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# Commonwealth of Kentucky

# Court of Appeals

NO. 2010-CA-001750-MR

B. TODD CRUTCHER, INDIVIDUALLY, AND
AS TRUSTEE OF THE B. TODD CRUTCHER
LIVING TRUST, AND JAMES DONALD CRUTCHER — APPELLANTS

APPEAL FROM FRANKLIN CIRCUIT COURT
v. HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 03-CI-01502

HARROD CONCRETE AND STONE CO. — APPELLEE

and NO. 2010-CA-001801-MR

HARROD CONCRETE AND STONE CO. — CROSS-APPELLANT

v. CROSS-APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 03-CI-01502

B. TODD CRUTCHER AND
JAMES DONALD CRUTCHER — CROSS-APPELLEES

OPINION
AFFIRMING IN PART,
REVERSING AND VACATING IN PART, AND REMANDING

** ** ** ** **

BEFORE: COMBS, MOORE AND NICKELL, JUDGES.

NICKELL, JUDGE: This appeal determines the measure of damages for underground removal of limestone by a willful trespasser. We write on a clean slate. For the following reasons, we affirm in part, reverse in part and remand for further proceedings consistent with this opinion.

FACTS AND PROCEDURAL HISTORY

It is undisputed that B. Todd Crutcher, individually, and as trustee of the B. Todd Crutcher Living Trust, and his brother, James Donald Crutcher (collectively "Crutcher"), own and possess 36 acres of unimproved land in Franklin County bordering a 500-acre tract of land owned by Harrod Concrete and Stone Co. ("Harrod") and operated as an underground limestone quarry since 1958. It is further undisputed that in the course of mining its own property in 2002, Harrod learned[1] it may have encroached upon and removed 164,000 tons of shot rock (limestone loosened by blasting) from beneath Crutcher's land. David Harrod, President of Harrod, apprised Crutcher of the potential encroachment in December 2002 and in attempting to reach a settlement, offered to buy Crutcher's property; pay Crutcher a reasonable royalty for the limestone it had mistakenly

[1] David Harrod testified he learned of the possible encroachment upon being cited for mining Crutcher's land without a permit by the Kentucky Office of Surface Mining Regulation and Enforcement.

removed; or mine more of Crutcher's property to increase the amount of royalty that would be earned.

Unable to reach a settlement, Crutcher filed a complaint in Franklin Circuit Court on November 25, 2003, alleging Harrod had encroached on its land, removed valuable stone without authority, and converted that stone for its own use with "intentional or reckless omission to ascertain the boundaries of [Crutcher's] land[.]" Crutcher maintained that had Harrod timely obtained a boundary survey of its property; adopted a system to correlate its surface boundaries to the annual mapping of its underground mining activity; and not "maintained ignorance" of its boundaries, the encroachment and resulting injury would not have occurred. In answering the complaint, Harrod stated any encroachment was "entirely inadvertent" and noted that Crutcher had rejected its proposal that the parties "cooperate to obtain a survey to determine to [Crutcher's] satisfaction whether or not an encroachment had occurred." Both parties demanded a jury trial.

Throughout the pendency of this case, Crutcher vigorously urged the trial court to measure compensatory damages for a willful encroachment and taking of limestone by the value of the material at the time of removal—without reduction for the expense of mining—coincidentally, the same measure that would apply to the removal of coal. *Griffith v. Clark Mfg. Co.*, 212 Ky. 498, 279 S.W. 971, 972 (1926). "Where the trespass is willful, and not the result of an honest mistake, the measure of damages is the value of the coal mined at the time and place of its severance, without deducting the expense of severing it." *North Jellico*

*Coal Co. v. Helton*, 187 Ky. 394, 219 S.W. 185 (1920). Where the taking is due to an honest mistake, the owner is entitled to recover the value of the coal "in place". *Griffith,* 279 S.W. at 972. A similar measure has been applied to the taking of fluorspar. *Hughett v. Caldwell County,* 313 Ky. 85, 92, 230 S.W.2d 92, 96-97 (1950). Consistent with this approach and citing *Griffith* as authority, Crutcher further contended that any evidence of the value of its land, its "condition, nature, accessibility or use[,]" or "the ability or inability . . . to remove marketable stone from said property" was irrelevant and should be excluded from trial.

