

COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
2005-SC0686-CL

WARREN SMITH, ET AL.,

Plaintiffs/Appellants

v.

United States Court of Appeals
for the Sixth Circuit (No. 04-5323)

CARBIDE AND CHEMICALS
CORPORATION, ET AL.,

Defendants/Appellees

BRIEF FOR APPELLANTS WARREN SMITH, ET AL.

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. STATEMENT REGARDING ORAL ARGUMENT 2

III. STATEMENT OF POINTS AND AUTHORITIES 3

IV. STATEMENT OF THE CASE..... 5

V. ARGUMENT 7

 1. Is Proof of Actual Harm Required to State a Claim for Intentional Trespass?..... 7

 A. Kentucky Law Recognizes Intentional Trespass..... 7

 B. Kentucky Law Respects the Rights of Property Ownership..... 9

 C. Other States Recognize Liability for Intentional Trespass..... 10

 D. Defendants Seek to Change Kentucky Law on Trespass 11

 E. *Mercer and Wilhite* Do Not Apply to this Case 13

 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? 14

VI. CONCLUSION..... 15

VII. CERTIFICATE OF SERVICE..... 16

I. INTRODUCTION

The purpose of this brief is to answer questions of law certified to the Kentucky Supreme Court by the United States Court of Appeal for the Sixth Circuit. The questions the Sixth Circuit Court of Appeal certified to this Court are as follows:

1. Is proof of actual harm required to state a claim for intentional trespass?
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?

Application of existing Kentucky law compels the answer “No” to question number 1 and, answer “yes” to question number 2.

II. STATEMENT REGARDING ORAL ARGUMENT

The underlying facts that gave rise to this claim are unique and complicated. This case is vitally important to the plaintiffs and for the rights of all property owners in Kentucky. Plaintiffs suggest that oral argument would assist this Court in reaching the correct decision. Therefore, Plaintiffs request oral argument.

III. STATEMENT OF POINTS AND AUTHORITIES

<i>Randall v. Shelton</i> , 293 S.W.2d 599 (Ky. 1956)	7
RESTATEMENT (SECOND) OF TORTS, § 158	7
RESTATEMENT (SECOND) OF TORTS, § 165	7
<i>Louisville Asphalt Company v. Bloomer</i> , 306 S.W.2d 304 (Ky. 1957).....	7
<i>Ellison v. R & B Contracting, Inc.</i> , 32 S.W. 3d 66 (Ky. 2000).....	7
<i>Hughett v. Caldwell County</i> , 230 S.W.2d 92 (1950).....	7
<i>Fletcher v. Howard</i> , 10 S.W.2d 825 (1928).....	8
<i>Long v. Louisville and NR Company</i> , 107 S.W. 203 (Ky. App. Ct. 1908).....	8
<i>Kinnaird v. Standard Oil Company</i> , 12 S.W. 937 (Ky. App. 1890).....	8
<i>Kentucky Jurisprudence (LAWYERS CO-OP, 1987)</i> , § 19-5	8
<i>Common Law Remedies Available for Petroleum Contamination of Soil and Groundwater in Kentucky (JOURNAL OF NATIONAL RESOURCES & ENVIRONMENT LAW, 1998-1999)</i>	8-9
PROSSER & KEETON ON THE LAW OF TORTS, § 13 (5 th ed. 1984)	9
Kentucky Constitution, Bill of Rights, § 5	9
Kentucky Constitution, § 54.....	9
<i>Cobb v. Hoskins</i> , 554 S.W.2d 886 (Ky. Ct. App. 1977)	9
<i>Southland Development v. Ehrler's Dairy, Inc.</i> , 468 S.W.2d 284 (Ky. 1971)	9
<i>Edward v. Simms</i> , 24 S.W.2d 619 (Ky. 1929)	9
<i>Commissioner, ex rel. Department of Natural Resources v. Stevens</i> , 539 S.W.2d 303 (Ky. 1976)	9
<i>Jacque v. Steenburg Homes, Inc.</i> , 563 N.W.2d 154 (Wisc. 1997)	10
<i>McLaughlin v. Robinson</i> , 646 P.2d 453 (Idaho App. Ct. 1982)	10

