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**NOT TO BE PUBLISHED OPINION**

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RENDERED: MARCH 18, 2010  
NOT TO BE PUBLISHED

# Supreme Court of Kentucky

2006-SC-000763-DG  
AND  
2007-SC-000818-DG

FINAL

DATE 4/8/10 Kelly Klaber D.C.

WOODIE CANTRELL, ET AL.

APPELLANTS/CROSS-APPELLEES

V.

ON REVIEW FROM COURT OF APPEALS  
CASE NOS. 2003-CA-001784-MR AND  
2003-CA-001865-MR  
JOHNSON CIRCUIT COURT NO. 97-CI-00442

ASHLAND OIL, INC., ET AL.

APPELLEES/CROSS-APPELLANTS

## MEMORANDUM OPINION OF THE COURT

### AFFIRMING

In 1997, 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 [hereinafter the Plaintiffs], filed suit against Ashland Oil Inc. and Ashland Exploration Holdings, Inc [hereinafter Ashland], alleging that Ashland's negligent oil production methods had contaminated the surface and groundwater of their properties in Johnson County, Kentucky, and that this contamination constituted a continuing trespass and a permanent nuisance, which permanently diminished the value of their land. Although the trial court dismissed the Plaintiffs' claims of water and non-radiation contamination prior

to trial because they were untimely filed, the court permitted the ground surface contamination claims to go to the jury. After finding that Ashland's negligent conduct did contaminate the surface of the Plaintiffs' property, the jury concluded that nonetheless, the contamination had not produced an actual injury or present harm to the land. Thus, the trial court entered a judgment in favor of Ashland.

On appeal to the Kentucky Court of Appeals, the Plaintiffs raised several allegations of error, and Ashland cross-appealed the trial court's partial denial of its summary judgment and directed verdict motions. The Plaintiffs complained that the trial court should not have dismissed their groundwater and non-radiation contamination claims, that the trial court improperly excluded key expert testimony relevant to the extent of damage caused by the contamination, and that the trial court made numerous other evidentiary errors warranting the grant of a new trial. In a unanimous opinion, the Court of Appeals rejected the claims of error, affirmed the judgment in favor of Ashland, and dismissed Ashland's cross-appeal as moot. The Plaintiffs then petitioned this Court for discretionary review, which we granted. The Plaintiffs now argue to this Court essentially the same errors they presented to the Court of Appeals: that the trial court erroneously excluded essential expert testimony that would have demonstrated the extent of their damages; that the trial court improperly dismissed their water and non-radiation contamination claims; and that the trial court erred in numerous evidentiary rulings, the cumulative effect of which constitutes reversible error. Finding that the Court of Appeals

analyzed and resolved all the Plaintiffs' claims of error correctly, we affirm and thus do not address the issues raised in Ashland's cross-appeal.

**RELEVANT FACTS**

As the Court of Appeals recognized, the underlying facts of this case are not in dispute. The Plaintiffs own real property in Johnson County, Kentucky, in an area known as Martha Oil Field. After Ashland acquired this field in the mid-1920s, it entered into leases with the property owners, including the Plaintiffs or their predecessors in title, and, pursuant to these leases, began engaging in oil production. In the late 1950s and early 1960s, Ashland Oil began injecting pressurized water into the oil-bearing stratum layer of Martha Oil Field in order to increase oil production. This method of oil production (also called water-flooding), however, causes other materials located below ground to be carried to the surface, one being naturally occurring radioactive material (NORM). When NORM is concentrated on the earth's surface due to human activities, it is called technologically enhanced naturally occurring radioactive material (TENORM). Because all forms of NORM are colorless, odorless, and tasteless, it cannot be detected by humans.

In 1997, the Plaintiffs filed suit against Ashland, claiming that Ashland's water-flooding method of oil production created NORM contamination on the surface of their property, non-NORM contamination on the surface of their property, and contamination in their groundwater. In their complaint, they alleged that this contamination permanently diminished the value of their property. The Plaintiffs did not claim that any person, animal, or vegetation

had been harmed by the contamination, but rather, only claimed that Ashland's conduct and the resulting contamination constituted a negligent trespass and a continuing nuisance on their property. Prior to trial, Ashland moved to dismiss the groundwater contamination and non-NORM surface contamination claims. The trial court granted this motion, agreeing that these claims were barred by the statute of limitations. In July 2003, a jury trial was held to determine the remaining claims regarding NORM contamination on the ground surface of the Plaintiffs' properties.

After considering all the proof, the jury concluded that Ashland had been negligent in its method of oil production and that its conduct caused the ground surface of the Plaintiffs' property to be contaminated with above-background levels of NORM. Nonetheless, the jury found that based on the evidence presented, there was no reason for the Plaintiffs to fear the above-background levels of NORM on their property. Because the jury determined that the Plaintiffs' suffered no injury from the NORM contamination and were not entitled to damages, the trial court entered a judgment for Ashland.

On appeal to the Kentucky Court of Appeals, as noted, that court disagreed with the Plaintiffs' claims of error and unanimously affirmed the trial court's decision to dismiss the Plaintiffs' water and non-NORM contamination claims, to exclude certain expert testimony, and to enter other evidentiary and trial-related rulings. The Court of Appeals held that because the Plaintiffs were aware that they had problems with their groundwater and that the problems were caused by Ashland by 1989 at the latest, their failure to file this action

until 1997 barred their water and non-NORM contamination claims under the statute of limitations. The Court of Appeals held that the trial court properly excluded certain expert testimony being offered by the Plaintiffs because the testimony only related to a possible future harm to the Plaintiffs' property and not to what, if any, actual present harm was currently occurring on the their property. Lastly, regarding the Plaintiffs' remaining claims of evidentiary and trial-related errors, the Court of Appeals concluded that the Plaintiffs were not entitled to a new trial.

