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Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001784-MR
AND
NO. 2003-CA-001865-MR

WOODIE CANTRELL; WATHALENE CANTRELL; TAMMY CANTRELL; MURL WRIGHT; JAMES WRIGHT; HAROLD DEAN WRIGHT; ALETHA ANN WRIGHT BUTLER, ADMINISTRATRIX OF THE ESTATE OF LUTHER WRIGHT, DECEASED; KENNETH WRIGHT; LINDA WRIGHT; KATHLEEN PHILLIPS; THE ESTATE OF SHIRLEY WRIGHT; AND THE ESTATE OF ERMA JEAN WRIGHT — APPELLANTS/CROSS-APPELLEES

APPEALS FROM JOHNSON CIRCUIT COURT
v. HONORABLE CARL U. HURST, SPECIAL JUDGE
ACTION NO. 97-CI-00442

ASHLAND INC. (F/K/A ASHLAND OIL, INC.); AND ASHLAND EXPLORATION HOLDINGS, INC. (A/K/A ASHLAND EXPLORATION, INC.) — APPELLEES/CROSS-APPELLANTS

OPINION AND ORDER:
1. AFFIRMING DIRECT APPEAL;
2. DISMISSING CROSS-APPEAL;
3. DENYING MOTION TO TAKE JUDICIAL NOTICE; AND
4. GRANTING MOTION TO STRIKE

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BEFORE: COMBS, CHIEF JUDGE; TAYLOR, JUDGE; KNOPF,[1] SENIOR JUDGE.

KNOPF, SENIOR JUDGE: The parties to this appeal paint dramatically different pictures of the claims in this case and the proceedings in the Johnson Circuit Court. The appellants, Woodie Cantrell, Wathalene Cantrell, Tammy Cantrell, Murl Wright, James Wright, Harold Dean Wright, Kenneth Wright, Linda Wright, Kathleen Phillips, and the estates of Luther Wright, Shirley Wright and Erma Jean Wright, brought this action against Ashland Inc. and Ashland Exploration Holdings, Inc. They allege that Ashland's oil-production activities on their properties have brought above-normal concentrations of radioactive material to the surface and, in the process, have contaminated the surface and ground water of their properties. The appellants assert that this contamination has permanently diminished the value of their properties. In contrast, Ashland concedes that there is some contamination, but asserts that the appellants have magnified the danger out of all proportion to the actual harm caused.

Likewise, the appellants claim that the trial court was actively biased against them and that the court's evidentiary and discretionary rulings unfairly prevented them

[1] Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

from proving their claims against Ashland at trial. For its part, Ashland counters that the trial court bent over backwards to accommodate the appellants' claims. Ashland further asserts that the trial court should not have even allowed the appellants' claims to proceed to trial.

As is often the case, the truth lies somewhere between these poles. Nevertheless, we conclude that Ashland's position has greater support in both fact and law. We agree with the trial court that the appellants knew for more than five years before they brought this action that Ashland's activities had contaminated their ground water. Therefore, those claims were properly dismissed as untimely.

As to their claims for surface contamination by radioactive materials, the appellants were required to prove not only that their properties were contaminated by Ashland's conduct, but also that the contamination has caused an actual and present injury to the properties. Based on this standard, the trial court's evidentiary rulings and jury instructions were proper. Finally, we conclude that the trial court afforded the appellants a fundamentally fair trial and the jury's verdict in favor of Ashland was supported by substantial evidence. Hence, we affirm the judgment in favor of Ashland, and we dismiss Ashland's cross-appeal as moot. We further deny the appellants' motion to take judicial notice of the scientific study included

in their reply brief, and we grant Ashland's motion to strike those materials.

Facts

The underlying facts of this action are not in dispute. The appellants allege that Ashland's oil production methods contaminated their properties with naturally occurring radioactive material (NORM). As the name implies, NORM consists of natural radioactive material, principally radon. NORM can be found almost anywhere, but it is most often found below the earth's surface in minute concentrations. However, NORM can be concentrated above ground by human activities; it is referred to as technologically enhanced naturally occurring radioactive material (TENORM). In all its forms, NORM cannot be detected by human senses as it is invisible, silent, tasteless and odorless.

The appellants are owners of real property in Johnson County, Kentucky. Their respective properties are located in an area known as the Martha Oil Field. The field was established in the early 1920's by Swiss Oil Company and was later acquired by Ashland. Ashland conducted this activity in the Martha Field pursuant to leases with the landowners, including the appellants. All of the leases expired in 1987.

Beginning in the late 1950s through the early 1960s, Ashland injected pressurized water into the oil-bearing stratum

of the Martha Field. In addition to increasing oil production, this process carried other materials, including NORM, to the surface. The appellants also allege that this process polluted their ground water with NORM and with non-radioactive contaminants.

