validity of such a risk threshold, by admitting Frazier's testimony, the court ignored Goodyear's dictate that the court admit testimony that adheres to constructs supporting

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[57] Id.

[58] Id. at p. 40-41.

[59] Jahn v. Equine Servs., Inc., 233 F.3d 382, 391 (6th Cir. 2000).

[60] V. 95, p. 13,854-977.

[61] V108 15,672-73.

existing regulatory schemes.[62] In so doing, the court again erroneously resolved the scientific debate on its own by siding with Ashland and against Plaintiffs.

In Goodyear, the Plaintiff, injured while changing a tire with a multi-piece rim, alleged that the manufacturer negligently designed the rim and failed to warn of its dangers. The supreme court held that: (1) the plaintiff's expert's testimony on negligent design and warning was inadmissible, noting that the factors to be considered in a Daubert objection include:

> (1) whether a theory or technique can be and has been tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) whether, with respect to a particular technique, there is a high known or potential rate of error and whether there are standards controlling the technique's operation; and (4) whether the theory or technique enjoys general acceptance within the relevant scientific, technical, or other specialized community.[63]

Because the expert had neither offered proof of any widespread acceptance of his theory or technology nor "demonstrate[d] any acceptance of his procedure either in the industry or through OSHA standards," the Kentucky Supreme Court concluded that his testimony was properly excluded.[64] That is, the court looked to the existing federal regulatory scheme in determining whether the theory enjoyed widespread acceptance. It is this fourth gatekeeping criteria that is at issue here. Plaintiffs contend Ashland contaminated their properties and water with levels of radiation that in some areas exceed the generally accepted guidelines established by the EPA. Such guidelines were established in an effort to avoid the health effects of exposure to radiation, and embrace the notion that there is a linear no-threshold health risk associated with radiation exposure. Even though this linear no-threshold health risk concept is generally

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[62] 11 S.W.3d 575 (Ky. 2000).

[63] Id. at 578-79.

[64] Id. at 581, 583.

accepted in the scientific community and embodied in the pertinent statutory framework. Ashland's expert opined that it is out-dated, and that the public policy of protecting health espoused in the current regulations should be ignored.

For purposes of this appeal, it is not necessary to discuss what restrictions EPA places upon TENORM found in soils or water. It suffices to say that EPA utilizes the linear, no-threshold model for deriving its guidelines in an effort to protect the public health. Ashland's expert rejected the theory underlying such EPA guidelines, suggesting that there is instead some threshold below which chronic exposure to low levels of radiation is harmless. Because existing regulatory schemes reject Frazier's position, his testimony should have been excluded.

Finally, it is beyond dispute that the exclusion of Waligora's testimony was harmful. Indeed, Ashland only won this case because the jury had no evidence from which to find that the contamination on Plaintiffs' properties represented a health risk.[65] And the jury had no such evidence because the court prevented Plaintiffs from presenting it.[66] [67] Excluding Waligora's testimony was erroneous, and requires reversal.

B. The trial court erroneous restricted Bob Grace's testimony.

This issue is preserved by Plaintiffs' arguments and objections at trial, as indicated herein.

Expert Bob Grace was to testify regarding Ashland's water-flooding program, which contaminated Plaintiffs' properties. Grace is a petroleum engineer with extensive experience in

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[65] V120 17,485, 17,495, Appendix, Tab 2.

[66] V111 16,156-65, Appendix Tab 4.

[67] V115 16,833-35, Appendix Tab 5.

the oilfield, and particular expertise in water flooding and other secondary recovery techniques, including the use of nitroglycerin to stimulate production.[68] Having reviewed the history of the Martha oilfield and the "well files" for the wells located throughout it (including those on Plaintiffs' properties), Grace opined that Ashland's recovery techniques were negligent and substandard and contaminated the land, surface waters, and aquifers of the Martha oilfield.[69] He opined that Ashland's methods were reckless, dangerous, and grossly negligent, and that Ashland's improper use of nitroglycerine and high pressure water injection fractured the underground rock formations, permitting radioactive material to migrate between formations and contaminate the field.[70] [71]

Ashland objected because it had not committed all of these negligent activities on the particular properties at issue. But Ashland's activities that fractured the formation were an important part of why the radioactive materials were brought to the surface, concentrated, and deposited on Plaintiffs' properties.[72] Plaintiffs could not explain this cohesive story, because Grace could not talk about the use of nitroglycerine or other activities occurring on other properties.[73] Grace's testimony should have been admitted, because it was scientifically valid. Moreover, it was relevant because it showed how Ashland contaminated these Plaintiffs'

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[68] 8T 929-65.

[69] 8T 1018-43 (avowal).

[70] Plaintiffs' expert Clay Kimbrell would also have testified to this. (11T 1309-10).

[71] 8T 1027-39 (avowal testimony).

[72] 8T 957-58, 1041 (avowal testimony).

[73] 7T 881, 892-93, 922-23; 8T 991-92, 998-1000.

property. The trial court's exclusion of activity on "other" property flies in the face of science and fact since the activity on these other properties contributed to the damage alleged by the Plaintiffs to their property.

The trial court also made other errors, and improperly injected itself into the trial. When Bob Grace tried to discuss how Ashland's operations had contaminated the Wright and Cantrell properties, in compliance with the court's ***December 19, 2002***, ruling excluding evidence relating to other properties,[74] the court asked if Grace's report, ***filed on July 10, 2002***,[75] included any opinions limited to these specific properties. Because Grace's role was to explain how Ashland's improper field-wide practices permitted contamination to occur, and his report was filed before the court's order excluding any reference to "activities on other properties," the report did not specify individual properties.[76] The court criticized Grace because he viewed records from these properties, but included no opinions specific to the properties in his report, and Grace explained that he had provided all the underlying information to Ashland.[77] So the court switched horses, and attempted to undermine Grace's qualifications because he had never worked in the Martha field. Grace responded that there were no differences relevant to his opinions between the Martha area and the areas he had worked, and that he was hired in his non-litigation practice to work in locations where he had never worked before. The court responded, "Well, I understand, but that's . . . you're going up there to do a job, not to offer an opinion,

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[74] V108, 15,672-82

[75] 7 T 866-75

[76] 8 T 958-61

[77] 8 T 961-62

right," indicating that it was inclined to exclude Grace's opinion because it comported with the way he works in his non-litigation practice, rather than being developed solely for litigation.[78] ***That is exactly the opposite of what the rules of evidence contemplate.***[79] The point is that the court was determined to find an excuse to restrict Grace's testimony, which it did.[80]

C. The trial court erroneously struck, sua sponte, the entirety of Clay Kimbrel's testimony.

This issue is preserved by Plaintiffs' arguments and objections at trial.[81] The court struck Kimbrel's testimony after Ashland requested (only) a mistrial.[82] By doing so, the court erroneously applied the ultimate issue rule, which was abrogated by KRE 702.[83] Whether an opinion "involve[s] the 'ultimate issue' at trial — is not relevant to the admissibility inquiry and therefore, does not support" a ruling excluding such testimony.[84] The court admitted that the ultimate issue rule was abrogated, yet excluded the *entirety* of Kimbrel's testimony because Kimbrel used "language of a legal conclusion."[85] In short, the court simply ignored the law in

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[78] 8 T 963-65

[79] See Kumho Tire Co., Ltd. v. Carmichael, 526 U.S.137, 142, 152 (1999) (critical point "is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.")