**I. The Court of Appeals Correctly Determined that The Trial Court Did Not Err In Limiting or Striking Certain Testimony of the Plaintiffs' Experts.**

Special Master Commissioner Pierce Hamblin presided over the *Daubert* hearing between the parties in this case.<sup>1</sup> After hearing arguments regarding what expert testimony the parties intended to present, Commissioner Hamblin prohibited the Plaintiffs' expert witnesses from testifying about how the property might be harmed in the future assuming certain hypothetical uses of the property and limited their testimony to how the property is currently being harmed by the contamination. Judge Carl Hurst, the judge subsequently appointed to preside over the trial, adopted Commissioner Hamblin's rulings and applied them at trial. The Plaintiffs now allege that in applying Commissioner Hamblin's decisions, the trial court erred by limiting the expert

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<sup>1</sup> This case was originally assigned to Judge James Knight of the Johnson Circuit Court. Judge Knight retired, however, soon thereafter. The judge elected to replace Judge Knight, Judge Daniel Sparks, took office and thereafter, appointed Pierce Hamblin to act as a Special Master Commissioner to assist with pre-trial rulings in this case. After Commissioner Hamblin began participating in the case, the parties agreed that it would be appropriate for him to preside over the *Daubert* hearing.

testimony of Dr. Steve Waligora, Bob Grace, and Michael Jarrett, and by striking the testimony of Clay Kimbrell. An appellate court reviews a trial court's decision on the admissibility of expert testimony under the abuse of discretion standard. *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 577-578 (Ky. 2000). A trial court abuses its discretion only if its "decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). Despite the Plaintiffs' contention, we disagree that the trial court's decision to exclude certain expert testimony was unreasonable or unsupported by sound legal principles.

**A. The Trial Court Did Not Apply an Unfair Standard When It Limited the Testimony of Dr. Stanley Waligora to the Present, Actual Harm Caused by the NORM Contamination.**

The Plaintiffs challenge the trial court's ruling excluding portions of Waligora's expert testimony as erroneous on several grounds: recent developments in Kentucky case law, such as the case of *Smith v. Carbide and Chemical Corp.*, 226 S.W.3d 52 (Ky. 2007), and in the scientific community, such as the Biological Effects of Ionizing Radiation (BIER VII) Report, which adopts the linear-no-threshold (LNT) model for analyzing the health risks of ionizing radiation; the court's determination that Waligora's opinions were based solely on the findings of Michael Jarrett, another of the Plaintiffs' experts; the court's decision that the Residual Radiation computer model (REDRAD) used by Waligora was too speculative to support his testimony; and

the court's rejection of the LNT model, a method used and accepted by the scientific community.

**1. The Recent Developments In Kentucky Case Law and In the Scientific Community Do Not Render the Trial Court's Partial Exclusion of Waligora's Testimony Erroneous.**

First, the Plaintiffs allege that because this Court recently held in *Smith, supra*, that “[p]roperty owners are not required to prove contamination that is an actual or verifiable *health risk* . . . ,” the trial court erred by basing its ruling on Waligora's inability to show a health hazard from the NORM contamination. *Id.* at 56 (emphasis in text). However, *Smith, supra*, is distinguishable from the case at hand because here, the Plaintiffs have neither claimed nor demonstrated that the contamination on their property constituted an unreasonable interference with their current use and enjoyment of their property.

In *Smith, supra*, this Court, pursuant to CR 76.37(1), answered the following questions of Kentucky law certified by the United States Court of Appeals for the Sixth Circuit: whether proof of actual harm is required to state a claim for intentional trespass, and whether plaintiffs have a right of recovery if they can prove a diminution in the property values due to an intentional trespass. *Id.* at 53. First, this Court stated that a plaintiff does not have to prove actual harm to state a claim for intentional trespass, but his failure to show actual harm will limit his recovery to only nominal damages. *Id.* at 54-55. In order for a plaintiff to be entitled to more than mere nominal damages in an intentional trespass action, he must show an actual injury or harm. *Id.*



at 55. Addressing the second question, this Court explained that proving a diminution in property values does not amount to proving an actual injury or harm. “Kentucky law allows the recovery of just compensation (not merely nominal damages) upon proof of actual injury to the real estate. Once the particular injury to the real estate is shown, the diminution in fair market value is a recognized *measure* of damages.” *Id.* (emphasis in text; internal citations omitted). Thus, a plaintiff is not entitled to actual damages (more than nominal) in a trespass action unless he can demonstrate an actual harm or injury to the property, and if he is successful in showing that harm, his damages may be measured by the diminution in his property value. The important question then becomes at what point does the trespass cause an actual injury or harm?

Although the inquiry in *Smith, supra*, involved an intentional trespass, this Court stated that “whether by intentional or negligent trespass,” property can be injured or harmed if there is “an unreasonable interference with the property owner’s possessory *use* of his/her property.” *Id.* at 56-57 (emphasis in original). The Plaintiffs are correct, therefore, that *Smith, supra*, is relevant to their negligent trespass action, and that it gives property owners a way to prove actual injury or harm without necessarily having to prove that the contamination “is an actual or verifiable *health* risk.” *Id.* at 56. If, however, property owners cannot prove a health risk, they must nonetheless prove that the contamination unreasonably interferes with their current use and enjoyment of their property in order to prove an actual harm or injury and be

entitled to actual damages. *Id.* at 56-57. Here, the Plaintiffs did not present evidence that they were currently prevented from using and enjoying their property in any way. Rather, the Plaintiffs merely alleged that the NORM contamination permanently diminished the value of their property and could interfere with their *future* use and enjoyment. This is exactly the type of negligent trespass action that *Smith, supra*, criticized, and thus, the Plaintiffs' claim that the holding in *Smith, supra*, renders Waligora's testimony admissible and entitles them to a new trial is completely without merit.<sup>2</sup>