With equal vigor, Harrod argued Kentucky courts have held limestone is not a mineral, *Little v. Carter,* 408 S.W.2d 207, 209 (Ky. 1966), and therefore, the measure of damages could not be the formula applied to the taking of valuable coal, Kentucky's state mineral. KRS[2] 2.094. Harrod asserted the proper measure of recovery was the difference in the fair market value (FMV) of Crutcher's land immediately before and after the encroachment/removal—the traditional measure of damages applied in non-coal/non-mineral cases. *Ellison v. R & B Contracting, Inc.*, 32 S.W.3d 66, 69 (Ky. 2000) (Kentucky courts have affirmed two types of damages in injury-to-property cases: for permanent injury, "the amount by which the fair market value of the property decreased immediately prior to and after the trespass"; and for temporary injury, "the cost to return [the property] to its original state.").

[2] Kentucky Revised Statutes.

In July 2006, then-presiding Judge William L. Graham entered a pre-trial order declaring in pertinent part:

> 1. The damages [the Crutchers] may recover for inadvertent trespass is a royalty.
>
> 2. The damages [the Crutchers] may recover if intentional trespass is proven shall be the market value of the mined material at the mouth of the mine without an allowance for the expense of removal.

Following Judge Graham's retirement from the bench, Judge Thomas D. Wingate became the presiding judge and the question of how to measure damages was resurrected. Crutcher continued arguing it should be allowed to recover either a royalty or actual value of the mined limestone, depending upon whether the jury believed Harrod's trespass was an honest mistake or a willful act. Harrod forcefully argued the reduction in the land's FMV was the proper measure. On September 20, 2006, Judge Wingate entered his own pre-trial order changing the measure of damages and stating:

> [u]pon additional briefing of the parties, and the Court's own research, this Court finds that the measure of damages in a trespass case involving the removal of limestone should not be the same measure of damages as traditionally applied in Kentucky to the removal of coal and minerals. Indeed, Kentucky courts have long held that "limestone is not legally cognizable as a mineral." *Little v. Carter,* 408 S.W.2d 207, 209 (Ky. 1966). *See also Elkhorn City Land Co. v. Elkhorn City,* 459 S.W.2d 762, 764 (Ky. 1970) and *Rudd v. Hayden*, 97 S.W.2d 35 (Ky. 1936).
>
> Accordingly, the measure of damages in this case shall be the traditional measure of damages in a trespass case not involving coal and minerals - - the difference

> between the fair market value of the [Crutcher's] property immediately before and immediately after [Harrod] trespassed upon the property. *See Ellison v. R & B Contracting, Inc.*, 32 S.W.3d 66, 69 (Ky. 2000) ("the amount by which the injury to the property diminishes its total value operates as an upper limit on any damage recovery."). *See also Burkshire Terrace, Inc. v. Schroerlucke,* 467 S.W.2d 770, 772 (Ky. 1971) ("in no case, of course, may the amount of recovery exceed the diminution in market value[.]").
>
> Because the Court has determined that the punitive formula for calculating damages in a coal and mineral trespass case (i.e., the market value of the mineral without an allowance for the expense of removal) does not apply in the case at bar, [Crutcher] will be entitled to seek punitive damages in this action should they make the requisite showing of proof to support such an award.

Nearly four more years passed before a jury trial[3] finally commenced in May 2010. Throughout this period, Crutcher persistently urged the trial court to reconsider and allow it to recover as compensatory damages either a royalty or the actual value of the mined limestone, but the court stood by its September 2006 ruling. However, once trial was underway, Crutcher was allowed, over Harrod's objection, to introduce proof of market and royalty values as that data could impact the award of punitive damages. Harrod strenuously argued such evidence was inadmissible and irrelevant and would be overly prejudicial to the defense.

As it had stated in a pre-trial stipulation, Crutcher offered no proof at trial of the FMV of its land. However, it did put on proof, through Stephen Gardner, a mining engineer offered as an expert witness, that in 2006, one ton of

[3] Due to construction of the new Franklin County Judicial Center, this trial occurred in a temporary court facility. We have reviewed the trial in its entirety. Unfortunately, much of the testimony was inaudible, which has hindered our review.

processed limestone sold in the market for an average of $7.30 and that 6% per ton was a common royalty value. Called to the witness stand by Crutcher, David Harrod testified he had told Crutcher the average market value of finished limestone in 2002 ranged from $5.50 to $5.65 per ton. Harrod also testified that while trying to settle the matter, he had mentioned to Crutcher that $0.05 per ton was a common royalty rate paid for limestone. A lease between parties unrelated to this action was introduced—revealing a royalty for limestone of $0.03 per ton. Harrod challenged Gardner's qualifications as an expert witness, arguing he was not a real estate appraiser and his method of determining royalty and market values —a telephone survey for whom he could not identify the respondents nor their individual answers—was hearsay and unscientific.