[80] 8 T 969-72

[81] 12T 1498-1509.

[82] 12T 1483-97.

[83] Stringer v. Commonwealth, 956 S.W.2d 883, 889 (Ky. 1997).

[84] Rogers v. Commonwealth, 86 S.W.3d 29, 41 (Ky. 2002).

[85] 12T 1501-02, 1506.

order to strike Kimbrel's testimony. Whether the question was phrased in terms of Ashland's "negligence" or its failure to live up to its standard of care, Kimbrel's testimony would have assisted the jury, and should have been admitted.[86] Further, the court also erred by striking Kimbrel's testimony *sua sponte*, because Ashland had only requested a mistrial. Since a mistrial was not warranted because the evidence was admissible.[87] Ashland asked for relief to which it was not entitled. That being the case, the *sua sponte* nature of the remedy invented by the court was error.[88]

During Kimbrel's testimony, the trial court once again improperly injected itself. The court then asked if Kimbrell tested produced water. Kimbrell responded that he had, and had also tested those fresh water wells he could get into. Despite this affirmative response, the court repeated the question: "Did you analyze the produced water?"[89] Kimbrell repeated his prior answer, "Yes, we did." The court repeated its question again. Kimbrell responded, "It was not on these two properties because there was no —" The court interrupted with "That's the question." No it wasn't.[90] The court asked if Kimbrell had tested the produced water, and Kimbrell had truthfully responded "yes" twice. When, faced with the court's repetitive interrogation, Kimbrell finally volunteered that there was no way to get a produced water sample

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[86] Rogers, 86 S.W.3d at 42.

[87] Turner v. Commonwealth, 153 S.W.3d 823, 829 (Ky. 2005).

[88] Thomas v. Commonwealth, 153 S.W.3d 772, 782 (Ky. 2005) (court needn't *sua sponte* search for error); Grange Mutual Insurance Co. v. Trude, 151 S.W.3d 803, 818 (Ky. 2004) (court needn't make a case for parties).

[89] 11 T 1327

[90] 11 T 1327

from these two properties because the wells had been plugged, and that they took samples from the nearest available wells, the court seized on that, ultimately repeating ***again*** the question that had already been answered: "Did you do any such analysis on either the Cantrell property or the Wright estate?"[91] Kimbrell answered, "Well we obtained samples from the creek, water wells —" The court interrupted again, "That wasn't my question." So, Kimbrell had to explain yet again, "Well....the wells that went down to the Weir formation on those two properties had been plugged." The court retorted, "So you did none? My question is pretty simple....You didn't do any on Cantrell because the wells were plugged. Correct?"[92] Later, the court "asked," "Isn't it true that the sampling, the composition of the elements in sampling vary from properties to properties?"[93] Having satisfied itself of the merits of its own cross-examination, the court restricted Kimbrell's testimony to "the manner in which NORM was deposited on the two properties that remain at issue in his trial."[94] Once again, the court acted as co-counsel for Ashland, not as an impartial arbiter of the dispute.

D. The trial court improperly limited the testimony of Michael Jarrett.

This issue is preserved by Plaintiffs' pretrial pleadings and objections at trial.

The court considered a Daubert motion as to Jarrett's testimony and ruled that Ashland's objections to Jarrett's readings went to the testimony's weight rather than admissibility.[95] Thus,

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[91] 11 T 1329

[92] 11 T 1326-30

[93] 8 T 1333

[94] 11 T 1364

[95] V115 16.833-35, Appx. Tab 5

his testimony should have been allowed subject to cross-examination as to any alleged errors in his methodology. However, the trial court compounded its error by expanding the ruling on Jarrett to exclude portions of Waligora's testimony because it was based (in part) on Jarrett's readings, as noted above.[96]

E. The Trial Court committed several other *Daubert* errors.

The court also unfairly permitted Ashland to lodge additional *Daubert* challenges after the pretrial deadline for such motions had passed. Under the court's scheduling order, Ashland was to file any *Daubert* motions by October 25, 2002. Ashland timely filed *Daubert* motions against Waligora and Jarrett, Plaintiffs responded, and the court held *Daubert* hearings on December 6 and 16, 2002.[97] These hearings involved extensive briefing and a comprehensive presentation of evidence concerning the witnesses' qualifications and methodologies. Nevertheless, without anything comparable to a true *Daubert* hearing, the court permitted Ashland to challenge (and proceeded to restrict or exclude the testimony of) several of Plaintiffs' experts ***as they were called to testify at trial***. The court ultimately sustained Ashland's untimely challenges to Robert Grace (oilfield practices and water flooding techniques)[98], Clay Kimbrell (oilfield practices, water flooding techniques, extent of radioactive contamination)[99], and Wade Smith (radiation sampling and identification of contaminated areas).[100] These objections were

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[96] Id. at p. 7.

[97] Exp. 46.

[98] 7 T 884 *et seq*; 8 T 929 *et seq.*; 8 T. 969-72.

[99] 10 T 11270 *et seq.*; 11 T 1303 *et seq.*; 11 T 13645.

[100] 19 T 2439-2499.

lodged long after the *Daubert* deadline had come and gone, permitting Ashland to blindside Plaintiffs with complicated objections when Plaintiffs had relied on the scheduling order to rest assured that such objections had been disposed of long before trial. Aside from the substantive errors the court made in ruling on these untimely objections, the mere fact that the court permitted them over Plaintiffs' objection was unfair and prejudicial, and further evidences the trial court's bias in favor of Ashland.

In sum, there were numerous *Daubert* errors committed by the trial court, which individually and cumulatively denied Plaintiffs a fair trial. This Court should, therefore, reverse the judgment in this matter and remand for a new trial.

II. THE TRIAL COURT ERRONEOUSLY DISMISSED PLAINTIFFS' WATER-CONTAMINATION AND NON-RADIATION DAMAGES CLAIMS AND EXCLUDED IMPORTANT EVIDENCE OF THEM.