Second, the Plaintiffs claim that a recent scientific development entitles them to a new trial: the BIER VII Report confirms that the LNT model is the appropriate model for analyzing the health risks of harmful radiation, such as TENORM. The Plaintiffs requested that the Court of Appeals take judicial notice of the BIER VII Report as evidence demonstrating the scientific community's general acceptance of the LNT model, but the court denied this request. The Court of Appeals found that judicial notice was not appropriate because the report involved matters outside of the range of knowledge generally known in the community; the report would be merely cumulative of evidence already presented at trial, such as the BIER V Report; and the conclusions in

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<sup>2</sup> *Smith, supra*, was rendered approximately one year after the Court of Appeals issued its opinion affirming Ashland's judgment at trial. This Court agrees with Ashland that due to the rule set forth in *Smith, supra*, the Plaintiffs' negligent trespass claims should have been dismissed prior to trial because they did not demonstrate an actual harm or injury and only claimed that their property values were diminished by the contamination. However, as Ashland recognizes in their brief, this error is harmless due to the jury's verdict at trial and the Court of Appeals' decision to affirm Ashland's judgment. Because we are also affirming the Court of Appeals, we will not address this argument in detail.

the report supporting the LNT model were not even probative or applicable to the present, actual danger caused by the NORM contamination on the property. On appeal to this Court, the Plaintiffs continue to assert that the scientific community's acceptance of the LNT model renders Waligora's methodology and testimony conclusively reliable, and thus, his testimony should not have been limited at trial. We disagree.

The Plaintiffs' argument ignores Commissioner Hamblin's primary reason for disapproving of the LNT model and finding it to be irrelevant to the case at hand: the LNT model measures the risk of *future* harm from exposure to potentially-harmful substances and does not assess the current circumstances of the property. The recent publication of the BIER VII report does not change the fact that the LNT model is irrelevant to any present, actual harm that the NORM contamination is allegedly causing on the property. As Commissioner Hamblin explained following the *Daubert* hearing:

[Waligora's] opinions are not based upon present circumstances. His [LNT] 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 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*.

Because the LNT model only measures future risks of NORM exposure, the BIER VII's acceptance of the LNT model does not affect the trial court's basis

for excluding portions of Waligora's testimony. Thus, the Court of Appeals acted properly in refusing to take judicial notice of the BIER VII report and the trial court did not err in prohibiting Waligora from testifying about possible future harm to the Plaintiffs' property.

**2. The Trial Court's Reasons for Striking Waligora's Testimony Were Legally Sound, and Thus, the Court Did Not Abuse Its Discretion In Limiting Waligora's Testimony to the Present Circumstances of the Plaintiffs' Property.**

The Plaintiffs take issue with the trial court's reasons for deciding to restrict Waligora's testimony. Waligora was a certified health physicist and had extensive experience working with the United States Government on the remediation of radioactive waste sites. During the *Daubert* hearing, Waligora admitted that his role as an expert witness was not to determine whether the NORM contamination created a health hazard to the property owners, but rather, to discuss the nature and extent of the NORM contamination in Martha Field. Following the *Daubert* hearing, Commissioner Hamblin ruled that Waligora would be allowed to testify regarding the fact and extent of the NORM contamination, but would be specifically prohibited from testifying as to the effect of the radiation and the danger it may pose to present and future users of the properties. On appeal, the Plaintiffs allege that this limitation on Waligora's testimony was erroneous for three reasons: the trial court wrongly found that Waligora relied solely on the faulty methodology of Michael Jarrett, another of the Plaintiffs' expert witnesses; the court erroneously concluded that the RESRAD computer model used by Waligora was too speculative to support his testimony; and the court incorrectly rejected the LNT model, which

Waligora used to predict future risks to the property owners assuming certain land-uses. We will address each of the Plaintiffs' allegations of error in turn.

Prior to trial, Commissioner Hamblin excluded Michael Jarrett's testimony because his data was unreliable. Commissioner Hamblin determined that Jarrett had used faulty equipment that tended to over-respond when detecting radiation, and Jarrett had used unscientific methods to state opinions as to extent of contamination on the Plaintiffs' properties.<sup>3</sup> Waligora admitted during the *Daubert* hearing that the data he entered into the RESRAD computer program, which he used to create his model demonstrating future harm, was in part based on Jarrett's findings. One reason for Commissioner Hamblin's exclusion of the future-opinion portion of Waligora's testimony was because of his reliance on Jarrett's unreliable findings. The Plaintiffs now contend that although Waligora did rely on Jarrett's data to develop his RESRAD models, he also relied on his own observations and the data collected by Ashland.

Although the Plaintiffs may be correct that Waligora did not rely solely on Jarrett's findings to develop his RESRAD computer model, because there was at least some reliance on Jarrett's measurements, the trial court's concerns about the reliability of Waligora's data were certainly legitimate, and its decision to act on those concerns cannot be said to constitute an abuse of discretion. However, even if the trial court should not have based its limitation

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<sup>3</sup> The Plaintiffs did not even appeal the trial court's ruling excluding Jarrett's testimony to the Court of Appeals.

of Waligora's testimony on the unreliability of Jarrett's data, the fact remains that the court's other two reasons for limiting Waligora's testimony were not erroneous.

The Plaintiffs claim that the trial court erred in concluding that the RESRAD model was too speculative to support Waligora's testimony and in rejecting the LNT model as being probative in this case. According to Waligora's statements in the *Daubert* hearing, he used the RESRAD program to calculate the risks to future owners and occupiers of Martha Oil Field properties based upon future land use scenarios. Waligora's RESRAD calculations were based on the LNT model, which assumes that there is no safe threshold for exposure to ionizing radiation and that low levels of radiation exposure over a long period of time increase the risk of cancer. Relying on these anticipated future risks, Waligora intended to testify that future land-owners could be limited in how they used their property on Martha Oil Field and could suffer health risks in the future because of the NORM contamination. As noted above, Commissioner Hamblin prohibited Waligora from testifying about the effect of the radiation and the danger it may pose in the future to users of the properties because his opinions were not based on the present circumstances of the property.