In 1987, Ashland and the federal Environmental Protection Agency (EPA) entered into a consent decree which required Ashland to take action to remedy the ground-water contamination. Ashland did not admit causation or liability in the consent decree. But Ashland did provide funds to cap wells, restore surface production pits and tank battery facilities, evaluate and monitor ground water quality, and provided alternative water supplies to residents of the affected properties.

The 1987 consent decree only addressed the non-NORM contamination. In 1988, pipe from the Martha Field tested positive for above-background levels of NORM. Thereafter, Ashland and the EPA entered into a second consent decree under which Ashland agreed to perform remediation. Pursuant to this decree, Ashland removed contaminated pipe and soil from the affected properties. Thereafter, a number of affected landowners brought actions against Ashland due to the contamination of their properties. The appellants brought their action against Ashland in 1997.

Prior to trial, Ashland moved to dismiss the claims for ground-water contamination and surface contamination by non-radioactive materials. The trial court granted the motion, concluding that these claims were untimely. But in a separate order, the trial court denied Ashland's motion to dismiss the claims relating to NORM contamination.

The remaining claims proceeded to a jury trial in July 2003. The appellants conceded that the NORM contamination had not caused any injury to any persons, animals or crops on their properties. Rather, they asserted that the contamination constituted a continuing trespass and a permanent nuisance which materially impaired the value and future use of the properties. At the conclusion of proof, the jury found that Ashland had failed to exercise ordinary care in its oil production, and that its conduct was a substantial factor in causing NORM to be deposited on the appellants' properties. However, the jury further found no "basis in reason and experience for a fear of the NORM above-background readings found" on the properties. Since the jury concluded that the appellants had suffered no injury from the NORM contamination, the court entered a judgment in favor of Ashland. This appeal followed. Ashland has cross-appealed from the denial of its summary judgment and subsequent directed-verdict motions.

The appellants raise numerous issues which can be grouped into four general categories: (1) dismissal of their claims relating to ground-water contamination; (2) evidentiary rulings; (3) jury instructions; and (4) trial-related issues. The first and last issues are discrete and may be considered separately. However, the second and third issues are essentially related as they both concern the sufficiency of the appellants' evidence. Therefore, we shall address these issues together.

Dismissal of claims relating to ground water contamination

The parties agree that actions for damages to real property caused by another's negligence are subject to the five-year statute of limitation set out in KRS 413.120(4). The trial court excluded evidence of the appellants' claims for ground-water contamination and non-radioactive surface contamination, concluding that the appellants failed to file these claims within five years from the time they knew of the contamination. The Appellants contend that there are fact issues regarding when they knew or should have known of the injury. They also assert that Ashland should be estopped from relying on the statute of limitations because it attempted to conceal both the NORM contamination in the ground water and the extent of the harm. Finally, the appellants assert that Ashland's conduct

constitutes a continuing tort for which they are entitled to recover damages for the five years preceding filing of their complaint. We find none of these arguments convincing.

A cause of action accrues when a party knows that he has been wronged, not when he knows that the wrong is actionable.[2] In cases involving latent injuries arising from exposure to harmful substances, Kentucky courts have held that the cause of action accrues when the plaintiff discovers or in the exercise of reasonable diligence should have discovered not only that he has been injured but also that his injury may have been caused by the defendant's conduct.[3] In this case, all of the appellants were aware of problems with their ground water at least before 1989.

Ashland presented evidence that the Cantrells and the Wrights had complained about the bad smell and taste of their well water for several decades prior to the entry of the 1987 consent decree. Likewise, there was substantial evidence that the appellants knew that these problems were caused by Ashland's oil production activities.[4] The appellants concede these facts,

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[2] Conway v. Huff, 644 S.W.2d 333, 334 (Ky. 1982).

[3] Louisville Trust Co. v. Johns-Manville Products Corp., 580 S.W.2d 497, 501 (Ky. 1979).

[4] Similarly, the appellants admitted that they had been aware for many years of incidents of oil spilling onto their land.

but contend that they were unaware of the presence of NORM in their water until they had it tested during the mid-1990s.

Nevertheless, a plaintiff's lack of knowledge of the extent of his injuries does not toll a statute of limitations to which the discovery rule is applied.[5] Thus, even if the appellants were not specifically aware of the NORM contamination in their water, they were aware that the Ashland's activities had caused a significant degradation in the quality of their ground water for more than five years before filing this action. Therefore, the trial court correctly found that their claims for ground-water contamination were untimely.

Furthermore, the burden of proving all the facts which constitute the essential ingredients of an equitable estoppel rests upon the party who asserts it, and the decision of that question rests largely on the facts and circumstances of the particular case.[6] In this case, the appellants assert that Ashland employees downplayed the danger from NORM contamination in the water after 1989. Nevertheless, the appellants failed to present evidence showing that Ashland prevented them from discovering the damage to the ground water supply. The appellants had been long aware that Ashland's oil production

[5] Id. at 500.