The court erroneously dismissed Plaintiffs' claims for water contamination[101] and then excluded that evidence. The error was preserved in Plaintiffs' pretrial responses filed on 5/16/01 and 11/04/02 [102] [103] and by avowal.[104] [105] The court originally denied Ashland's "Motion for Summary Judgment on Limitations Grounds," which alleged that Plaintiffs' claims relating to

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[101] V111 16,168-73(Appendix Tab 6); V115 16,836-39(Appendix Tab 7).

[102] V81 11,727-62.

[103] V103 15,004-41.

[104] Further, the trial court made a final pretrial ruling excluding Plaintiffs' evidence of water contamination (1T 114), which ruling preserved the error. *See* KRE 103(d). Moreover, the trial court actually had the words of Plaintiffs' hydrologist, Dr. Daniel Stephens, when it made this ruling, because Stephens's report was specifically addressed and attached to Ashland's motion to exclude the evidence and Ashland's "Summary Brief on Water Issues." (V98 14,208, 14,261-62; V107 15,571) Since the trial court had the actual words of the witness, Partin v. Commonwealth, 918 S.W.2d 219, 223 (Ky. 1996), and this Court has adequate information to know what the excluded evidence was, the error was preserved. Underhill v. Stephenson, 756 S.W.2d 459, 461 (Ky. 1988).

[105] 8T 1020-42.

NORM were time-barred, because fact issues existed regarding whether (i) Plaintiffs should have known of their legal injuries more than five years before suit was filed, (ii) Ashland had committed a continuing tort, and (iii) Ashland's representations that NORM was harmless estopped it from asserting the statute of limitations.[106] Ashland then moved to dismiss Plaintiffs' claims for water contamination and non-NORM contamination.[107] Plaintiffs' response to that motion incorporated their prior response to Ashland's "Motion for Summary Judgment on Limitations Grounds," and argued that the prior ruling's rationale would apply to claims for NORM in the water.[108] But the court reversed course and dismissed all of Plaintiffs' water-contamination claims (including those for NORM).[109]

This was error because Ashland did not conclusively establish that the claims were barred.[110] First, Ashland's summary-judgment evidence contained nothing about Plaintiffs' knowledge that their water contained NORM or the other non-radiation contaminants currently on their property and for which they are suing.[111] Second, Plaintiffs raised fact questions as to: (i) when Plaintiffs knew or should have known of their legal injury resulting from the NORM in their water and the other non-radiation contaminants currently on their properties for which they are suing, (ii) whether the NORM and other non-radiation contamination currently on Plaintiffs'

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[106] V91 13,265-72 (Apx. Tab 10).

[107] V99 14,344-517.

[108] V103 15,005-07.

[109] V111 16,168-73 (Apx. Tab 6); V115 16,836-39 (Apx. Tab 7).

[110] Steelvest, Inc. v. Scansteel Serv. Ctr., Inc., 807 S.W.2d 476, 480, 482 (Ky. 1991).

[111] V99 14,344-517 (collectively the exhibits are included as Apx. Tab 11).

properties constituted a continuing tort, and (iii) whether Ashland's representations that NORM is harmless estopped it to assert the statute of limitations.[112] Put simply, it was not conclusively established that any of these Plaintiffs knew (or, in the exercise of reasonable care, would have known), more than five years before suit was filed, that (i) there was radiation in their water, (ii) the radiation posed a health hazard or otherwise interfered with their use of their properties,[113] or (iii) Ashland's wrongful conduct caused the radiation to be in their water. Nor was it conclusively established that any of these Plaintiffs knew or should have known more than five years before suit was filed of the presence on their property of the non-radiation contamination that is currently contaminating their property, or that Ashland's wrongful conduct caused that contamination.[114] So, limitations was not conclusively established.[115] Plus, Ashland's representations that NORM was harmless[116] estops it from asserting the statute of limitations as

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[112] V81 11,802-90 (collectively, these affidavits are included as Appendix Tab 12). *See also* "Plaintiffs' Response to Defendants' Motion for Summary Judgment on Statute of Limitations Grounds" (V81 11,727-62) and "Plaintiffs' Response to Defendants' Motion for Summary Judgment on and to Exclude Evidence of Water Contamination and Non-Radioactive Substance Claims Accruing Prior to October 20, 1992" (V103 15,004-41).

[113] Smith v. Carbide and Chems. Corp., 226 S.W.3d 52, 56-57 (Ky. 2007).

[114] *See* "Plaintiffs' Response to Defendants' Motion for Summary Judgment on and to Exclude Evidence of Water Contamination and Non-Radioactive Substance Claims Accruing Prior to October 20, 1992" (V103 15,004-41).

[115] Wiseman v. Alliant Hospitals, Inc., 37 S.W.3d 709, 712-13 (Ky. 2000) ("'Discovery of injury' jurisdictions have concluded that the statute of limitations does not begin to run even though a harmful condition is known to a plaintiff so long as its negligent cause and its deleterious effect are not discovered." "A legally recognizable injury does not exist until the plaintiff discovers the defendant's wrongful conduct.").

[116] V81 11,801, 11,808.

to the NORM in Plaintiffs' water supply.[117] Both the discovery rule and fraudulent concealment are fraught with fact questions, and Plaintiffs raised those fact questions here.[118]

Though Ashland presented evidence that some Plaintiffs had knowledge of some intermittent problems with their water (saltiness, bad taste, oil runoff, etc.) or with occasional oil runoff on their property between the 30's and the 80's, Ashland presented no evidence that Plaintiffs were aware of the contamination ***that is currently in their water and on their property*** more than five years before this suit was filed. That Ashland had caused contaminants to get into Plaintiffs' water or on their properties in the distant past does not prevent Plaintiffs from suing for contaminants (including NORM) that currently pollute their land and water.[119] And even if Ashland had established that the contamination currently in Plaintiffs' water and on their land was the same contamination Plaintiffs talked about in their depositions (which it did not), the continued presence of that contamination would constitute a continuing trespass.[120] Accordingly, limitations would not begin to run until the last injury.[121]

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[117] Adams v. Ison, 249 S.W.2d 791, 794 (Ky. 1952). *See* "Plaintiffs' Response to Defendants' Motion for Summary Judgment on Statute of Limitations Grounds" (V81 11,727-62), pp. 8-9, 25-33.

[118] Lipsteuer v. CSX Transp., Inc., 37 S.W.3d 732, 737 (Ky. 2000); MacMillen v. A.H. Robbins Co., Inc., 348 N.W.2d 869, 872 (Neb. 1984).