On appeal, the Plaintiffs continue to emphasize that Waligora's testimony should not have been excluded due to doubts about the reliability of his methods. The Plaintiffs note that the RESRAD methodology is typically relied upon by experts in this field and that it is the appropriate scientific and legal

approach, that the LNT model is the methodology of the Environmental Protection Agency (EPA), that the EPA uses the LNT model to derive its guidelines to protect public health, and the LNT model is generally accepted in the scientific community. But again, even if this Court agrees completely with reliability of the RESRAD and LNT models, the fact remains that these models measure *future* risks. They do not demonstrate the present circumstances of the properties and do not inform the jury what, if any, injury currently exists on the properties.

The Court of Appeals correctly emphasized that the Plaintiffs had to prove a current, actual harm or injury in order to be entitled to damages. Applying this Court's recent decision in *Smith, supra*, that means the Plaintiffs had to prove that the contamination caused either a physical health risk or an unreasonable interference with their current use and enjoyment of the property to be entitled to damages. *Smith*, 226 S.W.3d at 56-57. Because Waligora's testimony only demonstrated examples of possible future risks to the property owners, it was not relevant to whether the Plaintiffs' suffered a current, physical health risk or an unreasonable interference with their current use and enjoyment of their property. However, even if the trial court had admitted the entirety of Waligora's testimony, including the results of his RESRAD method and LNT model, the Plaintiffs still would not have met this element of proof. Waligora's excluded testimony only demonstrated that under certain hypothetical, future land-uses, there could be a health risk to humans living on the properties in the future. Even the Plaintiffs stated in their brief to this

Court that if Waligora's testimony had been admitted, he would have "explained that the level of radiation on Plaintiffs' properties would present significant health risks to humans assuming various future land-use scenarios."

As the Court of Appeals succinctly stated,

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 present injury.

As noted above, the trial court excluded portions of Waligora's testimony not strictly because his methodology was unreliable, but rather, because it was irrelevant to whether a present injury existed on the properties at issue. Thus, the trial court did not err by criticizing the RESRAD and LNT models used by Waligora or by excluding his testimony relating to future harm.

The Plaintiffs also briefly contend that because the trial court limited Waligora's testimony and criticized the LNT model, the court should have also limited the testimony of Dr. John Frazier, who testified on behalf of Ashland. Dr. Frazier testified that there is a threshold below which radiation exposure is safe and the current level of radiation on the Plaintiffs' properties falls below that threshold. First, even though the trial court restricted Waligora's testimony, it did not err in allowing Frazier's testimony because Frazier's opinions related to the present circumstances of the properties. As explained



above, the trial court restricted Waligora's testimony because it related only to future risks. In so ruling, the trial court was not simply favoring Ashland but rather following Kentucky law regarding the type of proof that is relevant to Plaintiffs' claims. Significantly, the trial court was consistent in permitting testimony relating to the present circumstances of the Plaintiffs' property but prohibiting testimony relating to future circumstances. Furthermore, as the Court of Appeals recognized, it was incumbent on the Plaintiffs to prove that the radioactive substances on their property caused actual damage or interfered with their current enjoyment or use of their property. Even without Frazier's testimony, the evidence offered by the Plaintiffs was insufficient to prove this element, and thus, the exclusion of Frazier's testimony would not have changed the outcome at trial.

**B. Because Bob Grace's Testimony Would Not Have Altered the Result At Trial, the Plaintiffs Were Not Prejudiced By the Trial Court's Decision to Exclude His Testimony and Are Not Entitled To a New Trial on This Basis.**

Bob Grace, a petroleum engineer with experience in the water-flooding method of oil recovery, was one of the Plaintiffs' expert witnesses and was prepared to testify about Ashland's negligent method of oil production, which led to the NORM contamination on their properties. Prior to trial, the trial court limited Grace's testimony to what he had stated in his written report, which had been exchanged between the parties during pre-trial discovery. However, Grace subsequently stated that contrary to his pretrial report and deposition, he also intended to testify about the extent of the radiation contamination on the Plaintiffs' property. Because this portion of Grace's

testimony fell outside the parameters of his pre-trial disclosures, the trial court prohibited him from discussing the extent of the radiation contamination and limited his testimony to his pretrial disclosures. The trial court also limited Grace's testimony to Ashland's activities on the Plaintiffs' properties and prohibited him from testifying about activity that occurred on other property in the Martha Oil Field.

The Plaintiffs now allege that the excluded portion of Grace's testimony was relevant, reliable, and should have been admitted at trial. Specifically, they contend that Grace would have testified that Ashland's oil recovery techniques were negligent, reckless, and dangerous, and that the negligent techniques contaminated the land, surface waters, and aquifers of the Martha Oil Field. However, as the Court of Appeals explained, the jury found in favor of the Plaintiffs on this issue. The jury agreed with the Plaintiffs that Ashland's method of oil production was negligent, and that this negligent conduct caused the Plaintiffs' properties to be contaminated with NORM.<sup>4</sup> Thus, the trial court's limitation of Grace's testimony did not prejudice the Plaintiffs in any way and cannot be a basis for granting a new trial. RCr 9.24; *See Rogers v. Commonwealth*, 60 S.W.3d 555, 559 (Ky. 2001) (finding that the trial court's erroneous decision to exclude certain testimony was harmless error because there was no substantial possibility that the jury's verdict would have been any

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<sup>4</sup> Ashland notes that the NORM found on Plaintiffs' properties was "inside a few pipes on the Wrights' land (17T2,203), which was very hard to find 'because the radiation levels are so low' (17T2,206) and in soil on one remote spot on the Plaintiffs' property that could fit into a two-gallon mop bucket. (17T2,217-19)." Plaintiffs simply state their property was contaminated with NORM.

different if the testimony had been admitted). Furthermore, Grace admitted that he was not an expert in radioactive particles and did not have knowledge of the extent to which the particles had contaminated the Plaintiffs' properties. Thus, the trial court had a sound legal reason for excluding portions of Grace's testimony and cannot be said to have abused its discretion in this instance.

