

RENDERED: December 13, 1996; 2:00 p.m.  
NOT TO BE PUBLISHED

NO. 95-CA-0275-MR  
and  
NO. 95-CA-0397-MR

LEONARD E. HAYS, JR. and  
LOIS HAYS

APPELLANTS/CROSS-APPELLEES

V. APPEAL AND CROSS-APPEAL FROM MADISON CIRCUIT COURT  
HONORABLE JULIA HYLTON ADAMS, JUDGE  
ACTION NO. 90-CI-0237

WILLIAM H. JENNINGS and  
GRACE JENNINGS

APPELLEES/CROSS-APPELLANTS

**OPINION**  
**AFFIRMING**

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BEFORE: COMBS, GARDNER, and HUDDLESTON, Judges.

**COMBS, JUDGE:** This case originated as a nuisance action in the Madison Circuit Court. Appellants, Lois Hays and Leonard E. Hays, Jr., were the plaintiffs below. They own a 12.83 acre farm and residence located at the corner of Kentucky Highway 21 and Dale Road near Interstate 75 in southern Madison County. William H. Jennings and Grace Jennings, the cross-appellants, own

approximately 40 acres on the opposite corner of Kentucky Highway 21 and Dale Road.<sup>1</sup>

In December 1988, the Jenningses began renewed efforts to excavate slate from an open mine on their property. They mined from a two-acre area situated above the Hayses' pond and pasture. During the initial period of excavation, Dale Drive became muddy and nearly impassable. Eventually, a grader was brought in to remove the mud residue from the road so that residents could pass. Ultimately, it was decided that the slate would be hauled through the front of the Jenningses' property and directly on to Highway 21 avoiding further inconvenience to the users of Dale Road. Slate was removed from the area until the autumn of 1989. At that time, the Jenningses levelled the mining site and seeded and fertilized the area. Later, they planted six pine trees there.

Following the excavation, the Hayses filed suit against the Jenningses. They alleged that as a result of the mining activity, their pond had been filled with silt to such an extent that the drain became inoperative and could not be used to fill a concrete stock watering trough; additionally, they complained that the fish and other life in the pond had been killed.

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<sup>1</sup>The Madison Circuit Court found that Dale Road is a graveled public passway originating off of Highway 21. It was a originally a dirt passage. Prior to 1976, neighboring property owners and the Jenningses agreed to an accommodation whereby the roadbed would be laid in slate that was taken from the Jenningses' property from a bank adjacent to Dale Road creating a slate quarry and leaving an exposed wall of slate at the time the Hayses purchased their property at public auction in 1976.

Following the presentation of testimony and an on-site observation of the properties, the trial court found that the silt damage and water quality damage to the Hayses' pond was a direct result of the slate mining activity conducted on the Jenningses property during 1988 and 1989; that the Hayses had suffered a significant harm; and that the Jenningses had unreasonably interfered with the Hayses' use and enjoyment of their property. The court concluded that the Jenningses had created, through their slate mining enterprise, a permanent private nuisance under the provisions of KRS 411.530 and awarded the Hayses \$9,593.00, representing the reduction in the fair market value of their property.

By way of cross-appeal, the Jenningses contend that the trial court erred in finding in favor of the Hayses because the Hayses failed to prove that the slate excavation constituted a permanent, private nuisance pursuant to KRS 411.530. As the parties are aware, we may not set aside the trial court's finding of fact unless it is clearly erroneous. CR 52.01. Our review indicates that, in fact, the finding is amply supported by the evidence. Thus, it cannot be disturbed.

Next, both parties take issue with the trial court's award of damages. The Jenningses maintain that the Hayses altogether failed to prove their damages; the Hayses maintain that the court applied an incorrect measure of damages in making its award. We will consider these arguments together.

Pursuant to KRS 411.560, the measure of damages for a permanent private nuisance is the reduction in the fair market value of the affected property. After reviewing the evidence, the trial court concluded that the damage assessments offered by each party were unreasonable and without basis. It held that the cost approach method rather than a comparable sales approach method was appropriate in determining damages and awarded to the Hayses \$9,593.00. We are not persuaded by the Jenningses' argument that this amount was not proved through competent evidence. Moreover, in view of the facts as determined by the trial court, we are not convinced that this amount failed to reflect accurately the damages recoverable by the Hayses. On the contrary, we believe that the damage award was entirely proper.

Accordingly, the judgment of the Madison Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANTS/CROSS-  
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BRIEF FOR APPELLEES/CROSS-  
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