[119] Real Estate Marketing, Inc. v. Franz, 885 S.W.2d 921, 925 (Ky. 1994) (claim for latent structural defects not limited even though homeowners knew for more than five years that defective construction had caused other problems in house); Rockwell Int'l Corp. v. Wilhite, 143 S.W.3d 604, 617 (Ky. Ct. App. 2003).

[120] RESTATEMENT (SECOND) OF TORTS § 161 (1963); Rockwell, 143 S.W.3d at 617; *West Kentucky Coal Co. v. Rudd*, 328 S.W.2d 156, 160 (Ky. 1959); Commonwealth v. Tri-State Poster Co., 697 S.W.2d 169, 170 (Ky. Ct. App. 1987).

[121] Davis v. All Care Med., Inc., 986 S.W.2d 902, 905 (Ky. 1999). Though it would be expensive to remediate Plaintiffs' property, Plaintiffs did not have to sue within five years after the first contamination entered their properties. *See Rockwell*, 143 S.W.3d at 617. This was a *wrongful trespass onto Plaintiffs' properties*, not just the use of the defendant's own property in a way that constitutes a nuisance. Zella Mining Co. v. Collins, 261 S.W. 1090, 1091 (Ky. 1924). Further, unlike the railroads, etc., to which apply the rule that a temporary nuisance is considered "permanent" if it is unreasonably expensive to abate, Klosterman v. Chesapeake & O. Ry. Co., 56.

that plaintiff was exposed to that would lead a reasonable person to inquire.[125] Ashland presented no evidence that any individual Plaintiff had any knowledge of or reason to know of the Administrative Order. And Plaintiffs raised a fact question regarding whether they knew or should have known of

the water contamination as a result of the Administrative Order.[126] Indeed, most Plaintiffs had never heard of the Administrative Order, and some did not even live in the Martha Oil Field in 1987.[127]

The second basis for the court's ruling was that Ashland had provided Plaintiffs with an alternative water supply.[128] But Ashland's evidence did not prove when each individual Plaintiff became aware that Ashland had provided an alternative water supply, so it did not establish that every one of these individual Plaintiffs had knowledge that their water had been contaminated simply because it had provided an alternative water supply in 1989. Further, Ashland's own motion explained that it offered the alternative water supply to ***all*** residents of the Martha Oil Field — even those whose water it claimed was not contaminated [129] — and Ashland publicly stated it had provided city water hook-ups to 33 families whose water it had polluted, and to the

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[125] O'Connor v. Boeing N. Am., Inc., 311 F.3d 1139, 1152-53 (9th Cir. 2002); Conmar Corp. v. Mitsu & Co. (U.S.A.), Inc., 858 F.2d 499, 504 (9th Cir. 1988).

[126] *See* "Plaintiffs' Response to Defendants' Motion for Summary Judgment on Statute of Limitations Grounds, (V81 11,727-62) pp.2-7, 20-33, and "Plaintiffs' Response to Defendants' Motion for Summary Judgment on and to Exclude Evidence of Water Contamination and Non-Radioactive Substance Claims Accruing Prior to October 20, 1992 (V103 15,004-41) pp. 4-13.

[127] V81 11,802-905 (Apx. Tab 12).

[128] VIII 16,169.

[129] VIII 16,169.

rest of the residents as "a gift situation from Ashland Oil."[130] Whether each of these Plaintiffs acted reasonably in light of the information each Plaintiff had about the alternative water supply was an inherently factual question that a jury — not the court — should have decided.[131] Further, Plaintiffs raised a fact issue as to whether they knew or should have known of the water contamination more than five years before this suit was filed,[132] and Ashland's provision of an alternative water supply is simply a factor the jury can consider in determining whether Plaintiffs' failure to discover the contamination was reasonable under all the circumstances.

The court ignored the evidence of each Plaintiff's individual circumstances, and dismissed all Plaintiffs' water-contamination claims simply because *Ashland* knew long ago it had caused Plaintiffs' legal injury. But it was Ashland's job to demonstrate with specific, individualized evidence that no fact question existed regarding the expiration of each Plaintiff's individual statute of limitations. Ashland failed to carry that burden, so the court improperly disposed of these claims. And because of the erroneous summary judgment, the court erroneously excluded evidence that the aquifers and Plaintiffs' water were contaminated.[133] Indeed, the court even cautioned Plaintiffs to limit their ***avowal*** testimony regarding water contamination, because that "is no longer involved in this case."[134]

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[130] V76 10,946.

[131] Lipsteuer, 37 S.W.3d at 737. *See also* Bibeau v. Pacific Northwest Research Found., Inc., 188 F.3d 1105, 1108-09 (9th Cir. 1999), *opinion amended on denial of rehearing*, 208 F.3d 831 (9th Cir. 2000); Childs v. Haussecker, 974 S.W.2d 40-47 (Tex. 1998). *See also* "Plaintiffs' Response to Defendants' Motion for Summary Judgment on Statute of Limitations Grounds" (V81 11,727-62), pp. 2-7.

[132] *See* V 99 14,344-517 (Apx. Tab 11); V81 11,802-905 (Apx. Tab 12).

[133] 1T 113-15.

[134] 13 T 1022-23.

This error in dismissing Plaintiffs' claims and excluding this evidence was harmful, because the non-radiation contamination in the water was the type that can be perceived by the senses. After all, that was Ashland's whole argument — that Plaintiffs had perceived it more than five years before they filed suit.[135] As such, no evidence that it constituted a health hazard would be necessary, even under the erroneous theory accepted by the trial court.[136] Moreover, to the extent that the contamination currently in Plaintiffs' water might be the same as that for which the Administrative Order was entered (a proposition that Ashland failed to prove in its motion for summary judgement), the fact that such an order was entered pursuant to the *Safe Drinking Water Act* would certainly have been persuasive to the jury when answering the question that resulted in the judgment for Ashland in this case, i.e, whether there was a basis in reason and experience for a fear of the contamination on Plaintiffs' properties.[137] [138] Plus, Ashland argued this fear was unreasonable because the soil contamination on Plaintiffs' properties was limited to discrete areas, rather than distributed over the entire land surface.[139] The water contamination, on the other hand, was dispersed throughout the entire water supply.[140] This court should reverse and let Plaintiffs try their water claims.

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[135] 1T 107; 10T 1288-89.

[136] Rockwell International Corporation v. Wilhite, 143 S.W.3d, 604, 620 (Ky. App.2003). This Court has recently clarified that there is no requirement that the plaintiff establish that the contamination poses a health hazard, even when the contamination consists of imperceptible particles not visible to the naked eye. Smith, 226 S.W.3d at 56-57.