<i>Stevenson v. E.I. du Pont DeNumours</i> , 327 F.3d 400 (5 th Cir. 2003)	10
<i>U.S. v. Union Corporation</i> , 277 F.Supp.2d 478 (E.D. Pa. 2003)	10
<i>Ream v. Keen</i> , 828 P.2d 1038 (Or. App. Ct. 1982)	10
<i>Martin v. Reynolds Metals Company</i> , 342 P.2d 790 (Or. 1959)	10
<i>Cook v. Rockwell International Corporation</i> , 279 F.Supp.2d 1175 (D.C. Colo. 2003).....	10-11
<i>Shults v. Champion Intern Corp.</i> , 821 F.Supp. 517 (E.D. Tenn. 1992).....	11
<i>Maryland Heights Leasing, Inc. v. Mallinckrodt, Inc.</i> , 706 S.W.2d 218 (Mo. App. 1985).....	11
<i>Guenther v. Finley</i> , 769 P.2d 717 (Mon. 1989)	11
RESTATEMENT (SECOND) OF TORTS, § 158	11
<i>Krotz v. Sattler</i> , 695 N.W.2d 41 (Ia. App. 2004)	11
RESTATEMENT (SECOND) OF TORTS, § 158	11
<i>Mercer v. Rockwell International Corporation</i> , 24 F.Supp. 2d 735 (W.D. Ky. 1998).....	12
<i>Rockwell International Corporation v. Wilhite</i> , 143 S.W.3d 604 (Ky. App. Ct. 2004)	12
RESTATEMENT (SECOND) OF TORTS, § 165	12
<i>Bradley v. American Smelting & Refining Co.</i> , 635 F.Supp. 1154 (W.D. Wash. 1986)	12
<i>Cook v. Rockwell International Corporation</i> , 279 F.Supp.2d 1175 (D.C. Colo. 2003).....	13
<i>Ellison v. R & B Contracting, Inc.</i> , 32 S.W. 3d 66 (Ky. 2000).....	14

IV. STATEMENT OF THE CASE

In certifying questions of law to this Court, the Sixth Circuit Court of Appeal provided a condensed description of the facts that gave rise to this case.

The intention here is not to repeat the factual description provided by the Sixth Circuit Court of Appeal, but to supplement the description with additional facts that Plaintiffs believe will provide this Court with a better understanding of the context in which this case arose and the nature of Plaintiffs' claims.¹

During its operation from 1952 until 1959 the Paducah Gaseous Diffusion Plant ("PGDP") received approximately 100,000 metric tons or a million tons of recycled uranium. In addition, Plutonium and Neptunium materials were brought into and released from PGDP. During the plant's operation, approximately 60,000 kilograms of uranium was released into the environment through air emissions and liquid releases. The PGDP contained landfills, waste pits and other areas where the plant operators stored solid waste and depleted uranium. One waste pit on the PGDP site was estimated in 1977 to have held Six Million Four Hundred Thousand pounds of depleted uranium. In 1994 the Environmental Protection Agency named the PGDP site to its National Priorities List and became part of a billion dollar Superfund Cleanup effort.

The 80 Plaintiffs' properties lie within ten miles of PGDP. Some, but not all, of the Plaintiffs' properties lie over the groundwater contamination. Some, but not all, of the Plaintiffs' properties contain ponds and/or are contiguous to waterways that have surface water contamination that have been posted and restricted from human use by

¹ The record of this case is voluminous. As undersigned counsel understands that the record was not sent to this Court with the questions certified, no record citations are given in this brief.

the Kentucky state agencies. All of the Plaintiffs' properties have sustained radiological soil contamination.

