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

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

v.

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

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

* * * * *

COMBINED BRIEF ON APPEAL AND CROSS-APPEAL FOR APPELLEES ASHLAND INC. AND ASHLAND EXPLORATION, INC.

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CERTIFICATION

I hereby certify that on this 30th day of June, 2008, true and correct copies of the foregoing Combined Brief on Appeal and Cross-Appeal were mailed by first class mail, U.S. postage prepaid, to: Clerk, Johnson Circuit Court, Johnson County Judicial Center, 908 Third Street, Suite 109, Paintsville, KY 41240; the Hon. John David Preston, Johnson County Judicial Center, 908 Third Street, Suite 217, Paintsville, KY 41240; George Chandler and Kirk Mathis, Chandler Law Office, P.O. Box 340, Lufkin, TX 75902-0340; Broadus Spivey, 48 East Avenue, Austin, TX 78701-4320; Darrin Walker, 2054 Parkdale Drive, Kingwood, TX; 77339; Michael Endicott, P.O. Box 181, Paintsville, KY 41240; and Ned Pillersdorf, Pillersdorf Derossett & Lane, 124 West Court Street, Prestonsburg, KY 41653.

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STATEMENT CONCERNING ORAL ARGUMENT

Appellees would welcome oral argument in this case, but are not sure that oral argument would be useful. Despite being granted a review of the Court of Appeals' decision by this Court, Appellants barely mention the Court of Appeals' Opinion and do not discuss it at all. Because Appellants have limited themselves to duplicating their first appeal and revisiting only the trial court's decision, no apparent purpose would be served with oral argument at this point.

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COUNTERSTATEMENT OF THE CASE

I. INTRODUCTION

This is a property damage case in which a jury found against Plaintiffs, now Appellants. The Court of Appeals unanimously affirmed the judgment in favor of these Appellees/Cross-Appellants.

II. OVERVIEW

This appeal arose from the jury's rejection of property damage in Johnson County. Plaintiffs[1] alleged that oil production, under valid leases and ending 20 years ago, left on their property a substance called NORM (naturally occurring radioactive material). The parties stipulated that NORM cannot be seen, heard, felt, smelled, tasted or otherwise detected by human senses. Even though (according to Plaintiffs) NORM had been on their property for more than fifty years, no person, animal or plant has been harmed by the presence of NORM on these properties. Supported by years of extensive sampling, testing and analysis of these properties by all parties, scientific proof from one of the world's leading health physicists established that the level of NORM on the properties is not harmful to land, people, plants or animals.

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[1] Appellants were part of a larger group of plaintiffs below, whose claims have now all been resolved in the trial court by either dismissal or settlement. The term "Plaintiffs" as used in this Brief may refer to the larger group. "Appellants" refers specifically to the Cantrells and Wrights. Although Tammy Cantrell is named as an Appellant, she was dismissed at the beginning of the trial (1T 22). No issue regarding the dismissal of Tammy Cantrell was raised in the Court of Appeals or in the Motion for Discretionary Review.

Appellees use the same format for record references as used by Appellants: V for volumes of pleadings, T for volumes of trial transcript, and Exp. for hearing or deposition transcripts placed in the record and designated as "Exp." by the Clerk.

A jury found against Appellants at trial. Judgment was entered for Ashland.[2] The Court of Appeals unanimously affirmed the jury verdict and judgment in a lengthy, carefully reasoned Opinion. Nothing in Appellants' Brief supports a reversal of those decisions, and the Court of Appeals' Opinion should be affirmed.

III. FACTS

The following facts were undisputed on the record below:

1. Appellants and all the other Plaintiffs disavowed any personal injury. Their attorneys represented to the trial court that the claims were strictly "for property damage only for contamination from radiation." (2/02/00 hearing, Exp. 33, p. 16.)[3]

2. The only NORM-impacted material actually found on Appellants' properties was inside a few pipes on the Wrights' land (17T 2,203), which was very hard to locate "because the radiation levels are so low" (17T 2,206), and in one remote spot on the Cantrell property, in soil that could fit in a two-gallon mop bucket. (17T 2,217-19.)

3. The parties stipulated to the following:

> NORM is everywhere: we are exposed to it every day. This natural radiation has been with us since the creation of the earth. NORM is in our bodies, the places where we live and work, the ground we live on, the products we use and the food we eat. Almost everything in nature has some

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[2] "Ashland" is used herein to refer to both Appellees.

[3] Despite their representation that the claims were limited to "radiation" (NORM), which had only been known to exist in the Martha Oil Field since some pipes tested positive for it in 1988 (14T 1,739), Plaintiffs attempted to also make various claims for water and property damage from hydrocarbons, brine or other substances **known for decades** to be associated with oil production in the Martha Oil Field. The trial court dismissed the water and non-NORM claims prior to trial as clearly time-barred (V111 16,168-73 and V115 16,836-39), but allowed Plaintiffs a full trial on the alleged NORM injury to their properties.

> amount of natural radioactivity. Living systems have adapted to these levels of radiation and radioactivity.
>
> Some human activities (including mining, milling, oil and gas production and use of building materials) involving natural resources **may** concentrate or alter the distribution or location of NORM and thus enhance the level of radioactivity **or change its location**.[4]
>
> Radioactivity in oil production is of natural origin (NORM) but oil production activities may produce TENORM ("Technologically Enhanced Naturally Occurring Radioactive Material") that is deposited as scale in well tubing, flow lines and tanks and in the scale and sludge accumulated around a well.
>
> NORM and TENORM are imperceptible to human senses and cannot be detected by sight, hearing, smell, touch or taste.

(Stipulation reached at 5/22/03 hearing, Exp. 52, pp. 5-6, and read to jury at 3T 309-10.)

4. Oil production activities were conducted from the 1920's until 1987 (14T 1790-91), pursuant to valid leases (16T 2013-15). Plaintiffs alleged that these activities brought NORM to the surface.[5] Plaintiffs continued to farm and live on these properties with no ill effects. Shirley Wright and Irma Wright lived on the Wright property for 70 years (Shirley Wright dep., Exp. 24, p. 6), to ages 80 and 76, respectively. (V93, pp. 13,588-96.) Woodie Cantrell chose to maintain his residence on the property he claimed was impacted, even though he owns another home just down the road, on which no

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[4] (Emphasis added.) Thus, as stipulated, "technologically enhanced" NORM ("TENORM") may simply refer to a change in location of naturally occurring radioactive material without necessarily changing the level of radioactivity at all.

[5] Plaintiffs claimed that water injected under pressure into oil-bearing rock beginning in the 1950s (sometimes referred to by them as "water flooding") changed the location of NORM from below the surface to discrete, isolated, above-ground locations, such as in pipe and soil around separating tanks and other oil field equipment. (See, e.g., 14T 1,738.)

NORM was detected in surveys by any party. (7T 829-31.) Plaintiffs presented no evidence that NORM injured any person, animal or vegetation on the land in the half-century that followed the water flooding process that began in the 1950s.

5. When Ashland attempted to remove impacted pipes and soil from Plaintiffs' properties,[6] Plaintiffs' attorneys denied Ashland permission to remediate the properties. (V91, p. 13,358.) As one Plaintiff put it:

> I can't let them come on there with this lawsuit, until I find out how it goes. I mean, I've got to know what I'm doing. **How can I sue for something that's gone?**

(Ralph Scaggs dep., Vol. I, Exp. 3, p. 145 (emphasis added).) When other Plaintiffs were asked in depositions if they wanted the impacted soil or pipe to be removed from their property, their attorneys forbade them to answer. (E.g., Woodie Cantrell dep., Exp 1, pp. 151-52.)

6. Some Plaintiffs placed brightly colored flags and warning signs on their properties, in areas where they claimed there were "dangerous" levels of radiation. (18T 2,320-27.) The Commonwealth of Kentucky advised them that the signs were not appropriate and should be removed. (Id. at 2,330-35.) Plaintiffs and their consultants defied this directive and did not remove the signs.

7. Plaintiffs presented no evidence that they were ever restricted by any regulatory or health authorities or anyone else in the use of their properties for any

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[6] After NORM was detected in oil field pipe in 1988, Ashland investigated the source of the NORM and ambitiously promoted, advertised and conducted an extensive **voluntary** pipe-recall program, whereby Ashland attempted to collect every piece of above-ground pipe that had been used in its oil production activities (V91, pp. 13,278-80). Similarly, Ashland entered into a **voluntary** program with the Commonwealth of Kentucky to remove and/or remediate impacted soil. (V91, pp. 13,278-13,327).

purpose whatsoever. To the contrary, Appellants continued to farm and live on the properties as detailed above.

Thus the record was uncontroverted below that Appellants were not claiming to be injured by NORM; their properties were not restricted; and the presence of NORM could not even be detected or perceived by anyone's natural senses. The question before the trial court became: How can property be injured by the mere presence of this naturally occurring material that no one can taste, see, smell, touch, hear, or otherwise perceive? Plaintiffs attempted to show injury in two ways: (1) by insisting a health hazard did exist; and (2) by claiming a decrease in property value.

A. NONE OF PLAINTIFFS' EXPERTS OFFERED EVIDENCE TO SUPPORT AN EXISTING HEALTH HAZARD ON THE PROPERTIES.

Plaintiffs insisted that they would be able to prove property damage by showing that a health hazard exists on the property. Even though Plaintiffs were not claiming any personal injury in the case, they argued:

> Plaintiffs *admit* that it will be necessary that they establish that there are *health effects associated with the contamination* of their properties and water. While the Plaintiffs have recently abandoned their claim for medical monitoring (pursuant to the recent decision of the Kentucky Supreme Court in Wood v. Wyeth-Ayerst Laboratories, 82 S.W.3d 849 (Ky. Aug. 22, 2002)), they continue to assert several theories of recovery under which it will be necessary to show that the contamination of Plaintiffs' properties and water constitutes a potential risk to human health. This "*health effect element*" is central to the trespass, nuisance and ultrahazardous activities causes of action asserted by Plaintiffs.

(V103, pp. 15,059-60, Plaintiffs' November 4, 2002 Response to Defendants' Daubert Motion (emphasis added).) Plaintiffs acknowledged that they needed to do more than simply show the presence of "contamination" on their properties.