**C. Because the Plaintiffs Did Not Argue to the Court of Appeals that the Trial Court Erred By Excluding Michael Jarrett's Testimony, This Court Will Not Address Their Argument.**

As noted above, Commissioner Hamblin concluded following the *Daubert* hearing that Michael Jarrett's findings about the extent of the contamination on the Plaintiffs' properties were unreliable and that his testimony should be excluded. Commissioner Hamblin determined that Jarrett used faulty equipment that tended to over-respond when detecting radiation and unscientific methods to state opinions as to the extent of contamination on the Plaintiffs' properties. Although the Plaintiffs now argue to this Court that this determination by the trial court was erroneous, they never presented this argument to the Court of Appeals. This Court declines to address new claims of error that have not been presented to the lower court and have not been properly preserved for appellate review. *Skaggs v. Assad*, 712 S.W.2d 947, 950 (Ky. 1986); *Newell Enterprises, Inc. v. Bowling*, 158 S.W.3d 750, 755 (Ky. 2005).

**D. The Trial Court Did Not Err In Striking Clay Kimbrell's Testimony, But Even if it Were Error it Was Harmless.**

Like Bob Grace, Clay Kimbrell was an expert witness for the Plaintiffs and intended to testify that Ashland's oil production methods were negligent and caused the NORM contamination on the properties at issue. During

Kimbrell's trial testimony, he stated that Ashland's operation was "reckless." Although the trial court then informed the Plaintiffs' counsel that his witness was testifying to matters barred by previous limiting instructions, counsel subsequently asked Kimbrell again whether Ashland's conduct was "reckless", and then asked Kimbrell whether Ashland "failed to use ordinary care" in their oil production.

Later during Kimbrell's testimony, the trial court began asking Kimbrell questions directly in order to determine where he collected his water samples on which he based his findings of contamination. After several questions, Kimbrell admitted that although he tried to get water samples from the Plaintiffs' properties, all the wells on their properties had been plugged. Kimbrell disclosed that his contamination measurements were based on water samples that were taken from other neighboring properties. After the improper questioning by the Plaintiffs' counsel and Kimbrell's admission about his water samples, the trial court struck Kimbrell's entire testimony. The Plaintiffs now complain that the trial court should not have struck Kimbrell's testimony and should not have injected itself into the trial by asking Kimbrell questions directly. We disagree.

First, the Plaintiffs contend that the trial court erroneously applied the ultimate issue rule. They argue that whether an opinion contains the ultimate issue at trial is not relevant to the admissibility inquiry and does not support a ruling excluding the testimony. However, a trial court has the discretion to limit expert opinion evidence to circumstances where the testimony will assist

the trier of fact and where the probative value of the testimony outweighs its prejudicial effect. *Stringer v. Commonwealth*, 956 S.W.2d 883, 891 (Ky. 1997). Here, by stating that Ashland's conduct was "negligent" and that they "failed to use ordinary care", Kimbrell's testimony, as the trial court noted, employed "legal terminology" to draw the conclusion that the jury was to make. The trial court found this to be overly prejudicial. We need not determine whether this ruling was an abuse of discretion because Kimbrell's testimony was otherwise inadmissible.

Contrary to Plaintiffs' assertion, it was not error for the trial court to inquire of Kimbrell where he collected his water samples.<sup>5</sup> Kimbrell's role was to testify about the presence of contamination on the Plaintiffs' properties. The trial court was attempting to determine whether Kimbrell's findings were based on samples he collected from the Plaintiffs' properties. After learning that his samples were collected from other properties, the trial court acted within its discretion when it struck Kimbrell's testimony. Furthermore, as with Bob Grace's testimony, the jury ultimately agreed with Kimbrell that Ashland's conduct was negligent. Thus, even if the trial court erroneously struck Kimbrell's testimony, the Plaintiffs were not prejudiced by this error and are not entitled to a new trial on this basis.

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<sup>5</sup> Normally, trial judges should refrain from extensive questioning of witnesses. However, the trial court in this instance was justifiably concerned about violation of the court's pretrial orders.

## **II. The Court of Appeals Correctly Concluded that The Trial Court Did Not Err In Dismissing the Plaintiffs' Water and Non-NORM Contamination Claims.**

The Plaintiffs argue that the trial court should not have dismissed their water and non-radiation claims because Ashland Oil failed to conclusively establish that these claims were barred by the statute of limitations.<sup>6</sup> In particular, the Plaintiffs allege that Ashland Oil never demonstrated that the property owners in this action knew their water was specifically contaminated with NORM and other non-radiation contaminants, knew that the contamination on their property was caused by Ashland Oil, or knew that they had a legal injury. The Plaintiffs also argue that because Ashland Oil represented to them that NORM was harmless, Ashland is estopped from now claiming that the water and non-NORM contamination claims are barred by the statute of limitations. Like the Court of Appeals, this Court rejects both arguments.

All parties concede that the five-year statute of limitations set forth in KRS 413.120(4) is applicable to this action. According to Kentucky case law, a cause of action accrues, and the limitations period begins to run, 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.” *Louisville Trust Co. v. Johns-Manville*

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<sup>6</sup> Although the Plaintiffs do not discuss the non-radiation claims in the same detail as the water contamination claims, they state in their brief that “the same arguments made with regard to the Plaintiffs’ water claims [should] apply equally to their claims relating to non-radiation damage.