Through various witnesses, including surveyors and several Harrod employees, Crutcher established: Harrod had no surface boundary survey performed between 1996 and 2002 even though David Harrod knew the mining operation was heading toward Crutcher's property; as determined by Crutcher, Harrod's encroachment covered 1.8 acres and resulted in removal of 164,000 tons of limestone from the Crutcher property; Harrod could not correlate its boundary lines at the surface to its subsurface mining activity until *after* the encroachment although GPS coordinates could have been plotted *before* the encroachment; Harrod had encroached in another area prior to 1991; although Harrod knew the maps it received annually showing the progression of its mining depicted only approximate and uncertified boundary lines, this knowledge did not prompt it to

secure a boundary survey—and Harrod ignored and crossed the approximate lines shown on the maps it possessed; finally, Harrod employees continued advancing while clearly being unaware of their underground location as it related to the surface boundaries of the Harrod property. Because Crutcher offered no testimony of FMV during its case-in-chief, Harrod argued a directed verdict should be entered in its favor. Nonetheless, trial proceeded.

Harrod offered testimony from real estate appraiser Phillip Tamplin, who described the Crutcher land as woods over a limestone deposit, with level topography and seven or eight sinkholes. Around 1960, the 36-acre parcel had been landlocked by construction of I-64 and separated from a larger 55-acre tract. According to Tamplin, visual inspection of the surface showed no sign of mining. Tamplin valued the parcel at $27,900.00 as of January 1, 2002, and concluded Harrod's underground mining had not reduced its FMV. While Crutcher disagreed with Tamplin's statement of its property's value, Crutcher offered no competing testimony about the FMV of its land.

David Harrod testified that at the time of the encroachment, despite using the same equipment and tools used by other mine operators, he and his men had no idea their mining activity was anywhere near Crutcher's boundary. He further admitted he did not have his deed in hand, and saw no need to go to the courthouse to get a copy. He confirmed that the $5.50 per ton price for finished limestone in 2002 was the actual sales price without any reduction for costs. He testified about the royalty rates paid by some of his competitors, which he said

ranged from two to three percent of the average sales price and $0.02 to $0.05 per ton. When asked to explain how the encroachment occurred, Harrod said it was a mistake—"a human error." He also testified he obviously needed to reimburse Crutcher for the limestone he had taken, and had never suggested he owed Crutcher nothing.

In on-the-record discussions with counsel at the close of all the proof, the court queried how best to punish and deter a trespass/taking when the injured land was not worth much and suggested Crutcher should be awarded $0.05 for each ton of limestone removed or $8,200.00. The court also suggested the closest analogy to the trespass and taking of limestone was a trespass and removal of timber although unauthorized logging would change the surface of the land. On the issue of punitive damages, the court noted there had not been much evidence on the topic, but stated it was inclined to let the jury decide the issue and then it would correct the verdict, if necessary—the court was curious to see what the jury would do. Harrod's renewed motion for a directed verdict was denied.

Ultimately, jurors unanimously found Harrod had trespassed; awarded Crutcher $36,000.00 in compensatory damages[4]—an amount $100.00 shy of the

[4] In Instruction No. 3, regarding the calculation of *compensatory damages*, jurors were directed:

> You must now determine the amount of damages suffered by [Crutcher], if any, as a result of [Harrod's] trespass. You must determine the reduction in the fair market value of [Crutcher's] property caused by the trespass of [Harrod]. You may take into consideration the reduction in mineable limestone by applying a *royalty* value per ton of stone taken by [Harrod] in this calculation.
>
> "Fair market value," as used in this instruction means the price that a person who is willing but not compelled to buy would pay and a seller who is willing but is not compelled to sell would accept for the limestone in question.

FMV of Crutcher's land ($27,900.00) plus $0.05 for each ton of limestone removed ($8,200.00); and upon finding Harrod had acted with reckless disregard, awarded Crutcher another $902,000.00 in punitive damages—an amount equal to $5.50 for each of ton of limestone removed and 25 times the amount awarded in compensatory damages. Shocked by the jury's verdict, especially the high amount of punitive damages, the trial court partially granted Harrod's motion to alter, amend or vacate the judgment, or alternatively, grant a new trial. The court allowed the compensatory damages award to stand even though it exceeded the FMV of Crutcher's land by $8,100.00, but citing *McDonald's Corporation v. Ogborn*, 309 S.W.3d 274 (Ky. App. 2009), reduced the award of punitive damages to $144,000.00—four times the amount of compensatory damages awarded.