Plaintiffs offer the expert testimony of Bernd Franke, a world-renowned radiological assessment expert, who calculated that all of the Plaintiffs' properties have soil contamination of radiological material, namely technetium-99, whose radiological half-life is approximately 212,000 years.² Mr. Franke calculated that all of the Plaintiffs' properties are contaminated with technetium at a level that significantly exceeds background levels and exceeds the preliminary remediation goals established by the Environmental Protection Agency. Mr. Franke testified that PGDP air emissions and releases of radiological materials exceeded the applicable limits for many years of its operation. A summary of Mr. Bernd Franke's report is provided in the Appendix.

Additionally, Plaintiffs have offered evidence regarding the nature of their damages. Joe Linn Sloan, a real estate appraiser in Paducah with thirty years experience, has appraised the Plaintiffs' properties and concluded that their values have declined. Some, but not all, properties have lost the use of their groundwater. Some, but not all, properties have lost the use of surface water. Some, but not all, properties have restrictions on their commercial uses. Some, but not all, properties have restricted use. Finally, Plaintiffs have submitted expert Affidavit testimony of Louisville attorney Terence McCoy who concluded that due to the environmental radiological contamination the Plaintiffs' properties would require qualifiers on a real estate title

² Technetium is a radionuclide which is produced when plutonium or uranium 235 fissions. Radioactive "half-life" means the amount of time it takes for the radioactivity of a material to be reduced to half of its original strength.

opinion and, therefore, have a “cloud” on their property titles. A copy of this opinion is attached in the Appendix.

V. ARGUMENT

1. Is Proof of Actual Harm Required to State a Claim for Intentional Trespass?

Under existing Kentucky case law, the answer to this question is no.

A. Kentucky Law Recognizes Intentional Trespass

Kentucky law allows recovery for the tort of trespass under three situations: 1) extra-hazardous activity; 2) intentional trespass; and 3) negligent trespass. *Randall v. Shelton*, 293 S.W.2d 599 (Ky. 1956). The three instances of trespass recognized under Kentucky law correspond to the RESTATEMENT (SECOND) OF TORTS -- § 158 of intentional trespass:

“One is subject to liability for another for trespass, irrespective of whether he thereby causes harm to any legally protected interest of the other, if he intentionally . . . enters land in the possession of the other, or cause a thing or third person to do so . . .”; and

§ 165 applies to a negligent trespass and trespass from an abnormally dangerous activity:

“One who recklessly or negligently, or as a result of an abnormally dangerous activity, enters land in the possession of another, or causes a thing or third person to enter is subject to liability to possessor if, but only if, his presence or the presence of the thing or the third person upon the land causes harm to the land . . . “

Under intentional trespass, harm is not necessary for liability; whereas, under negligent trespass, proof of actual harm is necessary for liability.

Louisville Asphalt Company v. Bloomer, 306 S.W.2d 304 (Ky. 1957) recognized liability for intentional trespass regardless of harm or damages. This Court in *Ellison v. R & B Contracting, Inc.*, 32 S.W.3d 66 (Ky. 2000) commented that in “appropriate trespass cases” a jury should be instructed that the property owner is entitled to nominal damages even where there is not actual damage. In support, this Court at footnote 7 cited *Hughett v. Caldwell County*, 230 S.W.2d 92 (1950), that held:

“It is the universal inference of the law that every unauthorized entry upon the land of another person results in some damage, although it may be nominal. Where there is actual injury, just compensation must be made.”

And also *Fletcher v. Howard*, 10 S.W.2d 825 (1928) that held:

“. . .where a trespass has been committed upon the property of another, he is entitled at least to nominal damages for the violation of his rights. 10 S.W.2d at 826-27.

Groundwater contamination has been recognized in Kentucky as constituting a trespass. In *Long v. Louisville and NR Company*, 107 S.W. 203 (Ky. App. Ct. 1908) the court reversed a defense verdict in connection with a plaintiff’s property owners claim for diminution of property value due to pollution from a spring caused by the defendant’s conduct. See also *Kinnaird v. Standard Oil Company*, 12 S.W. 937 (Ky. App. 1890) in which the plaintiff property owner sued a nearby refinery for diminution of property value because a spring became polluted from leaking coal oil). In reversing the defense verdict, the court held that:

“If one has that on his own premises that is dangerous, or is a substance that he is constantly using which is liable to escape and injure others, whether above or under the ground, and injure the property or of his neighbor, or that which his neighbor has a right to use, he must answer for the consequences.” 12 S.W. at p. 939.

