RENDERED: OCTOBER 26, 2007; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-001712-MR

HARROD CONCRETE AND STONE CO. — APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER L. CRITTENDEN, JUDGE
CIVIL ACTION NOS. 01-CI-01033; 01-CI-01034;
01-CI-01044; 03-CI-00041; & 03-CI-00092

JAMES P. MELTON III; PAMELA MELTON; WILLIAM C. WOLEJSZA; PATTY M. WOLEJSZA; REVA M. LATHREM; DARNELL DEVERS; JOANNE V. DEVERS; MICHAEL L. STORY; DEAN STORY; CATHERINE SUE JEFFERS; EDWARD DUNN; ETHEL J. DUNN; RHODA L. SHAW; RANDALL L. OLIVER; MARY L. OLIVER; JACK W. THOMPSON; MARY F. THOMPSON; LANNY MYERS; LILLIAN B. MYERS; DAVID WARNER; DONNA WARNER; JOHN PARRISH; FAYE PARRISH; BURT STEVENSON; AND MARY ANN STEVENSON — APPELLEES

OPINION
REVERSING IN PART, VACATING IN PART,
AND REMANDING

** ** ** ** ** ** ** **

BEFORE: MOORE AND STUMBO, JUDGES; ROSENBLUM,[1] SENIOR JUDGE.

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

ROSENBLUM, SENIOR JUDGE: Harrod Concrete and Stone Company (Harrod) appeals from a judgment entered upon a jury verdict by the Franklin Circuit Court in favor of Appellees. Finding error, we reverse in part, vacate in part, and remand.

FACTUAL AND PROCEDURAL BACKGROUND

Harrod operates an underground limestone quarry in Franklin County, Kentucky. Harrod harvests the limestone by blasting. The Appellees are all homeowners with residences located from several hundred feet to several thousand feet away from Harrod's quarry. By all accounts, most all the Appellees were able to feel vibrations and/or hear the blasting operation from their respective homes.

On August 7, 2001, Appellees filed a complaint alleging that Harrod's blasting operation caused damage to their homes and constituted a temporary nuisance under KRS[2] 411.54. Additional parties with similar claims against Harrod filed complaints at later dates, however all the civil actions were eventually consolidated.[3] The complaints were amended to state claims for strict liability for property damage caused by blast vibrations, nuisance, trespass, punitive damages and for a permanent injunction. The homes allegedly all had varying degrees of damage, including cracks in the interior and exterior walls and slabs, cracks in chimneys and joints, bowed walls, cracked drywall, nail pops, and fogged and/or cracked windows. All of the homes are located in Franklin County, Kentucky over an area of roughly two square miles.

[2] Kentucky Revised Statutes.

[3] Originally, claims were made for fifteen homes.

On March 2, 2004, a jury was empaneled to hear the case over several weeks. Harrod moved for a directed verdict at the close of the Appellees' evidence and again at the close of all the evidence. The trial court denied both motions. On April 19, 2004, the jury returned a verdict in favor of certain Appellees as follows:

Appellee Name	Compensatory Damages	Punitive Damages
Darnell and Joanne Devers	$45,000	$100,000
Edward and Ethel Dunn	$42,500	$100,000
Catherine Sue Jeffers	$15,000	$100,000
Reva M. Lathrem	$45,000	$100,000
Lanny and Lillian Myers	$63,000	$100,000
Randall and Lillian Oliver	$55,000	$100,000
Rhoda L. Shaw	$43,000	$100,000
Jack and Frances Thompson	$35,000	$100,000
David and Donna Warner (Rental)[4]	$26,000	$100,000

Because it found that Harrod acted with reckless disregard for the lives, safety or property with regard to the above Appellees, the jury's award included punitive damages. The jury found that Harrod was not responsible for any alleged damage to the remaining Appellees' homes. The jury also found that Harrod's limestone operation did not constitute a nuisance to any of the Appellees.

On May 26, 2004, the trial court entered judgment on the jury's verdict. Harrod moved for a judgment notwithstanding the verdict (JNOV), or alternatively for a new trial on punitive damages. Harrod offered various arguments in support of its motion for a JNOV, including that the claims were barred by the statute of limitations. After trial, the Appellees, including those not receiving a favorable verdict, requested injunctive relief. Ultimately, the trial court overruled Harrod's motion for a JNOV and

[4] The Warners owned two homes, one rental and one private residence.

issued an injunction on behalf of all the Appellees requiring Harrod to perform seismographic monitoring of its operations. This appeal followed.