[6] Byerly Motors, Inc. v. Phillips Petroleum Co., 346 S.W.2d 762, 765 (Ky. 1961).

activities had degraded their ground water. And while Ashland did not admit liability in the 1987 consent decree, Ashland provided all of the appellants with alternative water supplies by 1990 at the latest.[7] Consequently, Ashland is not estopped from relying on the five-year statute of limitations.

Finally, the appellants argue that the ground water contamination constitutes a continuing tort for which they are entitled to claim damages for at least the five-year period before they filed their actions. But where the injury to the land is permanent and cannot be remedied at an expense reasonable in relation to the damage, only a one-time recovery brought within five years is allowed.[8] Furthermore, such a cause of action accrues, at the latest, on the date that the operations causing the trespass were completed.[9] As previously noted, Ashland's oil leases expired in 1987, and there is no allegation that any additional contamination to the ground water occurred after that time. Thus, the appellants' actions filed in 1997 were untimely.

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[7] In 1989, Ashland provided Woodie and Wathalene Cantrell with bottled water for six months, and thereafter provided the Cantrells with a city-water line. Ashland installed a cistern on the Wrights' property during the 1960s and also provided them with a city-water line in 1990.

[8] Wimmer v. City of Ft. Thomas, 733 S.W.2d 759, 761 (Ky.App. 1987).

[9] Lynn Mining Co. v. Kelly, 394 S.W.2d 755 (Ky. 1965).

Evidentiary issues/Jury Instructions/Sufficiency of Evidence

The appellants next argue that the trial court improperly excluded key evidence, thus preventing them from establishing the essential elements of their case. They further assert that the trial court failed to properly instruct the jury on their claims. However, the more fundamental issue concerns the proof necessary for the appellants to prevail on their claims against Ashland.

The key to this inquiry is the Rockwell line of cases, Wilhite v. Rockwell International Corp. (Rockwell I),[10] and Rockwell International Corp. v. Wilhite (Rockwell II).[11] The plaintiffs in these cases alleged that Rockwell International had discharged waste products containing polychlorinated biphenyls (PCBs) into the waterways adjacent to its manufacturing plant in Russellville, Kentucky. The landowners further alleged that the PCBs were deposited on their downstream properties. Like the appellants in this case, the Rockwell landowners sought damages for trespass and creation of a permanent nuisance. However, they offered no competent evidence to show that the level of PCB contamination posed any

[10] 83 S.W.3d 516 (Ky. 2002).

[11] 143 S.W.3d 604 (Ky.App. 2003).

significant danger to humans, animals or the use of their properties. Nevertheless, the jury awarded the landowners compensatory damages in excess of $7,000,000.00 and punitive damages of more than $200,000,000.00.

On appeal, this Court reversed, finding that the plaintiffs had failed to show injury to their properties and that their principal expert's testimony should not have been admitted. In the absence of such evidence, this Court concluded that Rockwell was entitled to a directed verdict. On discretionary review, the Kentucky Supreme Court agreed that the expert's testimony was inadmissible, but disagreed that the remedy was reversal for a directed verdict. The Supreme Court noted that there was other evidence of permanent injury to the properties for which landowners may be entitled to compensation, and remanded the matter back to the Court of Appeals to address whether the admissible evidence was sufficient to justify a new trial.[12]

On remand in Rockwell II, this Court found that the landowners' claims were not barred by the five-year statute of limitations. However, the Court also concluded that the landowners had failed to demonstrate an actual, present injury to their properties. The Court first noted that a landowner may

[12] Rockwell I, 83 S.W.3d at 518-19.

recover damages for intentional trespass even when it is harmless. But the Court further stated that liability is imposed for negligent trespass only where there has been harm to the property.[13] Because the landowners were only seeking damages for negligent trespass, this Court held that they were required to prove actual harm to their properties.

> Trespass is designed to protect against interference with exclusive possession, and not just mere entry. When an object can be seen or sensed in some manner, one may even assume that a landowner's right to exclusively possess his property is infringed. Where the "thing" that has entered onto the plaintiff's property is imperceptible to ordinary human senses, it does not so obviously infringe upon a landowner's right to exclusive possession. In such cases, only when the substance actually damages the property does it intrude upon the landowner's right to exclusive possession. Therefore, an essential element of [the landowners'] claim is that the PCBs interfere with their right to exclusive possession by causing actual harm to the property.[14]

While the landowners clearly proved that PCBs are dangerous and carcinogenic in higher concentrations, they presented no evidence that the levels of PCBs found on their

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[13] Rockwell II, 143 S.W.3d at 620, *citing* Restatement (Second) of Torts § 165 (comment b).