In William Haynes' multi-volume treatise entitled *Kentucky Jurisprudence* (LAWYERS CO-OP, 1987), he states in the tort volume, § 19-5:

"Where it is shown that the conduct complained of resulted directly in the plaintiff's loss of convenience . . . as in the case of a polluted well or stream from which the plaintiff secured his drinking water . . . then, as a general rule, this element [of injury] is satisfied." See pp. 226-227.

In addition, Henry L. Stephens, Jr., Professor of Law of the Salmon P. Chase College of Law, Northern Kentucky University, concluded that soil and groundwater contamination constitutes a trespass. See pp. 5-6 of *Common Law Remedies Available for Petroleum Contamination of Soil and Groundwater in Kentucky* (JOURNAL OF NATIONAL RESOURCES & ENVIRONMENT LAW, 1998-1999). There is no requirement that the level of contamination rise to the level of a health hazard or risk.

B. Kentucky Law Respects the Rights of Property Ownership

The protected principle of the tort of intentional trespass is a landowner's right to exclusive possession of his property. See PROSSER & KEETON ON THE LAW OF TORTS, § 13, pp. 67, 70 (5th ed. 1984). This principle which respects the exclusive possession of a landowner's property is consistent with and supported by the long-standing Kentucky law that respects the rights of property ownership.

The Kentucky Constitution, Bill of Rights, § 5, guarantees "the rights of acquiring and protecting property." Section 54 of the Kentucky Constitution states that:

"The General Assembly shall not have power to limit the amount to be recovered for injuries . . . to personal property."

Kentucky law recognizes a property owner's right to enjoy the revenue produced from land. See *Cobb v. Hoskins*, 554 S.W.2d 886 (Ky. Ct. App. 1977). Kentucky law recognizes that a property owner "may deny access to whomever he desires." See *Southland*

Development v. Ehrler's Dairy, Inc., 468 S.W.2d 284, 286 (Ky. 1971). Kentucky law recognizes that a property owner has the free and unfettered control of his land both above and beneath the surface. See *Edward v. Simms*, 24 S.W.2d 619 (Ky. 1929).

Kentucky jurisprudence has consistently maintained that:

“. . . the privilege of a landowner to the use and enjoyment of his property in any way he sees fit, so long as he does not infringe upon the rights of others, is inviolate incident of total ownership.”

See *Commissioner, ex rel. Department of Natural Resources v. Stevens*, 539 S.W.2d 303, 305 (Ky. 1976).

C. Other States Recognize Liability for Intentional Trespass

Kentucky is not alone in its adoption of the intentional trespass principle. Many other states recognize that an intentional trespass results in liability regardless of actual harm.

Wisconsin — *Jacque v. Steenburg Homes, Inc.*, 563 N.W.2d 154 (Wisc. 1997):

“Because a legal right is involved, the law recognizes that actual harm incurs in every trespass . . . the law infers some damage from every direct entry upon the land of another . . . a series of intentional trespassers . . . can threaten the individual's very ownership of the land.” 563 N.W.2d at 159-160.

Idaho — *McLaughlin v. Robinson*, 646 P.2d 453 (Idaho App. Ct. 1982):

“. . . plaintiff need not prove actual harm in order to recover nominal damages in cases of trespass to land because nominal damages are presumed to flow naturally from a wrongful entry upon land.” 646 P.2d at 458.

Texas — *Stevenson v. E.I. du Pont DeNumours*, 327 F.3d 400 (5th Cir. 2003) specifically rejected “substantial damage” test. “Because the only showing necessary [for trespass] is entry over land by some ‘thing,’ Texas law would permit recovery for airborne particulates.” 327 F.3d at 406.