> The notion that the Defendants' activities present a *risk to human health is an element central* to many of the Plaintiffs' claims. . . . Plaintiffs will demonstrate that the Defendants' actions resulted in a risk to human health.

(Id. at 15,062 (emphasis added).) Plaintiffs repeated this acknowledgement at the December 2002 pre-trial conference:

> **[The] central issue in the case is whether or not radiation is harmful to folks.** Plaintiffs have pled several different causes of action, including trespass, nuisance and ultrahazardous activities. *Embraced within these three causes of action is a health effects concern*, triggering different types of damages for the individual plaintiffs to recover on. *And in order to recover, plaintiffs will need to show that the defendants' activities have subjected the plaintiffs to risk to human health.*
>
> This is not a claim for medical monitoring. As the motion points out, the medical monitoring claim has been set aside, and *the claim here is for the risk to human health that the radiation on their property and other contamination presents.*

(Exp. 43, pp. 11-12 (statement by Plaintiffs' counsel) (emphasis added).)

The problem for Plaintiffs was that such proof, of course, would have to come from experts, and would necessarily be the subject of mandatory pre-trial disclosures. (See Order of 4-13-99 at V24, pp. 3,234-37; Order of 9-25-00 at V58, pp. 8,494-8,502; and Order of 6-28-02 at V92, pp. 13,409-417) (collective Appx. A), (repeatedly extending the time for Plaintiffs to find and disclose such evidence.) It finally became clear during pre-trial proceedings that Plaintiffs would not be able to find an expert who could offer any scientific proof that any such risk to human health existed on these properties. When pressed by the Court at a hearing May 22, 2003, the Plaintiffs admitted that the only health hazard witness they could offer was Stanley Waligora.

> BY THE COURT: And who would testify as to the creating the hazard to the people, plants and animals?

BY MR. AINSWORTH: If permitted to testify, Mr. Waligora.

BY THE COURT: He would be the witness that would do that?

BY MR. AINSWORTH: Yes, sir.

BY THE COURT: So we go back. Our only health hazard witness then would be Mr. Waligora?

BY MR. AINSWORTH: On property, that's right . . . .

(Exp. 52, p. 76.) But Waligora himself had already admitted he could not testify as to any such hazard. **Waligora agreed that the fact that a property is "contaminated" with NORM does not mean that any health hazard necessarily exists**. (12/06/02 hearing, Exp. 46, p. 88) (Appx. B). He specifically disclaimed any expertise regarding "the health effects of radium in animals or in humans." (Waligora dep., Exp. 48, pp. 146-47, Appx. C.) He admitted that determining whether or not the levels of radiation present a health hazard to any current residents on the properties was "beyond my scope." (12/06/02 hearing, Exp. 46, p. 39, Appx. B.) All Waligora could offer were some computer models speculating on possible future exposure to radiation on other properties. (The exclusion of this evidence is discussed in the Argument below.) Waligora admitted he did not even make any such computer model calculations for the Cantrell and Wright properties involved in this appeal. (12/06/02 hearing, Exp. 46, p. 69.) The record was thus uncontroverted prior to trial that the only health hazard testimony Plaintiffs intended to offer went to other properties and was from someone who had specifically disclaimed any expertise regarding "the health effects of radium in animals or humans." (Waligora dep., Exp. 48, pp. 146-47.)

In summary, the only witness who Appellants claim should have been allowed to discuss the hazard associated with radiation on their properties, Waligora, repeatedly

testified that he would not do so, or that doing so was beyond the scope of what he had been retained to do. (12/06/02 hearing, Exp. 46, pp. 34-35, 39, 43, 77-78, 83-85.)

Despite this dearth of evidence on the health hazard issue, Plaintiffs contended they could nevertheless claim a loss in fair market value. Ashland pointed out that any such loss (which was not supported by the evidence in any event) would only be a measure of property damage but could not be a cause of action itself. (5/22/03 hearing, Exp. 52, pp. 127-28.) Nevertheless, the trial court permitted Plaintiffs to go forward on this theory.

B. THE TRIAL COURT ALLOWED PLAINTIFFS TO PROCEED TO TRIAL ON A STIGMA CLAIM.

The only property damage theory Plaintiffs articulated (other than the non-existent health hazard) was an alleged drop in fair market value they said was caused by the mere presence of NORM on the property. On this claim, Ashland sought summary judgment based on Kentucky law that rejects such "stigma" claims. (See discussion of law in Argument III below.) Plaintiffs' counsel convinced the court to let Plaintiffs have a jury trial. (5/22/03 hearing, Exp. 52, p. 100; V115, pp. 16,833-35.) The court denied Ashland's motion for summary judgment on the NORM-impacted soil and pipe issue. (V115, pp. 16,833-35.) In doing so, the court expressed skepticism that Plaintiffs could prove harm to their property "as required to sustain a claim of damages under the laws of Kentucky," (id.) but the case proceeded to jury trial on July 9, 2003, in the Johnson Circuit Court. The jury found in favor of Ashland.

C. THE COURT OF APPEALS UNANIMOUSLY AFFIRMED THE JURY VERDICT AND PRETRIAL RULINGS.

The Court of Appeals painstakingly reviewed every argument Appellants made on appeal, and upheld the judgment and pretrial rulings as solid. In an extensive discussion,

spanning 35 pages, the Court of Appeals gave Appellants every benefit of every doubt and still affirmed what the jury and trial court had done below.[7]

Appellants had their day in court and have had an exhaustive review by the Court of Appeals. This is not a case where close questions were presented or opinions were divided on the result. The three-member Court of Appeals panel was unanimous. It was unanimous in both the result and in the reasoning that led to the result. There is no dissent, no concurring opinion and no debate for this Court to consider or resolve. What Appellants seek is to have this Court just reach a different result than the trial judges[8], jury, and Court of Appeals reached, all finding against Appellants. Dissatisfaction with the result (even with a result that disappointed Appellants at every level) is not an appropriate ground for reversal.

ARGUMENT

I. THE TRIAL COURT PROPERLY NARROWED THE ISSUES BY CAREFUL AND THOROUGH PRE-TRIAL PROCEEDINGS.

This case was originally assigned to Judge James Knight of the Johnson Circuit Court. After the retirement of Judge Knight, Judge Daniel Sparks was elected to the Johnson Circuit Court. Judge Sparks appointed Pierce Hamblin, a highly respected attorney welcomed by all of the parties (including Plaintiffs, see V47, pp. 6,767-68), to act as a Special Master Commissioner to assist with pre-trial rulings. (Order of

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[7] Ashland cross-appealed on the ground that the trial court should have entered summary judgment before trial. Because of the Court of Appeals' disposition of the main appeal in Ashland's favor, the protective cross-appeal became moot and was not addressed by that Court. Ashland's cross-motion for discretionary review was granted on this issue on December 12, 2007, and is similarly a protective cross-appeal only.

[8] This case went through several judges and a special master commissioner before reaching the jury.

Appointment, V47, pp. 6,765-66.) Commissioner Hamblin, with all parties' agreement, presided over Daubert hearings and assisted with the management of the multitude of issues that were presented to the trial court. He continued to act in this role after Judge Carl Hurst was appointed as special judge to preside over this case following a serious automobile accident involving Judge Sparks. (V111, p. 16,141.)

All of these judges, and the Special Master Commissioner, worked hard to manage the case through orderly pre-trial proceedings. Plaintiffs' own counsel praised them for the "extraordinary attention" being given to the case. (Appx. D.) The pretrial issues were properly decided, as detailed below.

A. THE TESTIMONY OF WALIGORA WAS PROPERLY LIMITED AFTER EXTENSIVE DAUBERT PROCEEDINGS.

1. The Trial Court Functions as a Gatekeeper Responsible for Keeping Out Unreliable Pseudoscience.

As this Court has described it, "the trial court functions as a 'gatekeeper' charged with keeping out unreliable pseudoscientific evidence." Miller v. Eldridge, 146 S.W.3d 909, 913-14 (Ky. 2004).[9] The court's role as a gatekeeper is

> especially sensitive in cases 'where the plaintiff claims that exposure to a toxic substance caused his injury, [because a] jury may blindly accept an expert's opinion that conforms with their underlying fears of toxic substances without carefully understanding or examining the basis for that opinion.'

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[9] Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), was adopted in Kentucky in Mitchell v. Commonwealth, 908 S.W.2d 100 (Ky. 1995), overruled on other grounds by Fugate v. Commonwealth, 993 S.W.2d 931 (Ky. 1999). Application of the "Daubert factors" is often "the cornerstone of the reliability analysis." Miller, supra, at 914, but these factors are not an exclusive list. Id. at 918. Each gatekeeping exercise is tied to the facts of the case at issue. Id. at 918-19. The proposed testimony must be both reliable and relevant. Id. at 914.

Whiting v. Boston Edison Co., 891 F.Supp. 12, 24 (D. Mass. 1995) (citations omitted). That risk - - - of blind acceptance based on fear, without any careful examination of the facts - - - was a very real problem below. While Plaintiffs were fear-mongering by posting "Danger!" signs (which the state instructed Plaintiffs' consultant to remove (Appx. E)), the only NORM actually found on Appellants' properties was inside a few pipes on the Wrights' land (17T 2,203), which was very hard to find "because the radiation levels are so low" (17T 2,206), and in soil on one remote spot on the Cantrell property that could fit in a two-gallon mop bucket. (17T 2,217-19.)

2. The Trial Court's Ruling is Entitled to Great Deference, Reversible Only For Clear Error or Abuse of Discretion.

Trial courts have considerable breadth of discretion in performing their gate-keeping function under KRE 702, and a reviewing court will "give great deference to the trial court's ruling and reverse only in circumstances of clear abuse." Toyota Motor Corp. v. Gregory, 136 S.W.3d 35, 39 (Ky. 2004). The trial court's ruling on reliability is reviewed for clear error. Miller, 146 S.W.3d at 917. The trial court's ruling on relevancy is reviewed for abuse of discretion, to determine whether the trial court's determination was arbitrary, unreasonable, unfair, unsupported by sound legal principles, or clearly erroneous. Id. at 914-15. Deference to the trial court's findings and rulings in such matters is appropriate because the trial court is in the best position to evaluate the evidence developed at a Daubert hearing. See Miller, 146 SW.3d at 917.