STATUTE OF LIMITATIONS

Although Harrod advances several arguments in favor of reversal, we first consider its argument that the property damage claims must be barred or limited by the five year statute of limitations. We agree that the trial court erred in failing to instruct the jury to limit the potential recovery to only those damages occurring within the five years immediately preceding the filing of the Appellees' claims, and thus reverse and remand.[5]

[5] Examples of the relevant jury instructions, in pertinent part, state:

> INSTRUCTION NO. 2
>
> You will find in favor of the Plaintiff, Catherine Sue Jeffers, on her claim for blasting damages against the Defendant, Harrod Concrete & Stone Co., if you are satisfied from the evidence that the Defendant's blasting operations were a substantial factor in causing or increasing the damage to the Jeffers' home. Otherwise, you will find for the Defendant.
>
> Question No. 1
>
> Do you find that Defendant's blasting operations were a substantial factor in causing or increasing the damage to the Jeffers' home?
>
> YES _____
> NO _____
>
> INSTRUCTION NO. 3
>
> If your answer to Question No. 1 was yes, you will determine from the evidence and award Catherine Sue Jeffers an amount not to exceed $79,000.00 for one of the following:
>
> (a) The reasonable cost of restoring the property to substantially the same condition as immediately before it was damaged by the Defendant;
>
> OR
>
> (b) The difference between the fair market value of Plaintiff Catherine Sue Jeffers' property before and immediately after the property was damaged. . . .

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 following actions shall be commenced within five (5) years after the cause of action accrued:
> (4) An action for trespass on real or personal property.

"Once the statute of limitations is raised, the burden falls on the complainant to prove such facts as would toll the statute." *Southeastern Kentucky Baptist Hospital, Inc. v. Gaylor,* 756 S.W.2d 467, 469 (Ky. 1988). A cause of action accrues when a party knows that he has been wronged, not when he knows that the wrong is actionable. *Conway v. Huff*, 644 S.W.2d 333, 334 (Ky. 1982). 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. *Louisville Trust Co. v. Johns-Manville Products Corp.*, 580 S.W.2d 497, 501 (Ky. 1979). 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. *Id.* at 500.

Kentucky adheres to the federal discovery rule in actions involving damage to real property. *See Rockwell International Corp. v. Wilhite*, 143 S.W.3d 604, 617 (Ky.App. 2003). In *Rockwell*, we squarely adopted and applied the discovery rule to actions involving chemical contamination of, and damage to, real property. Under the discovery rule, " '[a] cause of action will not accrue . . . until 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.*, 580 S.W.2d at 501, *quoting Raymond v. Eli Lilly & Co.*, 117 N.H. 164, 371 A.2d 170, 174 (1977)(Emphasis added).

The pertinent issue in this case is when Appellees discovered or, in the exercise of reasonable diligence, should have discovered their injuries, i.e., the alleged damages to their homes. The Appellees contend that they did not know they were injured and by whom until after filing their claims, at the time when their expert concluded that blasting vibrations were the cause of damages. Consequently, the Appellees argue that "[b]ecause the damage here was based on the tort of continuing trespass, the statute of limitations is tolled through the last day on which damages are suffered" and that they may bring suit at any time. Assuming, arguendo, that Appellees may bring suit at any time under such a theory, the statute of limitations is not thrown out the window. Indeed, the authority cited by the Appellees in support of their argument also clearly establishes that in cases of continuing trespass, the statute of limitation bars recovery for damage occurring more than five years prior to the bringing of the action. *See Judd v. Blakeman*, 175 Ky. 848, 195 S.W. 119 (1917); *Lynn Mining Co. v. Kelly*, 394 S.W.2d 755 (Ky. 1965).

As noted by the court in *Rockwell*, "a plaintiff's lack of knowledge as to the extent of his injury does not toll a statute of limitations to which the discovery rule is applied." 143 S.W.3d at 612-13. In *Rockwell*, the plaintiffs sought an award for damages

caused by the deposit of PCB pollutants on their properties. *Id.* at 606-7. The PCB's were invisible and odorless, thus the plaintiffs argued that they could not be faulted for not bringing claims they did not even know existed. *Id.* at 608. Such was not the case here.

Contrary to the latent damage described in *Rockwell*, the damage here was known and present as far back as the early 1980's for some of the Appellees. We agree with Harrod that "[c]racks are not latent or inherently undetectable. Neither are nail pops, drywall cracks or cracked and fogged windows. These conditions are patently obvious." Certainly, all the Appellees had knowledge of the blasting vibrations occurring as a result of Harrod's limestone operation from the first day of moving into their respective homes. Additionally, Harrod introduced evidence at trial showing that many Appellees knew or should have known of the damages and the possible cause before August 1996.[6] For example, the Dunns and Devers filed insurance claims for blast damage and received payments before 1996. Moreover, the Olivers filed insurance claims before 1996, which were denied; however, they had been advised in June 1996 by an engineering firm that they had blast damage.

Nor are we persuaded that Appellees were unable to determine the cause of the damage because they allegedly complained to state mining officials and to Harrod directly about the alleged blast damage and were told that the blasting was not causing their property damage. The Appellees are not relieved of their responsibility to exercise reasonable diligence to discover the cause of their damages merely because Harrod may

[6] August 1996 is five years prior to the original filing of Appellees' claims against Harrod.

have denied responsibility. Thus, the trial court erred and its instructions to the jury should have limited the award, if any, to only those damages proven to have occurred subsequent to August 1996. Accordingly, we reverse and remand.