[14] Id., *quoting* Mercer v. Rockwell International Corp., 24 F. Supp. 2d 735, 743 (W.D.Ky. 1998) (Mercer also involved a claim against Rockwell for PCB contamination from the Russellville plant).

properties presented any health hazard. Consequently, the Court held that the mere presence of a potentially hazardous substance on the landowners' properties would not support a claim for damages in the absence of a showing of some present injury to persons or property.[15] Therefore, this Court concluded that the landowners could not prevail on their claims against Rockwell.

The current case presents remarkably similar issues even though it involves contamination by a different substance. Like the Rockwell landowners, the appellants in this case claim that Ashland's activities caused a potentially hazardous substance to be deposited on their properties. Likewise, the appellants claim damage to their properties under theories of negligence, trespass and nuisance. And as in Rockwell, Ashland concedes that there is some contamination, but asserts that the levels of NORM found on the appellants properties are so minute as to cause no actual harm to the properties.

As this Court held in Rockwell II, the mere presence of NORM on their properties in above-background levels does not, by itself, constitute an injury to the appellants' properties.[16]

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[15] Id. at 620-25 (*citing* Wood v. Wyeth-Ayest Laboratories, 82 S.W.3d 849 (Ky. 2002), holding that mere exposure to a potentially toxic substance is insufficient to allow recovery without evidence of an actual, physical injury caused by that exposure).

[16] Id. at 623.

Thus, the appellants, like the Rockwell landowners, must present evidence that the levels of NORM present on their properties interfere with their right to exclusive possession by causing actual harm to the property.[17] When viewed in this light, the appellants' issues related to the trial court's evidentiary rulings and jury instructions come into clearer focus.

The appellants primarily argue that the trial court improperly excluded crucial testimony from the key expert witness, Stanley J. Waligora, Jr. Waligora, a principal health physicist with Environmental Dimensions, Inc., testified that he had extensive experience working under contract with the United States Government on the remediation of radioactive waste sites. Ashland moved to exclude or limit Waligora's testimony, arguing he was not qualified to express an opinion regarding any health risk from the NORM contamination. Ashland further argued that there was an insufficient scientific foundation for the models underlying his opinions about the risk of future uses of the properties.

In particular, Ashland asserted that these aspects of Waligora's testimony failed to meet the standards for admissibility set out in Daubert v. Merrill Dow Pharmaceuticals,

[17] Id. at 621.

Inc..[18] The trial court referred the Daubert issues to a special master commissioner, Hon. Pierce W. Hamblin. After conducting a hearing and reviewing Waligora's deposition testimony, Commissioner Hamblin partially granted Ashland's motion to exclude Waligora's testimony. The commissioner allowed Waligora to testify regarding the fact and extent of the NORM contamination on the Cantrell's and the Wrights properties. However, the commissioner specifically prohibited Waligora from testifying as to the effect of the radiation or whether the contamination creates a danger to present or future users of the properties.

The appellants contend that this order prevented them from showing actual harm to the property. They state that "Waligora would have explained that the level of radiation on Plaintiffs' properties would present significant health risks to humans assuming various future land-use scenarios".[19] But Waligora repeatedly admitted that his role was not to determine whether the levels of contamination pose a health hazard to the current landowners or residents, or to calculate the radiation dose actually received by any of the current landowners.

[18] 509 U.S. 579, 113, S. Ct. 2786 125 L. Ed. 2d 469 (1993).

[19] Appellants' Brief at 7.

Rather, Waligora testified that his role was to determine the nature and extent of the NORM contamination in the Martha Field.

To calculate the risks to future owners and occupiers of the land from the radiation levels present on the appellants' properties, Waligora used the Residual Radioactivity (RESRAD) computer program to extrapolate the extent of the risk based upon future land use scenarios. But notwithstanding the admissibility of such evidence, such methodology runs afoul of the Rockwell II requirement that the landowners must show an actual and present harm to the property.

By comparison, we note that that Waligora also testified in a Louisiana case involving NORM contamination caused by oil production activities, Grefer v. Alpha Technical.[20] But in Grefer, Waligora testified concerning the actual costs that the plaintiffs in that case would incur to remediate the NORM contamination to within Federal regulatory levels.[21] Under the rule set out in Rockwell II, the plaintiffs' liability for such remediation expenses would constitute an actual and present injury.

In this case, there is no allegation that any of the landowners would be required to make those expenditures to

[20] 901 So.2d 1117 (La.App. 2005).

[21] Id. at 1139-40.

remediate the NORM contamination. Indeed, the appellants did not seek to recover remediation expenses, but only damages for reduction in the value of their properties caused by the presence of NORM. To this end, Waligora stated that he was retained to analyze the risk of future harm caused by exposure to the low levels of radiation present on the appellants' properties. Based upon these anticipated future risks, Waligora intended to offer his opinions concerning the limitations on future land uses to which the properties would be subject without any further remediation.