3. The Trial Court Did Not Abuse Its Discretion Or Commit "Clear Error" in Finding Waligora's Opinions Were Not Reliable.

To support their claim that the NORM on their properties could pose a health hazard, Plaintiffs tried to rely on speculative opinion testimony as to what might,

someday, maybe occur in the future. They relied upon Stanley Waligora, who admitted that he is not actually an expert on the health effects of radium in humans, nor a radiobiologist, nor an epidemiologist. (Waligora deposition, Exp. 48, pp. 146-47, 160.) Waligora based his opinions on calculations using a computer model known as "RESRAD." (Id. at 21.) Appellants' attorneys also wanted to use a scientific construct known as the linear no-threshold hypothesis ("LNT"), explained below. Neither RESRAD nor LNT could properly be used in this case, for the reasons discussed more fully below.

a. Waligora Improperly Used the RESRAD Program.

In preparing his opinions, Waligora used a computer code, RESRAD, which used soil sample analyses made on Plaintiffs' properties to determine what radiation exposure a resident of those properties could experience from various possible future uses of those properties. (12/06/02 hearing, Exp. 46, pp. 26-27, 39-40, 52-53.) Among the data from Plaintiffs' properties that Waligora input in the RESRAD program were the concentration of radium in soil samples reported by Plaintiffs' consultant Michael Jarrett, and the area over which elevated radiation readings were measured by Jarrett. (Id. at 52-54.)[10]

The RESRAD program includes assumptions about possible uses of the property and models radiation exposures based on those conditions. Waligora testified that "you want to be practical" in making assumptions about the property conditions that serve as inputs into the RESRAD program (Waligora dep., Exp. 48, p. 73), but his methodology was anything but practical. In fact, Waligora's methodology assumes a person would

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[10] Waligora later recognized that Jarrett's data was faulty and should not hav been used, as detailed below at p. 14.

have to spend 12 hours each day inside of a house to be built on the most highly contaminated spot on his property (id. at 72-73), eat vegetables from a garden to be planted on the same spot as the house, eat grain from fields sown on the same spot as the garden and house, consume meat from chicken that are fed and cattle that graze on the already-crowded spot, drink milk from dairy cattle that graze on the same spot and eat fish from a river that flows through the same spot. (Id. at 77-79.) Plaintiffs' argument that Waligora's opinion was based upon "various future land-use scenarios" is incorrect. For those properties where he made a RESRAD computation, Waligora used only this one future scenario – grain fields, crops, pastures and creeks, all stacked on top of one another and on top of a house. (Id. at 83-85.)

Waligora repeatedly stated that he was not using the RESRAD program to calculate an exposure -- nor reasonably foreseeable exposure -- to the owners or current residents of the property. Waligora testified that he could not opine that any Plaintiff was exposed to a hazardous dose of radiation because he had not made a single dose calculation for any Plaintiff.[11] (Waligora dep., Exp. 48, p. 10.) **Waligora did not calculate any risk to the Plaintiffs because the low levels and discrete locations of the NORM did not create any concern regarding actual exposure to the Plaintiffs.** (Id. at 116.) His calculations were for some fictitious persons who might someday hypothetically exist as "proposed or potential future occupants of the property." (Id. at 87; see also, e.g., pp. 10, 25, 73-77, 87-88, 114.) Waligora admitted that he was "not trying to recreate existing conditions." (Id. at 78.) Most important to this appeal,

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[11] A "dose" is the amount of radiation to which a person is or has been exposed.

Waligora never even prepared a RESRAD computation for the Cantrells' or Wrights' properties! (12/06/02 hearing, Exp. 46, p. 69.) After thorough briefing and a hearing which included testimony by Waligora, the Special Master Commissioner concluded that because Waligora assumed pathways for radiation exposure in the future that were not then present, and their future existence did not "rise above the level of speculation," he would not be permitted to rely on RESRAD for his opinions regarding how the extent of contamination present on the properties could affect future potential users of those properties. (V111, p. 16,162.)

Waligora wanted to use these computer calculations even though he conceded (and even said "all scientists agree") that where empirical data (direct radiation measurements, as compared with estimates derived from a computer program) are available, the use of the empirical data is infinitely superior to the use of a computer program. (Waligora dep., Exp. 48, pp. 63-64, 103-04.) Waligora conceded in his report, that "literally thousands of radiation measurements" were available which "allow calculation of the associated radiation doses and a presentation of the [purported] health risks posed. . . ." (Id. at 113-14.) Nonetheless, Waligora chose to use the RESRAD program to simulate improbable future exposures associated with non-existent potential future uses of the properties for his fictitious future farmers.

In addition, the data Waligora used to determine the extent of the land areas allegedly impacted were "bogus" measurements collected by Plaintiffs' consultant Michael Jarrett, by Waligora's own embarrassed admission. (Id. at 314.) Waligora

acknowledged that Jarrett's information was erroneous and, for purposes of Waligora's hypothetical RESRAD calculations, was "not useful." (Id. at 299.)[12]

In contrast, Waligora testified that the radiation measurements performed for Ashland under the supervision of Dr. John Frazier, a Certified Health Physicist employed by Auxier & Associates and then-president of the Health Physics Society, were much more detailed than Jarrett's measurements, and that Dr. Frazier and his colleagues performed a more thorough analysis of the data. (Id. at 292.)[13] Although Waligora initially testified that he had used Auxier & Associates' affected-area dimensions in making his RESRAD calculations (id. at 292-93), he was forced to concede that he had actually used the faulty Jarrett data. (Id. at 288-314.)

With these errors conceded by Waligora, the trial court certainly did not abuse its discretion in finding the RESRAD calculations unreliable and inadmissible. (V111, pp. 16, 156-65.)[14]

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[12] As the Court of Appeals noted at p. 18 of its Opinion, the "trial court previously excluded the Jarrett data as unreliable," and Appellants did "not appeal from this ruling." Now Appellants do attempt to raise this issue, for the first time, in this Court; see, e.g., Brief for Appellants at pp. 23-24. Because the issue has not been properly preserved, this Court should decline to consider the exclusion of the Jarrett data. See, e.g., Hubbard v. Henry, 231 S.W.3d 124, 128 (Ky. 2007) (issue "not preserved for [Supreme Court] review because [appellant] failed to present it to the Court of Appeals)." If this Court does consider the issue (despite Appellants' failure to preserve it), the fact that Plaintiffs' own expert found Jarrett's data "not useful" and grossly in error should be conclusive.

[13] Waligora even described Frazier at trial as "the boss" (12T 1,566), recognizing him as a renowned health physicist respected throughout the world, a "certified health physicist of the first order." (12T 1,564.)

[14] And again, even if Waligora had been permitted to testify at trial about his RESRAD calculations generally, he did not make or offer any such calculations that pertained specifically to the Wright and Cantrell properties. (12/06/02 hearing, Exp. 46, p. 69.)

b. LNT Theory Has No Place Here.

Contrary to Appellant's characterization of them, the Daubert Orders describing the scope of permissible testimony by Waligora make no mention of the LNT theory.[15] **Waligora himself testified that the LNT theory was inapplicable to assessing the hazard associated with TENORM on Plaintiffs' properties, observing that it "is strictly for regulatory compliance and it has nothing to do with the work we're doing here."** (12/06/02 hearing, Exp. 46, p. 40.) In fact, contrary to the controversial LNT theory (which baselessly assumes that there is no safe radiation exposure level), Waligora admitted during his deposition that there is a threshold for gamma radiation, below which exposures pose no risk. (Waligora dep., Exp. 48, p. 171.)

Appellants' effort to insert the LNT theory into this case demonstrates their complete failure of proof on the issue of harm associated with NORM on their properties. While the LNT theory *hypothesizes* that there are very low risks of health effects at low radiation exposure levels, such health effects have never been detected or observed. (12T 1,578.) The most relevant studies to this case are the decades of radium dial painter research.[16] The dial painter research concludes that radium levels 1,000 times the natural radium 226 levels found in all individuals apparently do little or no recognizable damage. As Dr. Frazier explained at trial, the scientific data show that "**thousands of times the**

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[15] LNT theorizes that the risk of health effects caused by low level radiation exposures is directly proportional (linearly related) to the risk of health effects at high exposure levels. As explained by Dr. Otto Raabe, one of the Appellee's experts, this logic is the equivalent of claiming that if a 100-mile per hour hurricane strikes Miami, 10 people will die; so if a 10-mile-per-hour wind blows in Miami, 1 person will die. (Raabe dep., Exp. 44, p. 88.)

[16] This was research conducted over several decades on persons applying radium paint to dials on instruments.

potential doses that we could receive from oil field NORM in this properties . . . the potential health effect from that is either zero or so low it could not be measured. . . ." (17T 2,291.)

Several courts have considered and rejected the LNT theory as representative of a scientific consensus on the risk associated with low-levels of radiation, and as proof that a hazard exists at those low levels. See, e.g., Cano v Everest Mineral Corp., 362 F.Supp.2d 814, 849 (W.D. Tex. 2005); Whiting v. Boston Edison Co., supra; Johnston v. United States, 597 F.Supp. 374, 393 (D. Kan. 1984). As Whiting explained:

> To the extent that it [LNT] has been subjected to peer review and publication, it has been rejected by the overwhelming majority of the scientific community. It has no known or potential rate of error. It is merely an hypothesis. In sum, it has no capacity to be of assistance to a jury in resolving the ultimate issues in this case.

891 F.Supp. at 25. The U.S. Nuclear Regulatory Commission has also criticized the LNT theory:

> NRC, as well as many within the scientific community, is concerned that the uncertainties associated with estimating risks from radiation at low doses and low dose rates are significant, and that there is significant disagreement among scientists regarding the magnitude of the actual health effect at these levels. This scientific uncertainty occurs because *evidence of radiation dose health effects has only been observed at high dose levels and dose rates and significant uncertainty is introduced when extrapolating to estimate the health effects at very low dose levels and dose rates.*

See V101, p. 14,746 (emphasis added). Appellants' attorneys contend that the LNT theory should be accepted because it is used in developing regulatory standards, but Appellants' expert agreed that LNT is "strictly for regulatory compliance and it has nothing to do with the work we're doing here." (12/06/02 hearing, Exp. 46, p. 40.)