Pennsylvania – *U.S. v. Union Corporation*, 277 F.Supp.2d 478 (E.D. Pa. 2003) adopted the analysis of RESTATEMENT (SECOND) OF TORTS § 158 for intentional trespass.

Oregon – *Ream v. Keen*, 828 P.2d 1038 (Or. App. Ct. 1982) held that actual damage is not necessary to establish liability for intentional trespass, and implicitly modified *Martin v. Reynolds Metals Company*, 342 P.2d 790 (Or. 1959)

Colorado – *Cook v. Rockwell International Corporation*, 273 F.Supp.2d 1175 (D.C. Colo. 2003):

“ . . . Colorado law does not require proof of actual damages to prove trespass based on physical intrusion upon property.” 273 F.Supp.2d at 1201³

North Carolina – *Shults v. Champion Intern Corp.*, 821 F.Supp. 517 (E.D. Tenn. 1992):

“ . . . a trespass action must involve proof of actual physical invasion but understands North Carolina law to allow recovery for trespass even where there has been no actual damage.” 82 F. Supp. at 519.

Missouri – *Maryland Heights Leasing, Inc. v. Mallinckrodt, Inc.*, 706 S.W.2d 218 (Mo. App. 1985) deposit of radioactive emissions on plaintiff's property constituted a trespass.

Montana – *Guenther v. Finley*, 769 P.2d 717 (Mon. 1989) adopted RESTATEMENT (SECOND) OF TORTS § 158 for intentional trespass.

³ The facts of *Cook v. Rockwell International* are virtually identical to the present case. Plaintiffs in *Cook* were landowners in close proximity to a government operated uranium enrichment plant. Plaintiff landowners sued for diminution of property. They alleged and provided evidence that their land had received radioactive emissions from the plant and, therefore, was contaminated. Plant contractors sought dismissal of the landowners' claims on the very same basis that the Defendants argue in this case. The district court, citing principles of intentional trespass under Restatement (Second) of Torts, § 158, rejected the defendants' claims and denied summary judgment. The matter proceeded to trial in which a jury last month (2006) returned a verdict in the plaintiffs' favor in the amount of \$553 Million.

Iowa — *Krotz v. Sattler*, 695 N.W.2d 41 (Ia. App. 2004) adopted RESTATEMENT (SECOND) OF TORTS § 158 for intentional trespass.

D. Defendants Seek to Change Kentucky Law on Trespass

The defendant contractors in this case seek to change existing Kentucky law on trespass by creating a new subcategory of intentional trespass by material imperceptible to human senses. In that event, and for the facts of this case, the defendant contractors wish to apply the burden of proof for negligent trespass and require the plaintiff property owners to establish radioactive contamination to a level that presents a health hazard.

Defendants cite and rely upon *Mercer v. Rockwell International Corporation*, 24 F.Supp.2d 735 (W.D. Ky. 1998), "*Mercer*," and *Rockwell International Corporation v. Wilhite*, 143 S.W.3d 604 (Ky. App. Ct. 2004), "*Wilhite*." Both *Mercer* and *Wilhite* arose out of the same facts. The plaintiffs in both cases were landowners that lived approximately 50 miles downstream of the town branch of the Mud River from the Rockwell International Plant. The Rockwell International Plant over the course of its operation used and discarded enormous volumes of PCB's. The PCB's were in a holding tank that escaped into a drainage system and flowed into the town branch of the Mud River. The plaintiffs claimed their properties were contaminated by this downstream release of PCB's.

Both *Mercer* and *Wilhite* were decided on the basis of negligent trespass. In *Mercer*, not only could the plaintiffs not prove any damages as required under negligent trespass pursuant to RESTATEMENT (SECOND) OF TORTS § 165, the Court was skeptical as to actual contamination,

“Plaintiffs still have not shown that the amount deposited are greater than background levels. Thus, plaintiffs have not proven that the amounts are more than what any buyer could expect to find on any other piece of property. Such a failure may be fatal because that means there is no evidence that these amounts of PCB’s caused their fair market value to decrease.” 24 F.Supp.2d at 751-752.