[137] Again, if this case is re-tried, it is likely that the jury charge would look substantially different, in light of the recent Smith v. Carbide and Chemicals Corp. case.

[138] V120 17,486, 17,496.

[139] 5T 593, 597-98.

[140] 10T 1284-87.

The same arguments made with regard to the Plaintiffs' water claims apply equally to their claims relating to non-radiation damage. They will not be repeated again, but the same result should apply. Moreover, evidence of non-radioactive contamination on Plaintiffs' property, particularly hydrocarbon contamination on the property of the Wright Estate Plaintiffs, which was not discovered until the property was tested by Clay Kimbrel, was particularly relevant.[141] The hydrocarbons are evidence of where the production stream of oil (contaminated also with NORM) went on Plaintiffs' property. As such, it is evidence of how the Plaintiffs' property was contaminated by NORM, an issue relevant at trial even after the separate claims were improperly dismissed.

III. NUMEROUS ADDITIONAL ERRORS BY THE TRIAL COURT DEPRIVED PLAINTIFFS OF A FAIR TRIAL

A. The trial court unfairly dictated Plaintiffs' order of proof, but not Ashland's.

Right off the bat, the court restricted the order in which Plaintiffs called their witnesses, requiring Plaintiffs to wait until the end of their case to call their experts.[142] And this even though Plaintiffs advised the court that this posed substantial scheduling problems for the witnesses and undermined their trial strategy designed to advance a logical and understandable presentation for the jury.[143] Put simply, each individual Plaintiff had only a limited understanding of certain discrete facts, while the experts understood the whole story and the

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[141] V10 1271.

[142] 1T 123-31.

[143] 1T 123-24, 128.

overarching issues in the case. Requiring Plaintiffs to wait until the end of the case to present the witnesses who could tell the coherent story undermined the effectiveness of their presentation. Nor is there any legal basis to require Plaintiffs to present their proof in any particular order.

B. The Court improperly struck part of Plaintiffs' opening statement.

The court erroneously struck a portion of Plaintiffs' opening statement on a ground not raised by Ashland. The issue was preserved by Plaintiffs' arguments to the court.[144] In his opening statement, Plaintiffs' attorney stated that the jury would be able to look at how Ashland breached its own internal standards of conduct when deciding whether Ashland complied with the standard of care, and said, "You have to ask yourself if this Defendant was being a good corporate neighbor? Was it treating its neighbors as Ashland would wish to be treated?"[145] Ashland objected that this was argumentative and moved for a mistrial on the ground that this was a "Golden Rule" argument.[146] Conceding that this was not a prohibited Golden Rule argument, the court nevertheless struck it because it referred to "various standards that are not legal standards," specifically, Ashland's internal policies.[147] Yet ultimately, the court instructed the jury to disregard the statement based on both the Golden Rule prohibition and the court's "improper standards" rationale.[148]

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[144] 6T 669-83.

[145] 5T 566-71.

[146] 5T 569, 571-72.

[147] 6T 674-75.

[148] 6T 687-88.

This action was erroneous, for the statement was not a prohibited Golden Rule argument because it did not invite the jurors to place themselves in the Plaintiffs' shoes.[149] And it merely forecast evidence relevant to the standard of care: Ashland's own standards. While not conclusive, such standards are admissible and probative of whether Ashland acted with ordinary prudence.[150] Accordingly, the court erred in striking Plaintiffs' opening statement.

C. *The court unfairly hamstrung Plaintiffs by prohibiting any testimony regarding Ashland's "activities on other properties."*

1. Ashland's field-wide conduct is relevant to Plaintiffs' trespass and nuisance claims.

The court unfairly straightjacketed Plaintiffs' presentation of their nuisance and trespass claims by excluding all evidence of "activities on other properties."[151] The error was preserved by pretrial pleadings and avowal.[152] The court reasoned that, it was trying just these Plaintiffs' claims, so activities on other properties was irrelevant. But a nuisance, by definition, occurs because of activity on property other than the plaintiff's,[153] and K.R.S. § 411.550 provides that the jury must consider the circumstances of the defendant's use of his own property to determine whether that use is a nuisance. Further, a trespass occurs when the defendant's activities on other property cause some thing to enter onto the plaintiff's property,[154] and the jury must

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[149] First and Farmers Bank v. Henderson, 763 S.W.2d 137, 142 (Ky. Ct. App. 1988).

[150] Bass v. Williams, 839 S.W.2d 559 (Ky. 1992); Wal-Mart Stores, Inc. v. Wright, 774 N.E.2d 891, 894-95 (Ind. 2002) (citing treatises and cases from multiple jurisdictions).

[151] V108 15.672-82 (Apx. Tab 9).

[152] 8T 1018-43; 2T 155-256; Exp. 41.

[153] Regional Airport Authority v. LFG, LLC., 255 F. Supp.2d 688, 692 (W.D. Ky. 2003).

[154] RESTATEMENT (SECOND) OF TORTS § 165; W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 13, at 70 (5th ed. 1984).

consider whether the defendant's actions on that other property were ultrahazardous, innocent, negligent, or intentional.[155] So activity on other property was a fundamental and essential fact in this case.

Moreover, it was necessary to allow a coherent picture of Ashland's activities to fairly show what happened to these Plaintiffs. It is a question of the forest and the trees. Focusing exclusively on one or two trees (these particular Plaintiffs' property) does not allow a jury to view the whole picture of what happened, how it happened, and why it happened that would result from looking at the whole forest (Ashland's activities on other properties in the Martha Oilfield). As noted above, the experts indicated that one has to look at field-wide activities in order to explain and understand what happened to these particular Plaintiffs. Since the trial court improperly limited the jury's view to only two trees in a vast forest, this Court should reverse and remand for a new trial.

2. Prohibiting evidence regarding other properties unfairly hindered Plaintiffs' presentation of a cohesive story.

Preventing Plaintiffs from mentioning activities on other properties prevented the jury from hearing relevant evidence, and hindered Plaintiffs' presentation of a cohesive story. Plaintiffs had to walk a tightrope lest any mention of these essential and relevant facts result in a sustained objection, derisive comment from the court, or mistrial. So Plaintiffs' lawyers had to eliminate important contextual and substantive questions for fear of incurring the court's wrath. And what questions they did ask were often interrupted by the objection that they inquired into activities on other properties. Some objections were sustained and others overruled, but the

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[155] Smith v. Carbide and Chemicals Corp., 298 F. Supp. 2d 561, 566 (W.D. Ky. 2004).

effect of the erroneous exclusion of this evidence was to tilt the field so far in Ashland's favor that Plaintiffs could not effectively try their case. It is as though Plaintiffs were told, "you can put on any evidence you want, but don't use the word "the". It may be theoretically possible to do so, but it is so likely to impede the cohesive presentation of the case that the trial is fundamentally unfair.