It must also be stressed that there are no federal or Kentucky regulations that apply to NORM in the Martha Oil Field. (V101, pp. 14,741-42, February 20, 1996 letter from John H. Hankinson, Jr., EPA Regional Administrator, to Tom Fitzgerald, Director, Kentucky Resources Council, Inc. (copy at Appx. F).) While the EPA may use the LNT to fill an empirical void in some regulatory matters, that does not control here. Appellants' reliance on Goodyear Tire & Rubber Co., 11 S.W.3d 575 (Ky. 2000), for the proposition that the court must "admit testimony that adheres to constructs supporting existing regulatory schemes" (Appellants' Brief, pp. 16-17) is misplaced for the same reason: There is no "existing regulatory scheme" that applies. The passing references in Goodyear to OSHA standards do not change the result here. Indeed, Goodyear supports the results in this case because Goodyear affirmed the trial court's discretion to exclude "expertise that is false and science that is junky . . . ." 11 S.W.3d at 583, quoting from Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999).

Appellants devote pages 10 – 12 of their brief to what they call a "significant development" after the trial of this case with the publication of a report called BEIR VII. They argue that BEIR VII "confirmed that the linear no-threshold model is the appropriate model" for use in this case and complain that the Court of Appeals did not take judicial notice of it. None of that is correct. First, BEIR VII does not offer evidence supporting what Appellants failed to prove at trial - that the levels of radiation on their properties were sufficient to create a health hazard to anyone who may reside there now or in the future. The authors of the report clearly note that the linear no-threshold model remains a hypothesis. In fact, the BEIR VII report states:

> There is no question that radiation exposure at relatively high doses has caused disease and death. However, at

> relatively low doses, there is still uncertainty as to whether there is an association between radiation and disease, and if there is an association, there is uncertainty about whether it is causal or not.[17]

With this uncertainty - - double uncertainty - - noted in BEIR VII itself, the Court of Appeals' refusal to take judicial notice of BEIR VII was prudent and did not constitute clear error.

Secondly, the Court of Appeals did carefully consider BEIR VII and explained why taking judicial notice of the report would not affect the outcome of this case in any event:

> [T]he BEIR VII report would not compel admittance of Waligora's opinions. As noted above, the LNT model was not probative of or applicable to the present danger caused by the levels of NORM occurring on the appellants' properties.

(Court of Appeals' Opinion, p. 21, n.23.)

Finally, and most importantly, even Appellants concede that BEIR VII did not reach any novel conclusion:

> Of course, the conclusion in BEIR VII . . . **is by no means novel**. The BEIR V Report issued in 1990 reached **the same conclusion**, as did the NRPD study in 1995.

(Brief for Appellants, p. 12 (emphasis added).) Again, the Court of Appeals underscored the same point:

> Waligora did refer to the earlier BEIR V report in support of his use of the LNT model, and the BEIR VII report would be merely cumulative of that evidence.

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[17] "Health Risks from Exposure to Low Levels of Ionizing Radiaion," National Research Council/National Academy of Science (2006) ("BEIR VII"), http://www.nap.edu/catalog.php?record_id-11340, p. 133. (This is the same BEIR VII report on which Appellants rely, but which they did not place in the record.)

(Opinion, p. 21, n.23.) Thus, the admission of BEIR VII would have added nothing.

Appellants try to cast this issue as one where scientific knowledge has evolved during the pendency of an appeal in such stark and dramatic fashion as occurred in the recent case of Ragland v. Commonwealth, 191 S.W.3d 569 (Ky. 2006). As this Court noted in Ragland, a "scientific study commissioned by the FBI Laboratory, itself, raised questions about the reliability and relevancy of CBLA [a comparative bullet lead analysis] that were sufficiently serious to convince the Laboratory to discontinue forthwith CBLA testing." Id. at 580. This was after the testimony of "a metallurgist employed as a forensic scientist by the FBI," id. at 574 (emphasis added), who had used the CBLA to help convict the accused. Thus the FBI, whose employee had championed the science of the test at trial and had testified for the prosecution, was publicly disclaiming and disavowing it by the time of the criminal appeal.

There is nothing remotely like Ragland in the present case. There is no criminal defendant facing 30 years in prison, partly because of a test later disclaimed and disfavored by its own proponent. There is no scientist urging the use of the LNT in this civil case and there never was. Appellants' attorneys (not Appellants' scientists or experts) wanted to use the LNT to get a court to assume what they could not prove (i.e., that a health hazard exists on property where it does not!). **Appellants' own expert explained that the LNT construct has no place in this litigation**. (12/06/02 Hearing, Exp. 46, p. 40.) The fact that some new report on the construct has been published (which even Appellants say discusses a theory "by no means novel") changes nothing.

Excluding the LNT theory in this case had only the effect of requiring proof that the material was present in such quantities on the land in question as to constitute a health

hazard, instead of assuming that to be the case. The trial court certainly did not abuse its discretion in requiring Plaintiffs to come up with at least one qualified expert, using actual data from Plaintiffs' properties, to say that the level of NORM on these properties constitutes a health hazard.[18] The Plaintiffs could not do it.

c. The Trial Court Properly Recognized Waligora's Deficiencies.

The parties had agreed that Commissioner Hamblin's Daubert opinions would govern at trial. (V117, p. 17,027.) The trial court, through Commissioner Hamblin, held a Daubert hearing regarding Waligora's proffered opinions on December 6, 2002. (Exp. 46.) At the Daubert hearing, Waligora was examined by Plaintiffs' counsel, cross-examined by Defendants' counsel and Commissioner Hamblin made his own inquiries. Commissioner Hamblin also reviewed Waligora's 318-page deposition. (Waligora Daubert Opinion, V111, p. 16,157.)

Commissioner Hamblin examined the legal requirements under Daubert and the substance of Waligora's proffered testimony. (Id.) He noted that Waligora testified that his only role was to determine the "nature and extent" of the radioactive materials on the Plaintiffs' properties. (12/06/02 hearing, Ex. 46, pp. 20-21.) Commissioner Hamblin then examined whether Waligora's opinions concerning the "extent" of the contamination

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[18] Again, this was a burden that Plaintiffs took on willingly, insisting they would show a health hazard. This makes the present case distinguishable from Smith v. Carbide Chem. Corp., 226 S.W.3d 52 (Ky. 2007), on which Appellants now rely to argue that "no health-hazard showing is needed." (Brief for Appellants, p. 9.) This is another issue Plaintiffs failed to preserve for appeal. (See discussion at Section III below.) Plaintiffs in this case (unlike the plaintiffs in Smith) are the ones who insisted they would prove a health hazard. Indeed, they needed to prove one to justify the fear-mongering that surrounded the lawsuit and continues to this date. The problem for Plaintiffs' case is that such a hazard, as the proof showed, simply does not exist.

met the guidelines set forth in Daubert, which are whether the opinions are scientifically valid and legally sufficient to assist the jury. (V111, p. 16,159.) Commissioner Hamblin further noted that **Waligora testified that he could not state whether the contamination had caused a health hazard because that was beyond the scope of his review**. (Id. at 16,159.)

Commissioner Hamblin specifically found that Waligora's opinions were based on impermissible speculation about possible future uses for the properties, which were used as inputs in his calculations using the RESRAD program. (Id. at 16,162.) Commissioner Hamblin also found that Waligora's use of the RESRAD computer program was flawed because he had used the invalid data supplied by Jarrett. (Id. at 16,160-61.) Commissioner Hamblin's decision is fully supported by an extensive record and his careful review and analysis of it.

The trial court's careful consideration and reconsideration of the limitation of Waligora's testimony is indicative of its thorough approach to the entire case. Based on Waligora's own self-confessed limitations, Appellants cannot genuinely contend that the trial court erred in reaching this conclusion.

B. WATER AND NON-RADIATION CLAIMS WERE PROPERLY DISMISSED AND EXCLUDED AS TIME-BARRED.

Another issue that cannot be genuinely pressed by Appellants is the dismissal of claims and exclusion of evidence related to water and land issues that Plaintiffs had known about for **decades** prior to bringing suit. The untimeliness of Appellants' claim of water contamination and contamination by non-radioactive material was briefed extensively and the trial court properly dismissed these claims as time-barred. (V111, pp.

16,168-173.)[19] As the trial court noted, the water issue was very different because, unlike NORM, water problems associated with oil production had been widely known for many years. (V111, p. 16,168-69.) Ashland had voluntarily entered into an Administrative Order on Consent with the EPA back in 1987 that addressed the very concerns Plaintiffs tried to raise 10 years later in this lawsuit. In what the EPA described as a "**national model for other cooperative agreements**" (July 29, 1987 EPA Region 4 Environmental News, Appx. G) (emphasis added), Ashland voluntarily committed to spend significant sums of money to plug and abandon wells, restore surface production pits and tank battery facilities, evaluate and monitor ground water quality, and provide alternative water supplies to residents on its leases (including Plaintiffs).

The Administrative Order had been the subject of public comment and was part of EPA's public record, thus constituting "constructive notice of the order to all affected persons." See, e.g., Nutt v. DEA, 916 F.2d 202, 203 (5th Cir. 1990) (plaintiff was deemed to have constructive notice of administrative order from drug enforcement agency). Additionally, the evidence was uncontroverted that the owners of these properties had actual knowledge of water damage from oil production many years before they ever filed suit. (V116, p.16,169.)

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[19] To the extent Appellants are complaining that evidence of water and non-radiation claims was excluded, they failed to preserve that issue because they did not tender the evidence by avowal. Their expert, Daniel Stephens, did testify by deposition and did prepare a report but Appellants did not tender them by avowal or otherwise make a record for this Court to review. In the absence of such a record, an appellate court will not consider the exclusion of such evidence an error because it cannot tell what the evidence would have been. See, e.g., Mills v. Comm., 95 S.W.3d 838, 843 (Ky. 2003).

a. Cantrells

Woodie Cantrell told an interviewer conducting a water survey prescribed by the EPA in 1987 that "water here is terrible," water quality had worsened over the years, and "Ashland has ruined all this damn water." (V99, pp. 14,356-57, Appx. H.) The Cantrells also testified that, by the 1970s and 1980s, they believed that their water was contaminated with benzene and other "dangerous" substances, that it was dangerous to drink, and that Ashland was responsible. (Wathalene Cantrell dep., Exp. 2, pp. 63-74.)[20] Around 1976, Mrs. Cantrell noticed oil and other material in her well water, believed that the water was dangerous, complained to Ashland and state officials about it, arranged for testing by the state, explained the test results to her husband, and never drank the well water again for fear that it would cause cancer. (Id. at 86-92.)