PUNITIVE DAMAGES

Harrod also argues that the trial court erred in its jury instruction[7] regarding punitive damages. Because we believe that this issue may arise on retrial, we will consider the argument. The basis of Harrod's argument is that the trial court erred because it failed to include the "clear and convincing" standard of proof in its punitive damages instruction. KRS 411.184(2) states:

> [a] plaintiff shall recover punitive damages only upon proving, **by clear and convincing evidence**, that the defendant from whom such damages are sought acted toward the plaintiff with oppression, fraud or malice.

(Emphasis added). Additionally, in *Hardin v. Savageau,* 906 S.W.2d 356 (Ky. 1995) the Kentucky Supreme Court held that:

> [i]f the elevated evidentiary standard is to have meaning and effect, the jury must be informed of the standard and directed to apply it to the evidence. Without instructing on the heightened standard, only the judge will have given it any consideration and the jury will make its determination using

[7] An example of the relevant jury instruction, in pertinent part, states:

> INSTRUCTION NO. 6
>
> If you find for the Plaintiff, Catherine Sue Jeffers, and award her a sum or sums for her claims of blasting damage or nuisance, and if you are further satisfied from the evidence that in damaging the Plaintiff's property or causing the nuisance, the Defendant acted toward Jeffers in reckless disregard for the lives, safety or property of others, you may in your discretion award punitive damages against the Defendant . . . .

> an erroneous standard, less than the law requires. When the law requires a particular evidentiary standard, both the judge and the jury must consider the evidence in that light. The nature of the inquiry is substantially different when the jury must say whether it "is satisfied from the evidence" or whether it "believes by clear and convincing evidence."

Id. at 358. Accordingly, because the statute specifically requires punitive damages to be proven by clear and convincing evidence, such language must be included in the jury instruction. Upon retrial, if the evidence supports a punitive damage instruction, it shall include the "clear and convincing" burden of proof.

EXPERT WITNESS

Harrod also argues that the trial court abused its discretion by admitting the testimony of the Appellees' expert witness, Dr. James Deatherage. We will address this issue as it may again arise during retrial. The trial judge "has wide discretion in (the) determination to admit and exclude evidence, and this is particularly true in the case of expert testimony." *Hamling v. United States*, 418 U.S. 87, 94 S.Ct. 2887, 2903, 41 L.Ed.2d 590, 615 (1974); *Keene v. Commonwealth*, 516 S.W.2d 852, 855 (Ky. 1974).

Dr. Deatherage testified that he is a professor of civil engineering with a Ph.D. in civil engineering. Moreover, he has numerous peer reviewed publications which he has authored. Dr. Deatherage's education, training, and experience were sufficient to qualify him as an expert witness. To the extent that Harrod argues Dr. Deatherage's opinions fall outside the scope of scientific, technical or other specialized knowledge pursuant to *Daubert*, we disagree. *See Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

The test of reliability outlined in *Daubert* is a flexible one and although *Daubert* identifies a list of factors to consider, those "factors neither necessarily nor exclusively appl[y] to all experts or in every case." *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000). "'[T]he factors identified in Daubert may or may not be pertinent in assessing reliability, depending on the nature of the issue, the expert's particular expertise, and the subject of his testimony.'" *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 150, 119 S.Ct. 1167, 1175, 143 L.Ed.2d 238 (1999)(quoting in agreement with the Solicitor General's Brief for United States as Amicus Curiae 19). The principles established in *Daubert* and its progeny concerning the admissibility of expert testimony "apply not only to expert testimony based on scientific knowledge, but are equally applicable to expert testimony based on **technical or other specialized knowledge**." *Goodyear Tire*, 11 S.W.3d at 583 (Emphasis added).

Here, in forming his opinions, Dr. Deatherage visually inspected the homes and interviewed the occupants. Dr. Deatherage also reviewed countless photographs of the alleged damage, reviewed the opinions of Harrod's experts, as well as reviewed technical publications regarding blast vibrations. We conclude that the trial court did not abuse its discretion in permitting Dr. Deatherage to testify as to his opinion regarding the alleged blast damage, and if the Appellees so choose, Dr. Deatherage may testify as an expert upon retrial.

INJUNCTIVE RELIEF

Finally, we note that the trial court entered an injunction against Harrod requiring that it conduct seismographic monitoring for a period of 24 months. The trial court's determination that Appellees were entitled to injunctive relief was based upon the evidence introduced at trial and the jury's verdict that Harrod engaged in wrongful conduct. However, because we reverse the jury's verdict, we must vacate the injunction. Based upon our disposition of this appeal, all other issues raised by Harrod are moot.

Accordingly, the judgment of the Franklin Circuit Court is reversed in part, vacated in part, and remanded for further proceedings consistent with this opinion.

ALL CONCUR.

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