Ashland objected to this testimony on three grounds: (1) the RESRAD calculations were based, at least in part, by faulty data collected by Michael Jarrett; (2) Waligora's interpretations of the RESRAD calculations were based on the linear, no-threshold (LNT) model for determining future risks from exposure to low levels of radiation; and (3) the RESRAD calculations of future risk were unduly speculative. The trial court previously excluded the Jarrett data as unreliable, and the appellants do not appeal from this ruling. They argue, however, that Waligora testified that he was able to make the RESRAD calculations by relying solely on data collected by Ashland.

The more critical issue concerns the RESRAD program's reliance on the LNT model to assess the extent of the future

risk. The LNT model postulates that there is no minimum "safe" threshold for exposure to ionizing radiation. Instead, any exposure to radiation increases the risk of cancer. Using this model, low levels of radiation can increase the risk of cancer given exposures over a long period of time. On the other hand, the period of time involved makes it difficult to exclude other causes. Thus, while the LNT model is used extensively for regulatory purposes, there is considerable dispute whether it is an acceptable scientific technique in determining causation in an individual instance.[22]

But in addition to the causation problem, Waligora's opinions, based upon the RESRAD program and the LNT model, look to the potential for future injury and fail to assess the present injury to the appellants' properties. Commissioner Hamblin's Daubert analysis highlights the problems with this aspect of Waligora's testimony:

> [Waligora's] opinions are not based upon present circumstance. His models predict construction of homes on hot spots (where there is presently no construction) on level property and/or hillsides; he predicts there will be animals and vegetable gardens on each property in the future; and he assumes certain pathways for this contamination in the future that are not present now and do not rise above the level of speculation. This future model opinion testimony may well

[22] *See* Cano v. Everest Minerals Corp., 362 F. Supp. 2d 814, 849-50 (W.D.Tex. 2005).

> be relevant to EPA standards for clean up and remediation, but such testimony is legally insufficient to present to the jury under the guidelines set forth by Daubert. There are simply too many flaws in Stanley Waligora's methodology and predictions to allow his testimony and opinions concerning the extent of contamination on Plaintiffs' properties.

The appellants urge that the commissioner disregarded substantial evidence showing that the LNT model is a generally accepted method for determining the effect of exposure to low levels of radiation. To this end, they have filed a motion for this Court to take judicial notice of a recent study supporting the validity of the LNT model. We conclude that it is inappropriate and unnecessary to do so. [23]

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[23] The appellants have moved this Court to take judicial notice of the seventh in a series of reports issued by the National Research Council of the National Academies, entitled "Biological Effects of Ionizing Radiation". (BEIR VII). According to the appellants, the recent BEIR VII report confirms their position that the LNT model is generally accepted in the scientific community. We conclude, however, that it is both inappropriate and unnecessary for this Court to take judicial notice of the BEIR VII report. Consequently, we must deny the appellants' motion and grant Ashland's motion to strike these materials from the appellants' reply brief.

KRE 201 permits a court to take judicial notice of adjudicative facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either generally known in the community or capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. The BEIR VII report clearly involves matters that are outside of the range of knowledge generally known in the community. And while the NRC could be regarded as an authoritative source, the conclusions contained in the report are well outside this Court's competence to interpret without

We do not quarrel with the general proposition that exposure to low levels of radiation may increase a future risk for developing cancer. For this reason, the RESRAD program and the LNT model may be prudent regulatory approaches to assess the long-term risks of exposure to low levels of radiation. We need not reach this question, however, because Waligora did not establish that his application of these methods was reliable or probative of the legal issues presented in this case. A plaintiff is not entitled to recover for increased risk of future harm from exposure to a potentially-harmful substance unless there is a present injury.[24] Therefore, the trial court

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expert testimony. *See* Polley v. Allen, 132 S.W.3d 223, 226 (Ky.App. 2004).

Furthermore, our review of the trial court's findings is confined to matters properly made part of the record below. Rohleder v. French, 675 S.W.2d 8, 9 (Ky.App. 1984). Although an appellate court may take judicial notice under KRE 201, that authority should not be used as a device to correct on appeal a failure to present adequate evidence to the trial court. R. Lawson, The Kentucky Evidence Law Handbook, s 1.00[5][d] (4th ed. 2003). In this case, the BEIR VII report was not in existence either at the time of the Daubert hearing or at the time of trial – it was not released until 2005. 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.

Finally, the 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. Consequently, we must deny the appellants' request to take judicial notice of the BEIR VII report.

[24] Capital Holding Corp. v. Bailey, 873 S.W.2d 187, 192-93 (Ky. 1994).

did not abuse its discretion by excluding those portions of Waligora's testimony.[25]

Along the same lines, the appellants also argue that Ashland's expert, Dr. John Frazier, should not have been allowed to testify that there is a safe threshold for exposure to radiation. They assert that, since the LNT model is accepted in the regulatory context, Dr. Frazier's opinions rejecting the model are implicitly without accepted scientific foundation. Consequently, the appellants contend that Dr. Frazier's opinions should not have been admitted.