The Cantrells complained about damage to their property and Defendants' oil production activities for many years before filing suit. They said that for decades before filing suit, and during the entire time Ashland operated on their property, they believed that Ashland's conduct was improper and causing damage. (Id. at 28-30.)[21]

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[20] When Appellants came into ownership possession of the properties, Ashland Oil had already been there pursuant to leases for many years, with oil wells, pump jacks, pipes, etc. already on the properties. (16T 2,015.)

[21] See also V52, pp. 7,552-60, Defendants' Memorandum in Support of Motion for Summary Judgment Against Woodie and Wathalene Cantrell at pp. 2-10, and cited evidence. They also said Ashland's alleged improper conduct and interference with their use and enjoyment of the property had ceased by the end of 1989. The Cantrells admitted that they had no evidence that they had sustained injury from any allegedly wrongful conduct by Defendants from October 1992 to October 1997, the five-year period immediately preceding the filing of this action. (See Wathalene Cantrell dep., Vol. 1, Exp. 2, pp. 23-30, 38-39, 45-48, 62-78, 82-92; Wathalene Cantrell dep., Vol. 2, Exp. 2, pp. 5-9; Woodie Cantrell dep., Vol. 1, Exp. 1, pp. 23-30, 81-86, 160-67; Woodie Cantrell dep., Vol. 2, Exp. 1, pp. 52-59, 61-64, 66.)

b. Wrights

Similarly, deposition testimony demonstrated that the Wrights had long believed their property and water had been impacted by Defendants' oil production activities. In fact, in 1988, Shirley Wright told the interviewer conducting the water study (under agreement with the EPA) that her drilled well contained oil and salt "probably around 20 yrs. ago." (See V99, pp. 14,414-15, Appx. I.)

Luther Wright, who lived on the Wright property from 1925 to 1934, complained that Ashland damaged the property by installing "pipelines all over the farm," putting in roads, knocking down fences, interfering with the livestock by spilling oil, and contaminating the water with oil. (Luther Wright dep., Exp. 24, pp. 15, 34, 35, 39.) **However, none of these activities occurred after 1960, and many did not occur after the 1930s.** (Luther Wright dep., Exp. 24, pp. 43-49, 52-54, 60-63.) Shirley Wright confirmed that no Ashland activities took place on the property after the wells were plugged in 1989. (See Shirley Wright dep., Exp. 24, pp. 14-21.)

Shirley Wright remembered their father complaining to Ashland before his death in 1953 and their mother continuing to complain in the 1960s, mainly about the water. (Id., pp. 22-23.) Similarly, Murl Wright (Luther and Shirley's brother) complained that the water on their property "went bad" in the 1960s, and was undrinkable. He said that Ashland told their mother back in the 1960s that the water was unsafe to drink, and he believed that Ashland was responsible for the quality of the water. (Murl Wright dep., Exp. 15, pp. 19-20.) Harold Wright, another brother, testified that Ashland put in a cistern in the late 1960s or 1970s, to replace water from the Wright's dug well. He believed that Ashland did this because Ashland's waterflooding contaminated the well

water (Harold Wright dep., Exp. 11, pp. 106-09.) In fact, in the 1960s, the Wrights stopped using water from their drilled well, because of contamination that they believed was caused by Ashland's waterflooding. (Id., pp. 106-112.)

The Wrights had no complaints about the water in recent years. **Luther Wright said that -- for at least the last 25 years -- Ashland has "kept it clean, pretty much clean."** (Luther Wright dep., Exp. 24, p. 51 (emphasis added).) In addition, Murl Wright testified that the water was no longer a concern to him since Ashland had provided city water. (See Murl Wright dep., Exp. 15, pp. 18-21.)

Appellants offered no evidence in any event on this issue as to their particular properties. Their expert, Waligora, testified that he had made no dose calculations based on their water. (Waligora dep., Exp. 48, p. 27.) It is the same failure of proof that exists throughout the case.

Dr. Frazier, on the other hand, testified in his deposition that he would have no reservation about drinking water from any of the wells on the properties that were tried, except for the bad taste associated with the solids (non-NORM) in the water. (Frazier 10/08/02 dep., Box 14, pp. 195-6.) Frazier's report specifically mentioned Woodie Cantrell's property and stated that the internal dose from consuming water from wells on these properties is insignificant. (V101, pp. 14,719-22.)

More importantly, it is beyond dispute that the Appellants were all provided alternative water supplies (some more than once) by Ashland and yet still did not commence suit within five years thereafter.[22]

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[22] These facts were established by Plaintiffs' own sworn deposition testimony, as detailed to the lower court at V107, p. 15,574. The water issues were given exhaustive

Plaintiff	Year in Which Ashland Provided Alternative Water Supply	Record Source of Information
Woodie & Wathalene Cantrell	**1989** (Ashland provided bottled water for about 6 months, then city water)	Wathalene's dep., Vol. 1, Exp. 2, pp. 83-87; Woodie's dep., Vol. 1, Exp. 1, p. 164
Wright Heirs	**1960s** (Ashland put in cistern) **1990** (Ashland hooked up city water)	James Wright dep., Exp. 15, pp. 96-97

On this **uncontroverted** record, the trial court properly found the water and non-radiation claims time-barred, as it was undisputed that the lawsuit was not filed until October 1997. (V1, pp. 1-11.)[23]

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treatment at V107, p. 15,569.

[23] Appellants try to come within the rule that a defendant can be estopped from asserting a limitations defense where it "obstructs or prevents [a plaintiff] from instituting his suit while he may do so." Adams v. Ison, 249 S.W.2d 791, 792 (Ky. 1952). (See Brief for Appellants, pp. 27-28.) Here, however, Appellees did nothing to prevent Appellants from filing their suit.

In Adams, the plaintiff was injured after a surgeon left a rubber tube in the plaintiff's lung following a surgery. The court held that the plaintiff's claim against the doctor was not time-barred, even though it was not asserted for approximately 20 years, because the doctor who had assured the patient that the tube would cause him no harm owed a fiduciary duty to his patient and the knowledge was "peculiarly within the knowledge of the wrongdoer." Adams, 249 S.W.2d at 792.

Here, Appellees owed no fiduciary duty to Appellants. More importantly, at no time did Appellees obstruct or prevent Appellants from independently assessing the damage to water or the levels of NORM. In fact, Appellees widely publicized the fact that NORM was present in the Martha Oil Field. Appellees were not the only entities with information regarding the alleged water contamination. Newspapers carried articles; citizens groups attended meetings; Ashland entered into a public Consent Order that addressed the very water issues complained of here. (Appx. G.) Appellants had every opportunity to obtain information from the public agencies that were working with Appellees to assess the situation.

Appellants argue that their causes of action did not arise until they knew exactly what type of contaminants existed in the water. Under Kentucky law, however, a cause of action arises when a party knows that he has been impacted and knows who caused the impact. Conway v. Huff, 644 S.W.2d 333 (Ky. 1982). "The statute of limitations begins to run as soon as the injury becomes known to the injured." Matherly Land Surveying, Inc. v. Gardiner Park Dev., LLC, 230 S.W.3d 586, 591 (Ky. 2007). The date the plaintiff discovered that he or she may sue for the wrong is not determinative. Blanton v. Cooper Indus., Inc., 99 F.Supp.2d 797, 801 (E.D. Ky. 2000). It is the discovery of the injury (and not discovery of the cause of action) that begins the running of the statute of limitations. It is not necessary for the plaintiff to discover the "extent" of his alleged injury, but only that he was, in fact, injured. Louisville Trust Company v. Johns-Manville Products Corp., 580 S.W.2d 497, 500 (Ky. 1979). See also Old Mason's Home v. Mitchell, 892 S.W.2d 304, 308 (Ky. App. 1995) (affirming summary judgment based on statute of limitations and cited with approval by this Court in Matherly).

Here, it was uncontroverted that Appellants testified their water had been impacted (in their words, "ruined" and "by Ashland") many years before they filed suit. Indeed, their water systems had been completely replaced by Ashland with city water.

Finally, the Court of Appeals studied this issue carefully, as reflected in pages 7-10 of its Opinion. The Court of Appeals found that Appellants' claims on these issues "were untimely" (p. 10) and properly affirmed the trial court's decision.

II. THE TRIAL COURT SHOWED EXTRAORDINARY PATIENCE IN GIVING PLAINTIFFS EVERY OPPORTUNITY TO PROVE THEIR CASE.

Appellants' accusations that the trial was "grossly unfair" are completely refuted by the record before this Court. In reviewing this record, the Court will see that Plaintiffs were allowed to choose which cases would be tried first (V92, pp. 13,370-76 and 13,409-17); were allowed to miss deadline after deadline, year after year, for expert and other pretrial disclosures (see Orders at Appx. A); and were permitted to take their case to a jury even though the law was clear there could be no recovery. Also, as discussed in Section IV below, Appellants were not entitled to a trial to begin with, so they cannot be entitled to a *new* trial.

A. ORDER OF PROOF.

The trial court acted within its discretion in requiring Appellants to testify prior to their experts. Under Kentucky law, "the order of proof shall be regulated by the [trial] court so as to expedite the trial and enable the tribunal to obtain a clear view of the whole evidence." CR 43.02(c). See also KRE 611(a) ("court shall exercise reasonable control over the mode and order of . . . presenting evidence."). The trial court properly determined that the function of Appellants' experts was to provide opinions rather than facts, and that Appellants' experts should testify based upon the factual evidence admitted at trial.

B. OPENING STATEMENT.

Appellants contend that the trial court erred in striking a portion of their opening statement that included an improper Golden Rule argument and a reference to Ashland Inc.'s internal code of conduct. (6T 687-88.) What the Court told the jury was absolutely correct:

> The standard that we are to decide here which will be given to the jury in instructions at the end of submission of evidence is not based on that type of standard ["Do unto others"]. So if you'll disregard that, then we'll start fresh this morning . . . .