*Products Corp.*, 580 S.W.2d 497, 501 (Ky. 1979), quoting *Raymond v. Eli Lilly & Co.*, 117 N.H. 164, 371 A.2d 170 (N.H. 1977). Here, the Plaintiffs claim that because they never knew their water was contaminated specifically with NORM and other harmful materials until certain tests were conducted in the mid-1990's, that is when the limitations period should begin to run. However, the Court of Appeals correctly recognized that a "[p]laintiff's lack of knowledge of the extent of his injury does not toll a statute of limitations to which the discovery rule is applied." *Louisville Trust Co.* at 500. Thus, even if the Plaintiffs were not aware of the extent or details of the water contamination, *i.e.*, the presence of NORM in their water, the fact remains that Ashland Oil presented ample evidence showing that the Plaintiffs were aware of a water contamination problem and that it was caused by Ashland Oil at least before 1989.

In 1987, Ashland Oil and the Environmental Protection Agency (EPA) entered into a public consent decree in order to address the non-NORM water contamination present on the Martha Oil Field properties. Although Ashland Oil did not admit liability at the time of the 1987 decree, during this time, they recapped wells, evaluated and monitored ground water quality in the area, and provided an alternative water supply to residents of the area, including the Plaintiffs. In 1988, Ashland Oil and the EPA entered into a second consent decree to address NORM contamination, which resulted in Ashland Oil removing contaminated pipe and soil from the affected properties. The Plaintiffs take issue with the trial court's reliance on the 1987 consent decree

because Ashland did not demonstrate whether each individual plaintiff in this case knew of the decree. The Plaintiffs also criticize the trial court's reliance on Ashland Oil's efforts to supply the residents of Martha Oil Field with an alternative water supply because Ashland did not demonstrate when each individual plaintiff in this action knew that he or she was receiving an alternative water supply or knew that it was supplied by Ashland Oil.<sup>7</sup> However, aside from the timing of this decree and Ashland Oil's remedial efforts, the Plaintiffs conceded prior to trial that they had complained about the bad smell and taste of their water for several decades prior to 1987 and that they knew these problems were caused by Ashland Oil. Thus, as noted above, although the Plaintiffs may not have known the extent and exact nature of the contamination, they nonetheless knew of the injury and knew that it was caused by Ashland Oil at least before 1989.

The Plaintiffs also complain that Ashland Oil did not demonstrate when the Plaintiffs knew or should have known of their legal injury in this case. However, Ashland Oil was not required to show the point at which the Plaintiffs became aware of a cause of action because the limitations period begins to run when a plaintiff knows he has received an injury, not when he knows the injury is actionable. *Conway v. Huff*, 644 S.W.2d 333, 334 (Ky. 1982) (holding that the statute of limitations period begins to run "with the discovery that a wrong has been committed and not that the party may sue for the wrong"). Ashland

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<sup>7</sup> The record demonstrates Ashland Oil provided the Plaintiffs in this action with a city-water line by 1990.



Oil clearly demonstrated that at least before 1989, the Plaintiffs knew there was a contamination problem with their water and that it was caused by Ashland Oil. Thus, because the Plaintiffs waited till 1997 to file this action, the trial court properly determined that their water and non-NORM contamination claims were time-barred by the statute of limitations.

Lastly, the Plaintiffs briefly contend that Ashland Oil should be prevented from asserting a statute of limitations defense because Ashland Oil misrepresented that NORM was harmless. However, as the Court of Appeals stated, for the Plaintiffs to successfully claim that Ashland Oil is equitably estopped, they must also demonstrate that Ashland Oil prevented them from discovering the damage to their ground water. *See Weiland v. Bd. Of Trs. of Ky. Ret. Sys.*, 25 S.W.3d 88, 91 (Ky. 2000) (explaining that one essential element of equitable estoppel is that the person claiming the estoppel lacks the means of knowing the truth as to the facts in question). Other than the allegation that Ashland Oil downplayed the harmful nature of NORM in the water, the Plaintiffs have not put forth any evidence to support this theory. Thus, the Court of Appeals was correct in concluding that Ashland Oil was not estopped from asserting a statute of limitations defense.

### **III. The Plaintiffs' Remaining Claims of Error Are Without Merit and Do Not Provide a Basis for Granting a New Trial.**

The Plaintiffs allege several additional instances of trial court error and claim that these errors, individually and cumulatively, entitle them to a new trial. Specifically, they claim that the trial court erred by (1) unfairly dictating their order of proof; (2) striking part of their opening statement; (3) prohibiting

them from introducing evidence, including the testimony of Bobby Alexander and a video tape created by Chris Dawson, about Ashland's activities on other properties not owned by the Plaintiffs, which, the they contend, was erroneous because Ashland's field-wide conduct was relevant to their claims and because this ruling unfairly hindered their ability to present a cohesive story of Ashland's misconduct; (4) excluding other important evidence, such as Earl Arp's testimony, Ashland's failed remediation efforts, the cost of remediation, and Mark Park's deposition; and (5) failing to properly instructing the jury on the Plaintiffs' theory of the case. Although these allegations of error will be addressed briefly by this Court, we ultimately agree with the Court of Appeals' analysis and resolution of each claim and find that these arguments are without merit.

#### **A. Order of Proof**

First, the Plaintiffs claim that the trial court unreasonably dictated their proof by requiring them to wait until the end of their case-in-chief to call their expert witnesses. They contend that because their experts could testify about the whole story of Ashland's misconduct and understood the overarching issues in the case, the trial court's order undermined the effectiveness of their presentation. The trial court did so, however, because it determined that the Plaintiffs' experts intended to offer more opinion testimony than factual testimony. As the Court of Appeals recognized, a trial court has broad discretion when dealing with problems associated with the production of evidence, and its decision will not be disturbed on appeal unless there is clear

evidence of an abuse of that discretion. *Metcalf v. Commonwealth*, 158 S.W.3d 740, 748-749 (Ky. 2005). Indeed, KRE 611(a) specifically states:

(a) Control by court. The 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 did not abuse its discretion in this complex case by requiring the expert witnesses to be called following the lay witnesses.

### **B. Opening Statement**

Second, the Plaintiffs argue that the trial court erred by striking a portion of their opening statement. When discussing whether Ashland lived-up to its internal standards of corporate conduct, the Plaintiffs' counsel informed the jury that

My faith teaches me that we're supposed to do unto others . . . 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?"