The plaintiffs in *Willhite* had similar evidentiary problems. In addition, the Court pointed out that the plaintiffs’ “land and the buildings thereon continue to be used as they were before the presence of PCB’s was discovered.” 143 S.W.3d at 625.

The *Mercer* and *Willhite* opinions adopt the analysis articulated in *Bradley v. American Smelting & Refining Co.*, 635 F.Supp. 1154 (W.D. Wash. 1986) that held that for landowners to recover under trespass from imperceptible airborne pollutants, there must be proof of actual damage.⁴ The *Mercer* and *Willhite* Courts interpreted the requirement for actual damage to mean proof of hazardous contamination, primarily because the plaintiffs claimed that any amount of PCB contamination on their property was dangerous and reduced their land to be worthless. In ruling for the defendants, the *Mercer* and *Willhite* Courts determined that the plaintiffs did not sustained their burden of proof.

E. *Mercer* and *Willhite* Do Not Apply to this Case

The analysis applied in *Mercer* and *Willhite* was specifically addressed and rejected in *Cook v. Rockwell International*, 273 F.Supp2d 1175, 1201 (D.C. Col. 2003). The Court in *Cook* found contamination, regardless of its level, constituted a physical intrusion sufficient for intentional trespass and proof of harm was unnecessary. This Court should rule similarly.

⁴ The District Court in granting Summary Judgment employed the legal analysis of *Mercer*, *Willhite* and *Bradley*.

The Plaintiffs in the present case pursue damages under the theory of intentional trespass. Notwithstanding this, the facts of the present case are distinguishable from those in *Mercer* and *Willhite*. Most significantly, the Plaintiffs have measurable radiological contamination on their properties in an amount that far exceeds expected background levels. These levels, as calculated by Plaintiffs' expert, Bernd Franke, exceed the preliminary remediation goals for the Environmental Protection Agency. Furthermore, Plaintiffs have offered Affidavit evidence that their property usage has changed. Several property owners lost the use of water wells due to the groundwater contamination. Several properties have posting restrictions on surface water of ponds and streams. Other Plaintiffs have offered Affidavit testimony that their commercial use of their properties has been restricted either in their inability to obtain loans for their properties, refinance their properties, or sell their properties on the open market. Finally, Plaintiffs have offered the Affidavit expert testimony of attorney Terrence McCoy that the Plaintiffs' properties have an effective cloud on their titles.

All of the harms demonstrated and proved by the Plaintiffs in this case are demonstratively different and more significant than those plaintiff property owners in both *Mercer* and *Willhite*. Plaintiffs can prove physical intrusion through measurable contamination.

The Plaintiff property owners in this case argue that their property value has been diminished as a result of radiological contamination intentionally caused by the Defendants. Under the intentional trespass law, Plaintiff landowners in this case have been damaged regardless of its actual harm. At a minimum, they are entitled to nominal damages. *See Ellison v. R & B Contracting, Inc.*, 32 S.W.3d at 71.

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?

Yes. This Court in *Ellison v. R & B Contracting, Inc.*, 32 S.W.3d 66 (Ky. 2000) held that in a property injury case, the property owner is entitled to damages that is the lesser of cost of restoration or the diminution of the property's value. The wrongful conduct in *Ellison* that resulted in the property injury occurred as a result of intentional trespass.

In the present case, Plaintiffs have offered the Affidavit testimony of their expert, Bernd Franke, that the radiological contamination of the Plaintiffs' property is permanent and that the cost of restoration exceeds the property diminution value. Accordingly, under the holding in *Ellison v. R & B Contracting, Inc.*, the answer to the above-referenced certified question by the Sixth Circuit Court of Appeal is yes.

VI. CONCLUSION

Kentucky long-standing tradition of respecting the rights of property owners and previous case law stand for the proposition that actual harm is unnecessary for the tort of intentional trespass. The facts of this case support the application of this principle and do not justify a change in law.

Respectfully Submitted,

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