(6T 688.) The Court also told counsel it was less concerned with the "Golden Rule" nature of the argument than the fact that it was argument (during what was supposed to be opening statement) and that it referred to standards that are not legal standards. (6T 674-75.) Since the purpose of opening statement is to outline the issues in the case (see, Co-De Coal Co. v. Combs, 325 S.W.2d 78, 79 (Ky. 1959), it would have been error to leave the jury thinking - - from the very beginning of the trial - - that they would be deciding the case on the improper standard alluded to by Plaintiffs' counsel. See Parker v. Commonwealth, 241 S.W.3d 805, 808 (Ky. 2007) ("While there is certainly the temptation to advance one's argument at the beginning of the trial . . . this is not the intent of opening statement, and pushing the envelope results in error . . . ."). The trial court properly avoided error when Appellants' counsel "pushed the envelope" in this case.

C. EVIDENCE REGARDING OTHER PROPERTIES.

Appellants repeatedly tried to violate the Court's pretrial orders and well-established evidence law in order to put on extensive evidence about other properties not involved in the case. The lower court had its hands full dealing with the cases before it and appropriately determined it was not going to try cases that had already been settled years ago or otherwise disposed of. (V108, p. 15,679.) The gist of Appellants' complaint on this issue is that they were forced to follow the rules of evidence and prove harm, if any, to their own specific properties. The fact that they could not show any harm to their

properties was not the trial court's fault but was caused by their own failure of proof, because the harm simply does not exist.

1. Bob Grace's Testimony.

Appellants suggest that Grace would have testified that improper fractures of geological formations resulted in the migration of NORM throughout the field,[24] but Grace disclaimed any knowledge of NORM. (7T 918.) In fact, Appellants' counsel admitted to the Court: "I don't really even think that [Grace] can tell the Court that, that was NORM." (8T959.)

Most importantly, regardless of how NORM came to be on the property, Plaintiffs were not able to show any harm to the property from its presence, as discussed at length above. Accordingly, Grace's testimony would only have served to confuse the jury and prolong the trial, without being able to fill in the fatal void in Plaintiffs' case.

Appellants also complain at p. 29 of their Brief that Ashland made "untimely challenges" to Grace, Kimbrell, and Smith "long after the Daubert deadline had come and gone . . . ." But the challenges to Grace, Kimbrell, and Smith at trial were based on Plaintiffs' attempt to call them on issues made irrelevant or excluded by the Court's pre-trial rulings. This had nothing to do with Daubert deadlines but everything to do with the fact that the Plaintiffs just kept ignoring the orders *in limine* and other pre-trial rulings.

For example, the Court's June 28, 2002, scheduling order (part of Appx. A here) warned Plaintiffs to make full disclosures of what their experts would say and that anything not disclosed would not be admissible at trial. Grace testified in his deposition that he did not know of any way in which Ashland had deviated from industry standards

[24] Appellants' Brief, p. 21.

in its use of nitroglycerine. (7T 904.) Yet Plaintiffs wanted to call him at trial to prove some deviation from industry standards. (V92, p. 13,449.) Similarly, Plaintiffs wanted Grace to testify at trial about NORM, but Grace had sworn in his pre-trial disclosures that he was not knowledgeable about NORM and, in his words, would not recognize Radium 226 if it came up and bit him. (7T 918.) Grace reaffirmed this lack of knowledge in voir dire outside the presence of the jury. (Id.) Ashland's objection to Grace at trial was that "everything in his report, other than the NORM, [was] out of the case . . . and he told us in his deposition that he didn't expect to 'testify to anything in this case about radiation or NORM or radium . . . .'" (7T 928.) The Court recognized that Ashland's objections were to testimony outside the parameters of the pre-trial disclosures and appropriately limited Grace on those grounds. (8T 970-71.) While Grace was allowed to testify, as an expert, and give his opinion that Ashland's waterflooding was inappropriate, Plaintiffs simply were not allowed to violate the pre-trial orders and come up with something new that the witness had previously sworn would not be his testimony at trial anyway.

2. Bobby Alexander's Testimony.

The testimony that Appellants wanted to place in the record from Alexander (an employee of Ashland Exploration Inc. ("AEI") who was involved in remediation efforts) included information about plugging and abandonment on other properties, what he had told other landowners in the area about NORM and remediation efforts in the Martha Oil Field. All of this testimony was properly excluded.

As Appellants made clear, they intended to use Alexander's testimony about plugging and abandonment on other properties to argue that AEI acted negligently and with gross negligence in the field generally. (E.g., 2T 170-172.) These alleged acts of

negligence on other properties could not be tied to any impact on Appellants' properties. Instead, Appellants intended to use the testimony in an effort to inflame and confuse the jury.[25]

3. Chris Dawson's Videotape and Testimony.

Appellants argue that they were unfairly precluded from using a videotape made by Chris Dawson to show AEI's contractor "pumping contaminated water and oil out of a pit and into Blaine creek . . . that is the boundary to the Wright Estate." (Appellants' Brief, p. 39.) Every part of this statement is incorrect.

Dawson was not qualified by experience or education to offer an opinion, and had no actual proof to support, that the water he observed being pumped into Blaine Creek (in broad daylight, by persons who knew they were being videotaped and went on about their work) was "contaminated." Dawson admits he did not take any samples but based his opinion on visual[26] observations only. (Chris Dawson dep., Exp. 47, pp. 75-76.) He is not a scientist but instead worked as a security guard at Wal-Mart. (Id. at 6.) He

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[25] Inexplicably, Appellants wanted to present evidence that Alexander told landowners that NORM was not harmful. As the trial court properly recognized, Appellants had no evidence that NORM on their properties was harmful. (2T 181-82.) Thus, Appellants had no way of demonstrating that anything that Alexander allegedly told area residents was false. If anything, this testimony would have benefited Appellees because it would have been even more evidence that NORM in the area is not harmful.

The same is true of Alexander's testimony regarding dosimeter badges worn by Ashland's employees shortly after NORM was discovered. Appellants point to no excluded evidence anywhere that would have shown that these employees were ever exposed to NORM in any significant amount. The inference would have benefited Ashland, not the Plaintiffs, because these oil field employees spent significantly more time in areas of elevated NORM than did any Plaintiff, yet there was still no evidence of any significant exposure whatsoever.

[26] The parties had stipulated, of course, that NORM is invisible. (5/22/03 hearing, Exp. 52, pp. 5-6 and read to jury at 3T 309-10.)

graduated from high school in 1992 and has had no further education. (Id. at 27). He worked at Food City for a few years, for his uncle in construction work for a while, and then for Mike Jarrett, from early 1996 to early 1997. (Id. at 40, 50-51.) (This is the same Jarrett who, working with Plaintiffs and their attorneys, placed the improper DANGER! signs everywhere and provided Waligora with the "bogus" data.) He says Jarrett taught him how to use a Geiger counter (id. at 40) to measure radiation, but he did not have such an instrument with him on the day the videotape was made. Someone else present was taking radiation measurements, he believes, but he could not see what readings or measurements were being registered. (Id. at 88-89.)[27] All he could say was that he observed water being pumped into a stream in broad daylight on property not involved in this lawsuit. Dawson testified that what he observed was on the property of T. C. Cantrell (Dawson dep., Exp. 47, pp. 70, 74.) T.C. is not one of the Cantrells in this lawsuit. While Plaintiffs' attorneys tried to "testify," through leading questions, that what Dawson saw was some improper conduct, Dawson himself honestly admitted that he only speculated that the material was radioactive based on his **visual** inspection. (Id., p. 75.) He took no samples and did no testing. (Id., pp. 75-76.) And if there is one thing

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[27] Even if the evidence had been otherwise competent, it would have been properly excluded under KRE 403 (as argued at V108, pp. 15,705-06) because any probative value was "substantially outweighed by the danger of undue prejudice" or "by considerations of undue delay . . . ." Dawson could not identify any of the other people shown on the video. (Chris Dawson dep., Exp. 47, pp. 71, 80, 87.) He did not know who they are or how they can be reached to explain what they were doing, or what the measurements did show on that day. And Plaintiffs waited over six years (with the videotape in the possession of their consultant, Mike Jarrett, that entire time) and after discovery had ended to even disclose it. (See V108, p. 15,706.)

in this case that is undisputed (and has even been stipulated to), it is that radiation **cannot** be seen or detected by human senses.

In summary, Dawson did not hold himself out as qualified to opine on whether something contains radiation or not. The presence of radiation clearly could not be established by his testimony or his videotape, as radiation is not visible. Even if it were, Dawson testified that all of this occurred on the property of T. C. Cantrell, who was not a plaintiff. Dawson had no knowledge relevant to the properties involved in the lawsuits or on this appeal.

For all these reasons, the Chris Dawson testimony and video were properly excluded.

4. Clay Kimbrell's Testimony.

Appellants' own brief confirms that Clay Kimbrell was not initially forthcoming with the trial court, but finally did admit that the testimony he wanted to offer did not even involve samples taken from the properties at issue in the trial! (11 T 1327.) This was another painful instance of Appellants' attorneys willfully violating the previous Orders that the trial court had entered to keep the trial focused on the properties at issue.[28]

Also in direct (and contemptuous) contravention of the court's rulings, Appellants kept eliciting testimony from Kimbrell that Appellees' operations were "negligent" and

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[28] Ashland had to live with those same Orders, as it was similarly precluded from introducing evidence on other properties. This even included the affidavit and deposition testimony of Karl McKinster that he had "planted" radioactive pipe on his father's property in order to create a claim in the lawsuit. (See Affidavit of Karl McKinster, V88, pp. 12,872-73.) This fabrication of a claim was relevant at trial because Woodie Cantrell's own claims of water contamination were based, in part, on samples taken when no one else was permitted to be present to observe. (V102, p. 14,859.) The trial court nevertheless excluded all of this evidence by its Order *in limine*, not allowing Ashland to introduce evidence as to other properties either. (V108, pp. 15,672-82.)