3. Erroneous exclusion of Bobby Alexander's testimony.

The court also excluded portions of Robert Alexander's testimony because it concerned activities on other properties. The error was preserved by objection and avowal.[156] Alexander was the Ashland representative that communicated with the landowners in the Martha field from 1990-96.[157] The court excluded his testimony regarding: his experience in the Martha Oil Field[158]; his observations of Ashland's oil production equipment[159]; his observations of oil spills[160]; what Ashland told him about NORM[161]; what he told residents about NORM in the Martha Oil Field[162]; land spreading pit materials[163]; his knowledge of widespread contamination

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[156] 2T 155-256; Exp. 41.

[157] Exp. 41.

[158] 2 T 155-65.

[159] Exp. 41.

[160] Exp. 41; 2 T 174-85.

[161] Exp. 41; 2 T 186-204.

[162] Exp. 41; 2 T 238-44, 246-47.

[163] Exp. 41; 2 T 213-26.

in the Martha field[164]; his involvement in measuring radiation[165]; his efforts to bury contaminated pipe and equipment and his efforts to cover up contaminated pits.[166] The exclusion of this testimony was error, because Ashland's actions throughout the Martha field were relevant to Ashland's liability under Plaintiffs' nuisance and trespass claims, and those actions deposited TENORM on Plaintiffs' properties.

Further, Alexander's knowledge of NORM and its potential dangers is relevant evidence of a health hazard. For example, Alexander tested and discovered high readings of radiation that exceeded background in certain areas in the Martha field.[167] Moreover, he was in charge of providing dosimeter badges that Ashland employees used in the field to measure the level of NORM to which they were exposed.[168] Ashland's measures to protect its workers from exposure to NORM is probative of a health hazard, and Alexander's testimony regarding these matters was probative evidence that the NORM on Plaintiffs' properties is a health hazard. Though Alexander answered "I don't recall" to most questions, that answer, coming from Ashland's "man in the field", is probative of Ashland's efforts to conceal its wrongdoing.

4. Erroneous exclusion of Chris Dawson's testimony and video tape.

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[164] Exp. 41; 2 T 226-28.

[165] Exp. 41; 2 T 228-35.

[166] Exp. 41; 2 T 245.

[167] Exp. 41.

[168] Exp. 41.

The court excluded Chris Dawson's testimony regarding the authenticating a videotape he created. The error was preserved by objection and avowal.[169] Created on November 12, 1996, the tape depicted Ashland's contractor, OHM, intentionally pumping contaminated water and oil out of a pit and into Blaine Creek, which is a public waterway that eventually discharges into Yatesville Lake that is the boundary to the Wright Estate.[170] All relevant evidence is admissible unless otherwise provided by law under KRE 401. The tape and Dawson's testimony were relevant to Plaintiffs' trespass claim because the tape depicted Ashland trespassing on Plaintiffs' property. Ashland was literally "caught on tape.[171]" Moreover, the tape depicted Ashland employee Bobby Alexander, who had repeatedly assured the residents of the Martha field that Ashland was not contaminating their properties.[172] So it was probative of Ashland's concealment of its conduct and the credibility of its denials in this case. Yet the court excluded this evidence on the four erroneous grounds discussed below.[173]

First, the trial court erred in viewing the conduct depicted on the tape as a subsequent remedial measure,[174] because under KRE 407, such measures must occur ***after an event***. The video depicted the present act of trespass on Plaintiffs' property. Moreover, the conduct depicted

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[169] 13T 1700-66.

[170] PX7; 6T 768-70.

[171] Moreover, to the extent that pumping contaminated sludge into a water way constitutes a violation of relevant environmental statutes and regulations, it constitutes a separate basis for Plaintiffs' claims pursuant to KRS 446.070 and Hargis v. Baize, 168 S.W.3d 36 (Ky.2005)

[172] PX 7.

[173] 13T 1710-15.

[174] 13T 1700 *et seq.*

on the tape was not taken to remedy the contamination on Plaintiffs' property. To the contrary, Ashland was pumping contamination ***onto*** the Wright Estate from other property. Finally, the tape did not depict "measures...which, if taken previously, would have made an injury or harm allegedly caused by the event less likely to occur," which is what the rule excludes. The Court of Appeals recognized this error.

Second, the trial court erred in excluding the video on the ground that Ashland's polluting the creek was "activity on other property,"[175] because the creek was the boundary of the Wright property.[176] The trial court erred in excluding evidence of "activities on other properties" generally, which was discussed in detail previously.

Third, the trial court erred in excluding the evidence under KRE 403 asserting that it was more prejudicial than probative.[177] The Court of Appeals upheld the exclusion of the videotape on this ground. The tape was centrally probative, as it actually showed Ashland committing a trespass. In fact, it showed Ashland committing a trespass in 1996. Moreover, it was not ***unfairly*** prejudicial, as it did not misrepresent Ashland's conduct or show any gruesome or graphic behavior.[178] It merely shows what really happened: Ashland pumping radiation into the creek. Thus, the videotape was not more prejudicial than probative as contemplated in KRE 403. The error in excluding it should be reversed and the matter remanded for a new trial.

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[175] 13T 1704-07.

[176] 6T 768-70.

[177] 13T 1704-07.

[178] *Cf.* Johnson v. Commonwealth, 105 S.W.3d 403 (Ky. 2003) (videotape of Defendant's arrest and search of residence not unduly prejudicial, despite stipulation of conduct in question, because video helped in weighing Defendant's guilt).

Finally, seizing on Plaintiffs' comment that the tape depicted a criminal act, the court stated, "Well, then you're in the wrong Court right now, then. You ought to be in Criminal Court."[179] But criminal conduct can be used in a civil action to establish the cause of action, including punitive damages.[180] In fact, conduct that is criminal or similar thereto is appropriate evidence for a jury to consider on the issue of punitive damages. So excluding the tape was error.

D. The court erroneously excluded other important evidence offered by Plaintiffs.

1. Erroneous exclusion of Earl Arp's testimony and memo.

These issues are preserved by Plaintiffs' responses to Ashland's objections.[181] The court erroneously excluded a 1982 memo prepared by Ashland employee Earl Arp relating to NORM, to which was attached a memo from Dr. Miller on the same subject.[182] However, since the memo was prepared by Ashland in 1982 and was found in Ashland's records, it fits KRE 803(16)'s ancient-documents exception to the hearsay rule. Plus, the entire memo, including the attachments, is a KRE 801A(b) admission of a party opponent. This includes the admission by Arp that Dr. Miller's memorandum (and its opinions) are reliable. Further, the memo and attachments were admissible business record pursuant to KRE 803(6). As such, it is not inadmissable based on authenticity or hearsay, the objections Ashland advanced.[183]

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[179] 13T 1710.