A court must determine the admissibility of an expert's opinion on its own merits. The trial court's exclusion of Waligora's opinions based on the LNT model does not necessarily justify the conclusion that Dr. Frazier's contrary opinions are scientifically reliable. But the appellants concede in their brief that "there is a debate in the scientific community regarding the validity of such a risk threshold".[26] And as previously noted, the use of the LNT model by regulatory agencies does not compel a conclusion that the model is applicable or reliable to determine the present injury to the

[25] Goodyear Tire and Rubber Co. v. Thompson, 11 S.W.3d 575, 577 (Ky. 2000).

[26] Appellant's Brief at 9-10.

properties. Consequently, we cannot find that the trial court abused its discretion by allowing Dr. Frazier's testimony.

And more to the point, the appellants bore the burden of proving that Ashland's activities caused injury to their properties. The jury found that Ashland's conduct was negligent and that it caused above-background levels of NORM to be deposited on the appellants' properties. But in Rockwell II, this Court held the mere presence of a potentially harmful substance in quantities not detectable by unassisted human senses is insufficient to show injury to the property. The landowner must also show that the substance has caused actual harm to persons or property.[27] In this case, the appellants concede that they could not establish that the NORM contamination presented a health risk without Waligora's excluded testimony. Therefore, the appellants could not prevail on their trespass or nuisance claims against Ashland.

Nevertheless, the appellants assert that they were entitled to recover because the presence of NORM has substantially depreciated the value of their properties. They argue, with some supporting evidence, that buyers would be unwilling to purchase their properties without a discount for the NORM contamination. Thus, the appellants assert that they and their properties have been damaged by Ashland's conduct.

[27] Rockwell II, 143 S.W.3d at 621.

The Court in Rockwell II drew a sharp distinction between an injury to property and the damages arising from that injury, holding that "[d]ecreased fair market value is not harm to the property, it is only a means of measuring that harm".[28] Since the trial of this action preceded this Court's decision in Rockwell II, the trial court allowed the appellants to present evidence of such depreciation or "stigma" damages. Where a trespass or a taking has created a potentially dangerous condition, a landowner may recover damages for depreciation in the value caused by potential buyer's fear of that condition.[29]

However, there must also be evidence that the fear is reasonable given the actual condition of the property.[30] This approach is entirely consistent with this Court's reasoning in Rockwell II rejecting the landowners' nuisance claims. A landowner may recover damages for the creation of a permanent condition that causes "unreasonable and substantial annoyance to the occupants of the claimant's property or unreasonably interferes with the use and enjoyment of such property, and thereby causes the fair market value of the claimant's property

[28] Id. at 621, *quoting* Mercer, 24 F. Supp. 2d at 743.

[29] Gulledge v. Texas Gas Transmission Corp., 256 S.W.2d 349, 352 (Ky. 1952).

[30] Id. at 352-53.

to be materially reduced".[31] But the interference with the use of the property must be reasonable based on the actual harm presented by the presence of the substance.

The Court in Rockwell II found "no rational basis for a finding that the discharge of minute quantities of PCBs onto the landowners' properties resulted in any interference with their use or enjoyment of the properties. … Any annoyance or interference sustained by the landowners here is the result of an irrational fear of PCBs. The law does not allow relief on the basis of an unsubstantiated phobia."[32] Similarly, the 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.

The other excluded evidence would not alter this result. The appellants complain that the trial court excluded evidence of Ashland's activities on other properties. In particular, they argue that the trial court struck the testimony of Bob Grace and Clay Kimbrell, who would have testified that Ashland's oil-production methods were negligent and caused the

[31] Rockwell II, 143 S.W.3d at 626, citing KRS 411.530(2).

[32] Id. at 627.

NORM contamination. However, the jury found for the appellants on these issues. Therefore, we cannot find that the appellants were prejudiced by the exclusion of this testimony.

Similarly, the appellants attempted to introduce the deposition testimony of Earl Arp, a former Ashland employee who had circulated a memorandum in 1982 about proposed regulations relating to radionuclides. The appellants argue that the memorandum was relevant to show Ashland's prior knowledge of the dangers of NORM as a by-product of oil-production activities. The trial court excluded Arp's testimony and the memorandum as hearsay not covered by any exception. But like the testimony from Bob Grace and Clay Kimbrell, this evidence was only probative of Ashland's negligence, which the appellants proved. Arp's testimony and the 1982 memorandum were not probative of the dangers of the levels of NORM actually present on the appellants' properties.