"reckless." (11T 1,390-91; 1,393-94.) Appellees moved for a mistrial based on this improper testimony. (11T 1,399-1,409.)[29] Even after a prior motion for a mistrial based on Appellants' counsel's questioning regarding "recklessness" of operations, Appellants' counsel persisted in attempting to elicit this testimony. (11T 1,437.)

Judge Hurst properly noted that "The jury determines what's negligent. And there's a definition of negligence that goes into the instructions." (Judge Hurst, 11T 1,404.) "[T]here is an occasion where [an] expert witness may make . . . express an opinion as to what might be considered the ultimate issue,[30] but I don't recall a case where they can make that statement using the legal terminology of the conclusion that must be within the responsibility of the jury to determine." (Judge Hurst, 12T 1,492.) There was no probative value to Appellants' repeated use of the terms "negligent" and "reckless," and there was a high likelihood of prejudice in that the jury would confuse Kimbrell's use of those terms with those terms as they would be defined in the instructions to the jury.

Because Appellants destroyed their own witness with improper questioning, Kimbrell's tainted testimony was finally stricken. (12T 1,506.) Appellants have no one but themselves to blame for this result.

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[29] Appellees moved for a mistrial four times, and every time were opposed by the Appellants. See discussion at G below. On the very issue of Kimbrell's testimony, the court asked Plaintiffs' counsel directly if they wanted a mistrial declared and they said no. (12T 1,513.)

[30] Judge Hurst was probably referring to Stringer v. Commonwealth, 956 S.W.2d 883 (Ky. 1997), cert. denied, 523 U.S. 1052 (1998), in which Kentucky abandoned the former "ultimate issue" test, but even in Stringer, the court noted that the physician was not giving an opinion on guilt, which is what Kimbrell was being asked to do.

D. JARRETT'S MEASUREMENTS

This issue was not raised in the Court of Appeals and has not been preserved. See discussion at Section III below. Since Jarrett's "bogus" measurements were discredited by Appellants' own expert, Waligora, the exclusion of this proof could not have been error. (See Waligora dep., Exp. 48, pp. 299, 314.)

E. ARP MEMORANDUM AND TESTIMONY.

Appellants attempted to introduce deposition testimony of Earl Arp, a former Ashland employee, who had circulated a memorandum from Gulf Oil Company in 1982 about proposed regulations pertaining to radionuclides.[31] The trial court rejected Appellants' "ancient record" argument because it did not eliminate the hearsay that comprised the document from Gulf Oil Company. (13T 1,681.) In addition, the trial court excluded the evidence as dealing with regulatory issues that had already been excluded by pretrial rulings. (Id. at 1,683-84.) Finally, the court excluded the testimony because the author of the memorandum had never been qualified as an expert witness. (Id. at 1,683.) Thus the introduction of this evidence would have violated both the court's own pretrial rulings and the Kentucky Rules of Evidence. It was properly excluded.

F. REMEDIATION COSTS AND ACTIVITIES ON OTHER PROPERTIES.

Estimated costs of remediation were properly excluded because Plaintiffs chose to pursue the purported reduction in fair market value instead. See Ellison v. R. & B.

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[31] The memo never referred to "NORM," as Appellants misrepresent. (Appellants' Brief, p. 41.) Instead, it referred to regulations that have not, to this day, ever been enacted.

Contracting, Inc., 32 S.W.3d 66, 70 (Ky. 2000) ("[c]laimants may receive restoration cost damages in injury to property cases only where compensation in the form of restoration costs is the least expensive way to make those claimants whole") (emphasis added). Since Plaintiffs claimed that costs of remediation far exceeded the fair market value of the properties, those costs could not be a proper measure of damages. See also Lewis v. Charolais Corp., 19 S.W.3d 671, 677 (Ky. App. 2000) (any error in failure to admit expert testimony as to the estimated cost of digging a replacement well was harmless "considering the jury's determination that [defendant] had no liability . . . .").

More fundamentally, the Court recognized that it was Ashland, not the Plaintiffs, who had taken on the responsibility to conduct remediation. (V91, pp. 13, 253-64.) To have allowed speculation as to what the remediation might have cost someone else would have been extremely confusing to the jury. Plaintiffs' own expert agreed he could not say what volume of soil would need to be removed, if any. (See V100, pp. 14,542-44.)

Evidence of remediation on other properties was also properly excluded. Appellants contend that KRE 407 does not apply to remediation efforts taken on other properties, and that the trial court's exclusion of such evidence on these grounds was improper. Appellants argue that they were not attempting to prove negligence through this evidence, but to prove a nuisance and show that Ashland would not have cleaned up their properties.[32] Appellants could not have used this evidence to prove a nuisance,

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[32] This, in turn, would have led to Ashland putting on proof that it had successfully remediated numerous other sites, as well as proof that the occurrence of materials on other properties differed in extent and location from materials on Appellants' properties -- all leading to a trial that eventually would have been about every property in the Martha Oil Field other than the ones at issue.

because it is not possible to have a nuisance when the substance cannot even be detected by humans. See City of Louisville v. Munro, 475 S.W.2d 479, 482 (Ky. 1971) ("The general rule . . . is that in order to be a nuisance the use of property must disturb physical comfort or be offensive to physical senses" (emphasis added). See also Rockwell Int'l Corp v. Wilhite, 143 S.W.3d 604, 627 n. (Ky. App. 2003) 106 (if substance is "imperceptible to ordinary persons" and there is no "sensory offensiveness," there is no nuisance in absence of a health or safety hazard).

G. PARKS' TESTIMONY.

Appellants criticize the exclusion of portions of Mark Parks' deposition testimony. (Appellants' Brief, pp. 44-45.) Nothing in Appellants' argument suggests how the outcome of the trial would have been different if the inadmissible testimony had been admitted. Appellants' argument addressed the manner in which the Court's rulings arose, instead of articulating the possible relevancy and admissibility of any substantive testimony. What is clear from the record is that Appellants were trying to offer testimony that would have served only to confuse the jury from a witness they had not designated as an expert and who had nothing to offer regarding the properties that were being tried.

H. APPELLANTS' REQUESTED INSTRUCTIONS.

Appellants tendered no instructions reflecting the law governing property damage claims related to a substance that is imperceptible to the human senses. Their instructions were properly rejected as not being proper under Kentucky law.

Appellants complain that no jury charge was given on trespass or nuisance (Brief at p. 45), but there is no actionable claim where the nuisance or trespass has not

"evolve[d] from a mere stigma, or damage to the reputation of the realty, into an actual injury or harm." Smith, 226 S.W.3d at 55.[33]

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

Id. at 56 (emphasis added). That "reputation" damage was all that Plaintiffs could prove, and it is not actionable. Id.

Appellants also mistakenly complain that the instructions were "based on a stigma doctrine from Illinois."[34] Id. In fact, Gulledge v. Texas Gas Transmission, 256 S.W.2d 349 (Ky. 1952), is Kentucky law. Finally, the Appellants complain that there was no instruction on nominal and punitive damages.[35] Since the jury never even got to the damages issues (finding against Appellants on liability), this cannot be grounds for reversal.[36]

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[33] As noted earlier, Plaintiffs insisted throughout these proceedings that they would prove a health hazard, bringing this case within Rockwell. While this Court has expressed (in Smith, supra) a willingness to consider injury in appropriate cases even in the absence of a health hazard, Appellants did not preserve that issue for appeal. Appellants did not preserve for appeal the idea that they should not have to prove a health hazard; instead, they wanted to prove one but could not do it!

[34] Appellants call this "the Gatledge case out of Illinois" on p. 46 of their Brief. It is actually a Kentucky case involving a geologic region known as the Illinois Basin.

[35] Since punitive damages must now bear some rational relationship to compensatory, any punitives award based on nominal damages would be miniscule in any event.

[36] Appellants say at p. 49 of their Brief that they are preserving the other issues mentioned in their prehearing statement but not addressed in their Brief. Those arguments, however, should be deemed waived or abandoned. See, e.g., White v. Rainbo Baking Co., 765 S.W.2d 26, 30 (Ky. App. 1988) ("issue not discussed in the briefs will not be reviewed by the appellate courts"), citing Milby v. Mears, 580 S.W.2d 724 (Ky. Ct. App. 1979). See also Koplin v. Kelrick, 443 S.W.2d 644, 646 (Ky. 1969) (Court of

I. APPELLANTS' FAILURE TO SEEK MISTRIAL OR RECUSAL.

Appellants complain now that they were treated unfairly by the trial court. This issue was not preserved because **Appellants never asked for a mistrial, recusal, continuance, admonishment, or any other corrective action**. Indeed, as noted above, Appellants objected repeatedly to Ashland's own motions that the Court stop the trial and start the case over. (See 5T 572; 11T 1,399; 11T 1,438, argued at 12T 1,483-97; 19T 2,518.) Where a party fails to ask for a mistrial the issue of unfairness is not preserved for review. Glass v. Com., 769 S.W.2d 764, 766 (Ky. App. 1989). **Appellants opposed each of Appellees' motions for a mistrial including one made at the close of all of the evidence**. Presumably, if Appellants really felt they had not been treated fairly, they would have joined in this last motion, after all the proof was in, or made their own.[37]

Appeals would assume issue was abandoned where it was not briefed); T. M. Crutcher Laboratory v. Crutcher, 288 Ky. 709, 157 S.W.2d 314, 318 (1941) ("matters not insisted upon in brief may be treated as waived"). This particularly applies to Tammy Cantrell, who is listed as an Appellant, but whose claims were dismissed when her counsel pointed out just before trial that she no longer owned the property. (1T 22.) Her claims were not mentioned or addressed in the Brief for Appellants at the Court of Appeals or in this Court and, accordingly, there was nothing for Appellees to respond to here.

[37] Appellants also argue that the trial court "ridiculed" them, but the record does not support that contention. Instead, as the record shows, much of this was just good natured banter and, in any event, took place outside the presence of the jury. Again, Appellants made no motion for recusal or mistrial or other action to preserve the issue for appeal. A review of the record reveals that, both before the jurors and outside their presence, the trial judge continued to display respect for Appellants' counsel, even in the face of their repeated efforts to circumvent carefully-reasoned pretrial orders limiting testimony and proof so that the trial could proceed in a fair and orderly manner.