After Ashland objected, arguing that this was an improper golden-rule argument, the trial court determined that although this statement was not precisely a golden-rule argument, the statement nonetheless tended to confuse the jury regarding the standard against which it should measure Ashland's conduct. The trial court then instructed the jury to disregard the statement.

We find that the trial court's decision in this instance was appropriate. The Plaintiffs' counsel's statement unquestionably invoked a standard of conduct that was not the legal standard under which Ashland's conduct would be judged, and it was not unreasonable for the trial court to conclude that the statement could confuse the jury. Thus, the trial court did not err by striking it.

### **C. Activity on Other Properties**

Third, the Plaintiffs allege that the trial court erred by excluding evidence of Ashland's activities on other properties located in Martha Oil Field. First, the Plaintiffs contend that Bobby Alexander should have been permitted to testify about his knowledge of Ashland's activities on other properties. Bobby Alexander was an Ashland employee involved with Ashland's remediation efforts on other properties located in Martha Oil Field. Although Alexander had knowledge about Ashland's methods of oil production and the levels of NORM present on those other properties, he recognized that he had no evidence to offer regarding the levels of NORM, if any, present on the Plaintiffs' properties. In excluding Alexander's testimony, the trial court ruled that evidence of Ashland's misconduct on other properties not owned by the Plaintiffs was irrelevant to their claims regarding contamination on their properties. The Plaintiffs now argue that this ruling was erroneous because Ashland's field-wide conduct was relevant to its trespass and nuisance claims and was an essential component of their ability to present a cohesive story of Ashland's misconduct. We disagree.

The Plaintiffs insist that because a nuisance claim requires the jury to consider the defendant's own use of his property, and because a trespass exists when the defendant's activities on other property cause something to enter onto the plaintiff's property, that Ashland's conduct on other properties was relevant to both their nuisance and trespass claims. First, the Plaintiffs' nuisance claim did not allege that Ashland made an improper use of its own land. Rather, the Plaintiffs alleged that Ashland, pursuant to valid leases, negligently harvested oil on the Plaintiffs' land, and that this negligent conduct caused NORM contamination on their properties. Thus, Ashland's conduct on its own or any other person's land was irrelevant to the Plaintiffs' claim. Second, Alexander's excluded testimony would not have shown how Ashland's conduct on other properties caused NORM contamination to enter onto the Plaintiffs' properties; his testimony only revealed how Ashland caused NORM contamination to enter onto other people's properties located in Martha Oil Field. Therefore, the trial court was correct in holding that the Plaintiffs' could not prove that their land was contaminated by demonstrating that Ashland contaminated other properties in Martha Field.

Moreover, the trial court's exclusion of Ashland's misconduct on other properties did not prevent the Plaintiffs from being able to present a cohesive story of Ashland's negligence. Although the Plaintiffs wanted to inform the jury of Ashland's alleged widespread negligence, the fact remains that the Plaintiffs' specific cause of action in this instance was only for damage to their property. Had the Plaintiffs' claims involved all the property owners in Martha Field, then

Ashland's conduct on the entire field would be relevant. Despite the trial court's exclusion of activities on other properties, the Plaintiffs were free to present any evidence that was relevant to their specific claim of NORM contamination on their own land.

The Plaintiffs also argue that Chris Dawson should have been allowed to authenticate and play a video tape he created, which he intended to testify revealed Ashland's misconduct on a nearby property. Chris Dawson was a security guard at Wal-Mart who observed and videotaped an Ashland employee pumping water into a creek that emptied into a lake that borders one of the Plaintiffs' properties. Dawson admitted that he was not a scientist, had no training in NORM contamination, and took no water samples to verify that the water being pumped was contaminated. Even though all parties stipulated that NORM and radioactive materials are invisible, Dawson based his opinion that this water was contaminated on his visual observations only. In excluding Dawson's authenticating statement and his video tape, the trial court held that this evidence was inadmissible under KRE 407 as evidence of a remedial activity and under KRE 403 because its prejudicial nature outweighed its probative value.

We agree with the Court of Appeals that although this tape may have been admissible under KRE 407, the trial court did not abuse its discretion by excluding it under KRE 403. It is within a trial court's sound discretion to apply the balancing test in KRE 403 and determine whether evidence that has a slight probative value but a significant prejudicial effect should be excluded.

*See Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). Here, as the Court of Appeals stated, there was no evidence offered that these actions by Ashland's employee actually deposited any significant amount of NORM on any of the Plaintiffs' properties. Whatever slight relevance, if any, this tape had to Ashland's negligence, its prejudicial effect far outweighed any real probative value. Thus, the trial court's exclusion of Dawson's video was proper.

#### **D. Other Important Evidence**

The Plaintiffs contend that the trial court erroneously excluded other important evidence, such as Earl Arp's testimony and memo, Ashland's failed remedial efforts, the cost of remediation, and Mark Park's deposition. We agree with the Court of Appeals' conclusion that these claims of error are without merit.

Earl Arp was a former Ashland employee who had circulated a memo in 1982 discussing the proposed regulations relating to radioactive materials. Although the Plaintiffs argued that this evidence was admissible to show Ashland's prior knowledge that its oil production methods could cause dangerous NORM contamination, the trial court disagreed. The trial court held that Arp's testimony and memo were inadmissible as hearsay not covered by any exception, and because this evidence was not probative of the levels of NORM actually present on the Plaintiffs' properties. Not only does this Court agree that the trial court did not abuse its discretion in excluding this evidence, but also, as the Court of Appeals noted, this evidence was only probative of

Ashland's negligent conduct, which, again, the Plaintiffs proved at trial. Thus, any error in excluding this evidence was harmless.