For the same reason, the trial court also properly excluded the testimony of Bobby Alexander, an Ashland employee who was involved in remediation efforts on other properties. The appellants argue that Alexander's testimony was relevant to show that Ashland recognized the dangers of NORM and took steps to monitor levels of radiation to which its employees were exposed. But while Alexander's testimony may be relevant to show that the levels of NORM present on other properties could

present a health hazard, he offered no evidence regarding the levels of NORM present on the appellants' properties.

Likewise, the trial court properly excluded the evidence regarding the cost of remediation on other properties. As with Bobby Alexander's testimony, this evidence was not probative of the levels of NORM present on the appellants' properties. And as previously noted, the appellants did not seek to recover remediation expenses. Therefore, this evidence was not relevant to the issues before the jury.

The appellants next argue that that trial court improperly excluded a video tape filmed by Chris Dawson. The video depicts Ashland employees dressed in protective gear pumping water from a pit into a creek that adjoins Murl Wright's property. The trial court excluded the tape, holding that it was inadmissible under KRE 407 as evidence of a remedial activity.

We disagree. Evidence of activity which caused or contributed to the NORM contamination on the appellants' property is admissible to show Ashland's negligence, notwithstanding the fact that Ashland engaged in the conduct to remediate a condition that it created on another property. Consequently, the trial court erred by excluding the videotape as evidence of a remedial activity.

However, the trial court also relied on KRE 403, holding that the prejudicial nature of the videotape outweighs its probative value. We agree. There was other evidence which would suggest that the water which Ashland was pumping into the creek was contaminated with NORM. But there was no evidence to indicate the levels of NORM in the water. At the evidentiary hearing, the appellants' counsel suggested that "a fraction" of the NORM in this water could have been deposited on Murl Wright's property. But there was no evidence offered that these actions by Ashland actually deposited any significant amount of NORM on the property. Therefore, while the videotape may have some limited relevance to prove negligence on the part of Ashland, the unfair prejudicial effect of the video far outweighs any probative value it may have.

Just as we conclude that the trial court's evidentiary rulings were within its reasonable discretion, we also find that the trial court's jury instructions generally complied with the applicable law. While the trial court did not separately instruct the jury on the applicable elements of trespass and nuisance, it specifically directed the jury to determine whether Ashland "failed to exercise ordinary care in its oil production operations … and that such conduct was a substantial factor in causing NORM to be deposited in above-background levels" on the appellants' properties. (Emphasis in original). The court

separately instructed the jury to determine from the evidence whether "there is a basis in reason and experience for a fear of the NORM above-background readings" found on the appellants' properties. This second instruction adequately covers the injury element required to prove trespass and the "unreasonable and substantial interference with the use and enjoyment of property" element necessary to prove nuisance. Furthermore, since the appellants could not prove actual harm to their properties, they were not prejudiced by the trial court's failure to include instructions for either nominal or punitive damages.

Trial-Related Issues

The appellants also complain about a number of issues related to the trial court's conduct during trial. They cite to specific rulings and comments during trial which they allege demonstrate that the trial court was biased against them and in favor of Ashland. A close review of the record, however, supports all of these rulings and dispels any suggestion of favoritism.

At several points during the course of the trial, the court expressed frustration to appellants' counsel for revisiting issues upon which the court had already ruled. But the court made these comments to the appellants' counsel outside

of the presence of the jury. Moreover, when considered in context, the comments are not of a character which would raise serious concerns about the trial judge's fairness or impartiality.[33] In fact, when the issue of bias was raised, the court tried to assure all parties that its evidentiary rulings were neither slanted in favor of one party nor would its rulings be influenced by allegations of bias.[34]

We also disagree with the appellants that the trial court showed favoritism toward Ashland by considering Daubert challenges to witnesses after its previously-imposed deadline had passed. Rather, the court questioned several of the appellants' witnesses to determine the admissibility of the witnesses' testimony based upon its prior evidentiary rulings. Furthermore, the court engaged in this process outside of the presence of the jury. Likewise, the trial court's apparently *sua sponte* evidentiary rulings actually involved continuing issues related to the admissibility of witness testimony. We find no abuse of discretion.

The appellants next argue that the trial court improperly struck a portion of their opening statement. During the opening statement, the Cantrells' counsel informed the jury

[33] Foster v. Commonwealth, 348 S.W.2d 759, 760 (Ky. 1961). *See also* Johnson v. Ducobu, 258 S.W.2d 509 (Ky. 1953).