III. APPELLANTS' REMAINING ISSUES WERE NOT PRESERVED FOR APPEAL.

The Court of Appeals painstakingly considered all of the issues Appellants put before it, and its Opinion should be affirmed for the reasons explained at length by that Court.

But several arguments Appellants now make here were never put before the trial court or the Court of Appeals. Specifically:

- Appellants' argument on pp. 23-24 of their Brief that Jarrett's data was wrongfully excluded did not appear in their Brief to the Court of Appeals;
- Appellants' argument that they do not have to prove a health hazard (Brief for Appellants at pp. 9-10) should not be considered here because it was not made below either. To the contrary, Appellants insisted to the trial court that they would prove a health hazard, and their only complaint to the Court of Appeals was that their evidence was excluded.

As this Court has repeatedly held:

> It goes without saying that errors to be considered for appellate review must be precisely preserved and identified in the lower court.

Skaggs v. Assad, 712 S.W.2d 947, 950 (Ky. 1986), citing Combs v. Knott Co. Fiscal Court, 283 Ky. 456, 141 S.W.2d 859, 860 (Ky. 1940). As the Court explained in Newell Enterprises v. Bowling, 158 S.W.3d 750, 755 (Ky. 2005):

> [A]ppellants will not be permitted to feed one can of worms to the trial judge and another to the appellate court.

Id., citing Kennedy v. Commonwealth, 544 S.W.2d 219, 222 (Ky. 1976). Yet that is exactly what Appellants attempt to do here: they did not appeal from the exclusion of Jarrett's measurements (probably because their own expert, Waligora, said they were bogus and "not useful"), yet they try to make that argument for the first time here. More importantly, because it pervades their entire case, they now try to argue that they should

not have to prove a health hazard, even though they are the ones who insisted below that they would prove one! This is a different "can of worms" indeed and has not been preserved for appeal.

IV. THE TRIAL COURT ERRED IN NOT GRANTING SUMMARY JUDGMENT TO ASHLAND OR DIRECTING A VERDICT IN ITS FAVOR.

CROSS-APPEAL

[This issue was preserved by Ashland's motion for summary judgment. (V111, pp. 16,174-77) and its motions for directed verdict at the close of Plaintiffs' case (16T 2,062) and at the close of all the evidence (19T 2,521). It was also preserved by a protective cross-appeal in the Court of Appeals and by a protective cross-motion for discretionary review, which was granted December 12, 2007.]

The only error committed by the lower court was in letting this case go to a jury at all. Since the jury verdict was in favor of Ashland, this was harmless error because the judgment was affirmed. This cross-appeal is similarly protective and need not be considered if the Court decides to affirm the Court of Appeals or to dismiss the appeal.[38]

Because Plaintiffs were proceeding to trial only on a "stigma" claim, Ashland was entitled to summary judgment on the basis Kentucky law (recently bolstered by this Court's decision in Smith v. Carbide, supra). Instead, again demonstrating extraordinary patience for the Plaintiffs and giving them every benefit of the doubt, the trial court allowed them to proceed on a theory of decreased fair market value as articulated by Plaintiffs' counsel at the May 22, 2003, hearing. (Exp. 52, p. 100.) But as this Court has recently affirmed:

> [D]ecreased fair market value is not harm to the property, it is only a means of measuring the harm.

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[38] See, e.g., Comm. v. McGinnis, 641 S.W.2d 42 (Ky. 1982) (dismissing appeal as review was "improvidently granted").

Smith, 226 S.W.2d at 56. See also Chapman v. Beaver Dam Coal, Ky., 327 S.W.2d 397, 400 (1959) (court cannot presume future total destruction of value when there is no concrete evidence of past or present injury).

A loss in value, with no physical harm to the property, is just a "stigma" claim. Kentucky law has long rejected stigma claims where no physical injury to the property occurs. E.g., City of Louisville v. Munro, 475 S.W.2d 479 (Ky. 1971) (value of property depreciated immediately when a nearby site was selected for a zoo, but the loss in value was not actionable); Morgan v. Hightower's Adm'r, 291 Ky. 58, 163 S.W.2d 21 (Ky. 1942) (no recovery for decreased fair market value when a person commits suicide on the owner's property).

Nevertheless, the trial court allowed Appellants to proceed on a lost value theory, instructing the jury under Gulledge, supra, that if they believed "from the evidence that there is a basis in reason and experience for a fear" of above-background NORM readings, then they could go on to consider whether such fears affected fair market value.[39] The jury in this case rejected the very first Gulledge factor, finding unanimously that there is no basis in reason and experience for a fear of the above-background readings found on the Cantrells' property (V120, p. 17,486) and making the same finding by an 11 to 1 vote on the Wright property. (Id. at 17,496.) The Court of Appeals affirmed.

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[39] See Gulledge, 256 S.W.2d at 353, holding that fear surrounding a property could enter into a calculation of its value if three facts are established in this sequence: 1) that there is a basis in reason and experience for the fear; 2) that such fear enters into the calculations of a substantial number of persons who deal in the buying or selling of similar property; and 3) that depreciation of market value is because of the existence of such fear.

Because of this, of course, Ashland does not complain in any way about the judgment in its favor or the Court of Appeals' ruling. But if for any reason the Court considers a remand or retrial on any of Appellants' trial issues, this Court should make the same analysis it employed in Smith, supra, and recognize that there is no actionable claim here, as a matter of law.

In Smith, this Court was answering two questions certified to it by the Sixth Circuit Court of Appeals:

> 1) Is proof of actual harm required to state a claim for an intentional trespass?
>
> and
>
> 2) If the plaintiffs can prove a diminution in their property values due to an intentional trespass, do they have a right of recovery under Kentucky law?

This Court's resolution of these two questions is discussed below.

A. Actual Harm.

To the first question, this Court answered "no," explaining that a plaintiff could be entitled to recover nominal damages even if the intentional trespass did not result in actual damages. Id. at 55, citing Ellison v. R&B Contracting, Inc., 32 S.W.3d 66 (Ky. 2000). But the Court reaffirmed existing Kentucky law to caution:

> [I]n order to recover **more than** nominal damages, a property owner must prove "actual injury . . . ."

226 S.W.3d at 55 (emphasis added). The Court went on to say that while "[p]roperty owners are not required to prove contamination that is an actual or verifiable health risk," they must show "an unreasonable interference with the property owner's possessory use of his/her property . . . ." Id. at 56-57 (emphasis supplied by the Court).

The trial court and Court of Appeals have already made this same analysis in the case presented here. Because there was no health hazard proven, the trial court struggled with what other injury could exist to property where people continued to farm and live and use the property in the same way they had always used it before, and where the substance was completely imperceptible to human senses. The trial court erred in favor of the Appellants by letting them go to trial on a stigma claim, but the Court of Appeals recognized, consistently with Smith, that such a stigma claim should not have gone to a jury:

> [T]he appellants in this case have not shown that the mere presence of low levels of radiation would unreasonably interfere with their use and enjoyment of the properties. Therefore, they cannot recover damages arising from an unsupported fear of that radiation.

(Opinion, p. 25.) Thus the Court of Appeals in this case even used the very wording of this Court in Smith, were this Court told the Sixth Circuit that the appropriate question would be whether there has been "an **unreasonable interference** with the property owner's possessory use of his/her property" (226 S.W.3d at 57). The Court of Appeals answered that question here by noting Appellants failed to make any showing that low levels of NORM "would **unreasonably interfere** with their use and enjoyment of the properties." (Opinion, p. 25.)

B. Diminution in Value.

This Court in Smith recognized that the second question certified to it "confuse[d] the 'right to recover' with the 'measure of damages' as a substitute 'for proof of actual harm.'" 226 S.W.3d at 55. That is the same mistake Appellants made below, confusing a purported decrease in fair market value as proof of an injury. Unfortunately, the trial court erred on this point in favor of Appellants and allowed them to go to trial on a

stigma claim. But as this Court held in Smith, that question of fair market value should not be reached until after some injury is shown:

> Once the particular injury to real estate is shown, the diminution in fair market value is a recognized measure of damages.

Id. (emphasis supplied by the Court). The Court of Appeals' Opinion made the same distinction in the present case, saying "'[d]ecreased fair market value is not harm to the property, it is only a means of measuring that harm.'" (Opinion, p. 24, citations omitted.) Because no "actual harm" was shown to these properties (not in the sense of a health hazard as in Rockwell, which Plaintiffs had set out to prove, and not in the sense of interference with use as in Smith), the measure of damages could not be reached.

The confusion between injury and measure of damages was also recognized very recently by the Supreme Court of Kansas in a case where landowners and businesses sought to recover from a gas company for diminution in market value caused by the escape of natural gas from a gas storage facility. The Kansas Supreme Court reviewed cases from other jurisdictions (including Kentucky) and concluded:

> It appears that the majority of other jurisdictions . . . hold that a nuisance claim requires a physical presence or an interference with plaintiffs' use and enjoyment of the real property which is separate and apart from the diminution of property's market value.

Smith v. Kansas Gas Service Co., 169 P.3d 1052, 1061 (Kan. 2007) (citing City of Louisville v. Munro, 475 S.W.2d 479, 482-83 (Ky. 1971) and collecting cases from other jurisdictions). The idea that "stigma damages are both the injury and the measure of damages" was rejected as being "an argument . . . circular and inappropriate." 169 P.3d at 1062.

The trial court should not have sent this case to a jury, on the basis of the authorities that existed then (in 2003). Since that time, the law has become even more clear that "mere damage to the reputation of realty does not entitle one to recovery." Smith v. Carbide, 226 S.W.3d at 56.

The Court of Appeals' Opinion should be affirmed in its entirety, with the only error being that of the trial court in giving the case to a jury at all.

CONCLUSION

The jury's verdict and the Court of Appeals' Opinion should both be affirmed. The only error the trial court made was in letting the case go to a jury at all, when the case should have been decided on the legal issues. After years of testing and searching, and coming up empty-handed, Plaintiffs could not prevail and the Johnson County jury rejected Appellants' claims. The Court of Appeals unanimously affirmed that verdict. This Court should also affirm and put a final end to this litigation that has now spanned more than a decade without anyone who has ever looked at the case carefully ever finding any merit to any of these claims.