We also agree with the Court of Appeals that the trial court's decision to exclude evidence regarding the cost of remediation was proper. Evidence of the cost of remediation was not probative of the levels of NORM present on the Plaintiffs' properties, and furthermore, remediation expenses were not relevant to this action because the Plaintiffs only claimed damages relating to the diminution in their property values, not to their cost of remediation. Likewise, evidence of Ashland's failed remedial efforts was not probative to the issues at hand because such evidence did not indicate how the NORM contamination actually injured or harmed the Plaintiffs' properties. Although such evidence may have been probative of Ashland's negligent conduct, again, the Plaintiffs prevailed on that issue at trial. Thus, the exclusion of Ashland's failed remedial efforts could not have affected the outcome at trial.

Finally, the Plaintiffs argue that the trial court erred by excluding portions of the deposition of Mark Park, a petroleum engineer at Ashland, who was prepared to testify about the negligent oil production methods of Ashland. Again, the Plaintiffs have not identified any aspect of Park's testimony that, if admitted, would have changed the result at trial. The jury agreed with Park that Ashland engaged in negligent conduct that resulted in NORM contamination, but Park offered no evidence relating to how the NORM contamination caused a present injury or harm to the Plaintiffs' properties. Thus, even if the trial court erred there is simply no identifiable harm.



### **E. Jury Instructions**

The Plaintiffs contend that the trial court erred by failing to instruct the jury on their theory of the case. They argue that the trial court should have included separate instructions on trespass and nuisance as well as on nominal and punitive damages, and that the trial court should not have included an instruction based on a stigma doctrine. As the Court of Appeals explains, however, the trial court's jury instructions generally complied with the applicable law. Although the trial court did not provide separate instructions on the applicable elements of trespass and nuisance, it instructed 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 properties. In a separate instruction, the trial court the asked the jury to determine whether based on the evidence presented, "there is a basis in reason and experience for a fear of the NORM above-background readings" found on the properties. We agree with the Court of Appeals that this second instruction covers the requirement in a trespass action that a plaintiff prove a current injury or harm to the property, and the requirement in a nuisance action that a plaintiff prove an unreasonable interference with the use and enjoyment of his property. In addition, because the Plaintiffs could not prove any actual harm to their properties, they were not entitled to any damages and thus, were not prejudiced by the trial court's failure to instruct on nominal and punitive

damages.<sup>8</sup> Lastly, despite the Plaintiffs' contention that the trial court erroneously relied on "the *Gatledge* case out of Illinois" to instruct the jury on the stigma doctrine, the stigma language in the instruction was actually based on *Gulledge v. Texas Gas Transmission Corp.*, 256 S.W.2d 349 (Ky. 1953), a condemnation case that was tried in Jefferson Circuit Court and that applied Kentucky law. Other than this incorrect citation to authority, the Plaintiffs have offered no reason why the trial court's inclusion of this stigma language was erroneous at the time the case was tried.<sup>9</sup> They are not entitled to a new trial on this basis.

### **CONCLUSION**

Despite the Plaintiffs' numerous claims of error, this Court concludes that they received a fair trial and that the trial court did not commit any errors mandating a reversal of the jury's verdict. Because the Plaintiffs waited more than five years after becoming aware of the contamination of their ground water and non-radioactive contamination of their surface to bring this action, these claims were properly dismissed by the trial court as being untimely. Because several of the Plaintiffs' experts could only testify about future risks to the property owners and not about the current circumstances of the properties,

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<sup>8</sup> Per this Court's opinion in *Smith, supra*, the Cantrells could be entitled to nominal damages if they had proven intentional instead of negligent trespass.

<sup>9</sup> These instructions were arguably more favorable to Plaintiffs than Kentucky law currently supports post-*Smith*. "[M]ere damage to the reputation of realty does not entitle one to recovery, as that injury is more imaginary than real. Likewise, the mere presence of contaminants may only damage the property's reputation and not its use." *Smith*, 226 S.W.3d at 56. Damage to the reputation of property alone is insufficient under Kentucky law to support a recovery.

the trial court's decision to exclude or restrict this expert testimony was proper. Lastly, none of the Plaintiffs' remaining claims of evidentiary and trial-related errors, either individually or cumulatively, constitute reversible error. Accordingly, the Court of Appeals Opinion affirming the judgment of the Johnson Circuit Court is affirmed.

Minton, C.J.; Abramson, Noble, and Venters, JJ., concur. Special Justice Paul W. Blair and Special Justice Patrick E. Price concur. Cunningham, J., concurs in result only by separate opinion. Schroder and Scott, JJ., not sitting.

CUNNINGHAM, J., CONCURRING IN RESULT ONLY: I concur in result, but continue to maintain my distance from the majority opinion in *Smith v. Carbide and Chemical Corp.* It is my belief, as expressed in my dissent in *Smith*, that once an intentional trespass is shown, the diminution in the property value should, in and of itself, be sufficient to award damages. Here, however, we are dealing with negligent trespass. Furthermore, the expert testimony excluded by the trial court went to future harm to the property—not present harm. As the majority notes, here the plaintiffs “neither claimed nor demonstrated” that the contamination affected the “current use and enjoyment of their property.” The testimony offered was properly deemed too speculative to satisfy the dictates of *Daubert*. I think the trial court and the Court of Appeals made the right call, my disagreement with the holding in *Smith* notwithstanding. Therefore, I concur in result only.

COUNSEL FOR APPELLANTS/CROSS-APPELLEES:

Joseph R. Lane  
Ned Barry Pillersdorf  
Pillersdorf, Derossett & Lane  
124 West Court Street  
Prestonsburg, KY 41653

COUNSEL FOR APPELLEES/CROSS-APPELLANTS:

Anne Adams Chesnut  
Phillip D. Scott  
Brian Michael Johnson  
Greenebaum, Doll & McDonald, PLLC  
300 W. Vine Street, Suite 1100  
Lexington, KY 40507-1655

Michael J. Schmitt  
Porter, Schmitt, Banks & Baldwin  
327 Main Street  
P. O. Drawer 1767  
Paintsville, KY 41240-1767