[180] See Shortridge v. Rice, 929 S.W.2d 194 (Ky App. 1996).

[181] 13T 1673, 1677-78, 1680, 1686.

[182] 13T 1681-86; Apx. Tab 13.

[183] 13T 1673.

Nor is the memo more prejudicial than probative, as the trial court suggested.[184] It was centrally probative, as words straight from the horse's mouth, of Ashland's knowledge or notice of the harmful effects of NORM, which they continued to ignore for years thereafter. In short, it was "prejudicial" to Ashland's good-corporate-citizen argument, as well as providing further support for Plaintiffs' punitive-damages claims. To the extent it was confusing as the trial court asserted, in referring to regulatory matters, these portions could have been easily redacted, as Plaintiffs' counsel point out.[185] In sum, none of the reasons argued by Ashland or the trial court were adequate or appropriate to exclude, in toto, the critical Earl Arp memo.

And even if the memo were not admissible to prove the truth of the matter asserted, it was at least admissible to prove Ashland's knowledge of the dangers of NORM. Arp's merely stating the potential for contamination and the danger thereof tends to prove the material fact of Ashland's knowledge.[186] This Court should reverse the judgment in this matter and remand with appropriate instructions to admit the Arp memo.

2. Erroneous exclusion of Ashland's failed remedial efforts.

This issue was preserved by Plaintiffs pretrial pleadings.[187] A KRE 407 subsequent remedial measure is an activity that, if taken before the incident, would have prevented it. Plaintiffs offered evidence that Ashland's efforts to remediate were ***unsuccessful***.[188] That is not

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[184] 13T 1685-86.

[185] 13T 1686.

[186] Lawson, Robert, *The Kentucky Evidence Law Handbook* § 805 [3], p. 558 (4th ed. 2003).

[187] V.102, 14,938-74; V 108, p. 15,672-82.

[188] V. 102, p. 14,938-74.

an subsequent remedial measure because an unsuccessful attempt to fix the damage already done is not an action that, if taken previously, would have prevented the injury. And even if it were, subsequent remedial measures are not admissible to prove *negligence*, but are admissible "when offered for another purpose."[189] Here, the unsuccessful remediation efforts were offered not to prove negligence, but to establish a nuisance and rebut Ashland's suggestion it would clean up Plaintiffs' properties.[190]

3. Erroneous exclusion of the cost of remediation.

The court excluded evidence of the cost of remediating Plaintiffs' properties, on the ground that such was irrelevant because the cost of repair exceeded the value of the property, which issue is preserved.[191] But the jury may consider the cost of restoration and the discomfort caused by the injury in determining the diminished value of the property.[192] The jury may presume that a purchaser will reduce his price commensurate with the cost of restoring the property, so evidence of cost of repair is sufficient to support an inference of diminished value in

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[189] KRE 407 (contrast FRE 407, under which SRM's are not admissible to prove "negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction."); Ostendorf v. Clark Equip Co., 122 S.W.3d 530 (Ky. 2003).

[190] V. 102, p. 14938-74.

[191] V103, 14,986-15,003; V108, 15,672-682.

[192] Ellison v R & B Contracting, Inc., 32 S.W.3d 66, 69, 76 (Ky. 2000); City of Danville v. Smallwood, 347 S.W.2d 516, 519 (Ky. 1961) (and cases cited therein). K.R.S. 411.560 (3), which states, "No damages shall be awarded for "annoyance, discomfort, sickness, emotional distress, or similar claims for a private nuisance," codified preexisting law, K.R.S. § 411.500, 411.570, under which a plaintiff could not recover diminution in property value and discomfort and annoyance as separate elements because discomfort and annoyance are factors the jury already considers in assessing damages for diminished value. Kentland-Elkhorn Coal Co. v. Charles, 514 SW2d 659, 664 (Ky. 1974); Kentucky W. Virginia Gas Co v. Matny, 279 S.W2d 805, 807 (Ky. 1955). Kentucky-Ohio Gas Co., v. Bowling, 95 S.W.2d 1,5 (Ky. 1936).

a like amount.[193] An appraiser's estimation of the property's value is evidence the jury may consider, but it is not conclusive.[194] The court erred by giving conclusive weight to the appraiser's opinion and excluding evidence of repair costs.

4. Other errors

The court excluded Mark Parks's deposition testimony. The error was preserved by objection and avowal.[195] Parks was a petroleum engineer and General Manager of International Operations when he quit working for Ashland.[196] When Plaintiffs offered Parks's testimony to rebut Ashland's criticism that Plaintiffs' experts had not worked in the Appalachian basin, Ashland's counsel uttered "objection," and the court provided the ground and excluded the testimony.[197] Further, Plaintiffs offered Parks's testimony that a prudent oil company would not exceed the fracture gradient to support their claim that Ashland exceeded the "fracture gradient", causing the underground formation to fracture and allowing contaminated fluids to migrate uncontrolledly to the surface.[198] Ashland erroneously objected to "lack of foundation", but the court came to its rescue, supplying a different objection and excluding the testimony.[199] When Plaintiffs offered a single page of Parks's testimony regarding the maintenance and condition of

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

[194] Id. at 77.

[195] 13 T 1619-71, and Exp. 40.

[196] 13 T 1634-36.

[197] 13 T 1629.

[198] 13 T 1631-33.

[199] 13 T 1631-33.

Ashland's wells. Ashland didn't even have to say "objection." "Your Honor" was sufficient to secure the exclusion of 17 pages of testimony.[200] And when Plaintiffs offered Parks's testimony about his knowledge of NORM in relation to oil production activity, Ashland didn't even have to say "Your Honor." The court excluded the evidence *sua sponte*.[201]

E. The trial court failed to properly instruct the jury on Plaintiffs' theory of the case.

Each party is entitled to have its theory of the case submitted to the jury if there is any evidence to support it.[202] As the trial here proceeded, the court not only shaped the evidence admitted to conform to its preconceived opinion of how the verdict should fall out, but crafted instructions which furthered this effort. The instruction errors included the lack of an instruction on trespass or nuisance; the submission of instructions based on a stigma doctrine from Illinois; the lack of an instruction on nominal damages, and the failure to instruct on punitive damages. These errors were preserved by tendered instructions[203] and objection at the trial.[204]

Landowners may recover when tortfeasors trespass on their property and when a tortfeasor used his own property in such as fashion as to unreasonably impair the plaintiff's quiet enjoyment of the plaintiff's land. And even though Ashland was on Plaintiffs' land by virtue of a negotiated

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[200] 13 T 1648-64.