[34] Trial Transcript, V. 16, pp. 2132-34.

that the evidence would show that Ashland breached its internal standards of conduct in its oil production methods. The Cantrells' counsel then added,

> Well, what I think you will hear that there is a standard of conduct that this Defendant incorporated internally. When you compare what they did with what they said, they didn't live up to that standard of conduct. You know, we can look for standards anywhere. My faith teaches me that we're supposed to do unto others … [Interjection by court omitted] … I think you will find those standards where you commonly expect to find them. You have to ask yourself if this Defendant was being a good corporate neighbor. Was it treating its neighbors as Ashland would wish to be treated? I think that at the end of the day, it did not.[35]

At this point, Ashland objected, arguing that this was an improper "golden rule" argument. A "golden rule" argument is one in which the counsel asks the jurors to imagine themselves or someone they care about in the position of the plaintiff.[36] The trial court correctly noted that the appellant's argument was not precisely a golden-rule argument. But the Cantrells' counsel admitted that "the argument is not that this jury should treat this Plaintiff as its neighbor. The argument is that the Defendant should treat Mr. Cantrell as its neighbor".[37]

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[35] Trial Transcript V. 5, pp. 569-70.

[36] Caudill v. Commonwealth, 120 S.W.3d 635, 675 (Ky. 2003), *citing* Black's Law Dictionary 700 (7th ed. West 1999).

[37] Trial Transcript V. 5, p. 572.

Since opening statements and closing arguments are not evidence, courts have traditionally allowed counsel wide latitude in both.[38] But that latitude is not unlimited. We agree with the trial court that this argument tended to confuse the jury regarding the standard under which Ashland's conduct was to be judged. Under the circumstances, the trial court did not abuse its discretion by directing the jury to disregard the argument.

The appellants complain that the trial court unreasonably dictated their order of proof, thus preventing them from presenting a comprehensible narrative to the jury. However, KRE 611(a) requires that the trial court "shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to: (1) Make the interrogation and presentation effective for the ascertainment of the truth; (2) Avoid needless consumption of time; and (3) Protect witnesses from harassment or undue embarrassment." The trial court is vested with broad discretion to deal with problems and situations associated with the production of evidence, and the court's discretion will not be

[38] Slaughter v. Commonwealth, 744 S.W.2d 407 (Ky. 1987).

disturbed except for abuse.[39] We find no abuse of discretion in this case.

Conclusion

In conclusion, we find that the appellants are not entitled to a new trial based on any of the issues raised in this appeal. The appellants were aware for more than five years prior to bringing this action of the contamination of their ground water and the surface contamination by non-radioactive substances. Therefore, these claims were untimely.

The appellants timely brought their claims alleging that Ashland's oil-production activities contaminated their properties with above-background levels of NORM. The appellants proved that Ashland's negligence caused the contamination, but they failed to prove that the above-background levels of NORM caused any actual and present injury to their properties. Consequently, the trial court acted within its discretion by excluding testimony which was not probative of this issue.

Furthermore, we find that the trial court afforded the appellants with a fundamentally fair trial. We find no evidence supporting the appellants' assertions that the trial court was

[39] Disabled American Veterans, Dept. of Kentucky, Inc. v. Crabb, 182 S.W.3d 541, 550-51 (Ky.App. 2005), *citing* Robert G. Lawson, The Kentucky Evidence Law Handbook, § 3.20[2], 238 (4th ed. 2003).

biased against them. The trial court reasonably exercised its discretion in the conduct of the trial and took no action that was unfairly prejudicial to the appellants' case. We also conclude that the instructions given to the jury were generally consistent with the applicable law and that the jury's verdict was supported by substantial evidence. Finally, because we are upholding the jury verdict in Ashland's favor, we need not determine whether Ashland was entitled to a summary judgment or a directed verdict on the appellants' claims.

Accordingly, the judgment of the Johnson Circuit Court dismissing the appellants' claims is AFFIRMED. Ashland's cross-appeal from the trial court's denial of their motions for summary judgment and for a directed verdict is DISMISSED AS MOOT.

IT IS FURTHER ORDERED that the appellants' motion for this Court to take judicial notice of the BEIR VII report is DENIED, and Ashland's motion to strike the BEIR VII report included as an exhibit to the appellants' reply brief is GRANTED.

ALL CONCUR.

ENTERED: September 15, 2006 /s/ Wm. L. Knopf
SENIOR JUDGE, COURT OF APPEALS

BRIEF FOR APPELLANTS/CROSS-APPELLEES:

Joseph Lane
Ned Pillersdorf
Pillersdorf, Derossett & Lane
Prestonsburg, Kentucky

Broadus Spivey
Price Ainsworth
Austin, Texas

Charles Cunningham
Charles E. Fell, Jr.
Cunningham & Fell, PLLC
Louisville, Kentucky

George Chandler
Kirk Matthis
Chandler Law Office
Lufkin, Texas

Michael Endicott
Paintsville, Kentucky

Darrin Walker
Kingwood, Texas

BRIEF FOR APPELLEES/CROSS-APPELLANTS:

Phillip D. Scott
Anne A. Chesnut
Brian M. Johnson
Greenbaum, Doll & McDonald, PLLC
Lexington, Kentucky

Michael J. Schmitt
Porter, Schmitt, Jones & Banks, LLP
Paintsville, Kentucky