[201] 13 T 1666.

[202] Clark v. Hauck Mfg. Co., 910 S.W.2d 247 (Ky. 1995).

[203] V116 16,936-51; Apx. Tab 8.

[204] 19T 2569, *et seq.*

lease. Ashland was not entitled to unreasonably frustrate Plaintiffs' use and enjoyment of the property. If it did, it must respond in damages.[205]

This position existed in Kentucky law long before *Akers* although that case reversed decades of Kentucky precedent related to the infamous "broad form deed". In fact, the unreasonable use of oil-drilling methods was proscribed long before strip mining was. In Wiser v. Conley,[206] a summary judgment for a driller using the water-flood method was reversed because unreasonable methods of mineral extraction support a claim for damages. This was spelled out in additional detail in cases such as *Kentland-Elkhorn Coal Co. v. Charles*.[207] The court should have instructed the jury as Plaintiffs requested so as to allow the jury to consider their nuisance/trespass claims. This position has been reinforced by this Court's recent decision that for an intentional trespass claim, that there is no requirement that a health hazard be demonstrated.[208]

Instead of following Kentucky law, the trial judge became enamored with the *Gatledge* case out of Illinois, which it felt was controlling. This led to its fixation on "stigma" as the key to the case even though Kentucky law does not deal with stigma to any significant extent. Thus, the court's instructions B1(b) and B2(a) serve only as a means to distract the jury from the true issues in the case and lead it down a path that could exonerate Ashland from the jury's finding that it acted unreasonably. This was a second error in the overall form of the instructions.

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[205] Akers v. Baldwin, 736 S.W.2d 294 (Ky. 1987).

[206] Wiser v. Conley 346 S.W.2d 718 (Ky.1961)

[207] 514 S.W.2d 659 (Ky. 1974).

[208] Smith v. Carbide and Chemical Corporation, 226 S.W. 3d 52 (Ky. 2007).

[209] Ellis v. B & B Contracting, Inc., 32 S.W.3d 66, 71 & n.7 (2000) (quoting Hughett v. Caldwell

Another error in the instructions concerns the failure to instruct on nominal damages as Plaintiffs had requested. Plaintiffs did so as a fall-back position because of concerns about how the court would limit their evidence and craft the instructions. Those concerns proved to be well-founded. The Kentucky Supreme Court recently held nominal damages were appropriate in a case involving the deposition of deleterious substances on land, even if the plaintiff suffered no actual damage as a result of the trespass.[209] As *Ellison* explains, this is important, for a party recovering nominal damages can also recover its taxable costs as the prevailing party.[210] Failure to award even nominal damages is grounds for reversal where the costs have not been granted to the party entitled to nominal damages.[211] That Plaintiffs would have prevailed but for the lack of proven damages under the instructions given (and evidence allowed) is clear from the jury's finding under Instruction B(1)(a), where the jury held that their property values had been diminished by Ashland's conduct. So this court should reverse and remand for a new trial.

The final error with regard to the instructions was the failure to give an instruction on punitive damages. If nothing else the Chris Dawson video supports a punitive damage instruction.[212] Of course, the Chris Dawson video does not stand alone; it is supported by the

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[209] Ellison v. R & B Contracting, Inc., 32 S.W.3d 66, 71 & n.7 (2000) (quoting Hughett v. Caldwell County, 313 Ky. 85, 230 S.W.2d 92 (Ky. 1950) ("...every unauthorized entry upon the land of another person results in some damage, though it may be nominal") and Fletcher v. Howard, 226 Ky. 258, 10 S.W.2d 825 (1928) ("where a trespass has been committed upon he property of another, he is entitled at least to nominal damages for the violation of his rights.").

[210] USACO Coal Co. v. Liberty Nat'l Bank, 700 S.W.2d 69, 72 (Ky. App. 1985).

[211] Id. at 72 (citing 22 Am.Jur.2d *Damages*, §6).

[212] 13 T 1710.

Plaintiffs' expert testimony of the gross negligent practices of Ashland noted above regarding prior issues relating to the testimony of Clay Kimbrell, Robert Grace, and Stanley Waligora.

Where there is evidence to support a claim for punitive damages, a trial court shall not substitute its judgment on the appropriateness of punitive damages in place of the jury.[213] In short, if there is evidence regarding a defendant's conduct that if credited by the jury would support a punitive damages verdict, then the instruction must be given.[214] The questions of whether to actually award such damages, and how much to award, if any, are for a jury to decide. Giving a punitive instruction is not tantamount to telling a jury to award such damages, but merely presents a plaintiff's theory of the case, as is done in all issues regarding instructions. If there is evidence, the instruction will be given. It was error to not instruct the jury on punitive damages.

As noted, there were multiple instruction errors. Each supports Plaintiffs' request for a new trial. Together they demonstrate how unfair of a trial the Plaintiffs received. This Court should reverse the judgment and remand for a new trial.

IV. THE CUMULATIVE IMPACT OF THE VOLUMINOUS ERRORS BY THE TRIAL COURT DENIED THE PLAINTIFFS A FUNDAMENTALLY FAIR TRIAL.

Plaintiffs continue to assert that the issues raised above warrant reversal of the judgment; however, if this Court is not persuaded that any one of those is sufficient to support reversing the judgment, then a cumulative impact of all of the error at trial together warrant that the judgment be reversed.[215] The trial court made many errors in its Pre-trial decisions excluding some of the

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[213] Shortridge v. Rice, 929 S.W.2d 194 (Ky. App. 1996)

[214] Id.

[215] Wellborn v. Commonwealth, 157 S.W.3d 608 (Ky. 2005); See NCAA v. Lasege, 53 S.W.3d 77 (Ky. 2001), which held that three errors cumulatively warranted extraordinary CR 65.09 relief.

Plaintiff's claims and evidence, as previously set forth in this brief. Then, additional rulings at trial excluding evidence relevant even under those erroneous rulings turned the trial into a charade, where Plaintiffs could not offer critical evidence of Defendant's wrongdoing, as has also been outlined above. There are additional errors raised in the Plaintiffs' Pre-hearing Statement filed with the Court of Appeals, but could not be addressed herein because of space limitations in Plaintiffs' brief there, as well as the brief filed herewith. The Plaintiffs certainly do not intend to waive those arguments, which demonstrate the length and breadth of the errors committed by the trial court and are part of the cumulative impact of those errors. The bottom line is simply this: The Plaintiffs did not receive a fundamentally fair trial. As a result, the Judgement in this matter should be reversed.

CONCLUSION

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

JOSEPH LANE