Crutcher has appealed, challenging the measure of compensatory damages applied by the trial court as well as the reduction in punitive damages. Harrod has cross-appealed attacking various evidentiary rulings, alleging flawed jury instructions, and arguing the trial court erred in failing to cap compensatory damages at $27,900.00—the maximum FMV of Crutcher's land as established by the only real estate appraiser who testified.

Errors require us to reverse those portions of the trial dealing with the measure of damages. While jurors were not required to explain how they calculated the damages awarded, it appears they may have given Crutcher the full

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(Emphasis added). Jurors were never told whether or how to apply the testimony they heard about the market value of limestone.

FMV of its land plus a royalty as compensatory damages, and then awarded Crutcher the market value of the limestone in punitive damages. Such a result is inconsistent with the law for the reasons that follow. Therefore, reversal, vacation and remand on the issue of damages, both compensatory and punitive, is necessary.

Our decision leaves intact, however, two of the jury's findings—chiefly, that Harrod committed a trespass and that it occurred with reckless disregard—both of which are supported by sufficient evidence. Harrod admitted encroaching upon Crutcher's land and removing 164,000 tons of limestone without authority. While Harrod maintained the encroachment was an honest mistake, there was sufficient evidence to lead jurors to believe otherwise, including the lack of a boundary survey for at least six years[5] despite Harrod's request for a proposal for such a survey in 1996 from HMB Professional Engineers, a company whose forte appears to be mapping underground progression of mining activity—not surface boundaries. Pursuant to *Sandlin v. Webb,* 240 S.W.2d 69, 70 (Ky. 1951),

> An intentional or reckless omission to ascertain the rights or the boundaries of land of his victim, for the purpose of maintaining ignorance regarding them, or a reckless disregard of them, is as fatal to the claim of a trespasser to limit the recovery of damages against him to the lower measure, as is an intentional or willful trespass or taking.

(quoting *Central Coal & Coke Co. v. Penny*, 173 F. 340, 345 (8th Cir. 1909)). Continuing to mine for several years without knowing its precise underground

[5] In a letter to Harrod dated November 23, 2002, HMB Professional Engineers, Inc. estimated the cost of work discussed earlier in the year to be $87,921.00. Included in this figure was an item identified as "Boundary Survey" at a cost of $47,972.00.

location in relation to the surface was careless, unreasonable and reckless—especially since there was evidence indicating this was not Harrod's first encroachment. A reasonable landowner would confirm the breadth of its holdings —both for itself and for all the world to see. Harrod did at least part of this by posting No Trespassing signs and maintaining them for several years, although it could not be certain those signs were accurately placed since they were posted long before Harrod obtained a survey of its surface boundary lines. Under the evidence developed, jurors properly found Harrod committed an intentional trespass. Thus, we affirm the trial court's denial of a directed verdict and the jury's verdict on these two points.

COMPENSATORY DAMAGES

> Compensation is always the aim of the law. It is 'the bottom principle of the law of damages. To restore the party injured, as near as may be, to his former position is the purpose of allowing a money equivalent of his property which has been taken, injured, or destroyed.'

*Hughett,* 313 Ky. at 91, 230 S.W.2d at 96 (quoting *Cincinnati, N. O. & T. P. Ry. Co. v. Falconer,* 30 Ky.L.Rptr. 152, 97 S.W. 727, 728 (1906)). As has been stated more recently, "[t]he object of compensatory damages is to make the injured party whole to the extent that it is possible to measure his injury in terms of money." *Ky. Cent. Ins. Co. v. Schneider*, 15 S.W.3d 373, 374 (Ky. 2000) (citing 22 Am.Jur.2d *Damages* § 26 (1988)). Because Harrod admits the encroachment and the unauthorized removal of 164,000 tons of limestone from Crutcher's land, the

crux of this appeal is what amount of money will fairly compensate Crutcher for the trespass to its property and the limestone removed from its land.

Harrod (and the trial court) are correct that several Kentucky cases have held limestone is not a mineral, but they did so while interpreting a deed, lease or will—an analysis that necessarily hinges on specific terms used in a particular writing. *Florman v. MEBCO Ltd. Partnership*, 207 S.W.3d 593 (Ky. App. 2006) (deed); *Elkhorn City,* (deed); *Little,* (deed). In that context, whether limestone is generally considered a mineral[6] takes on an entirely different aspect and importance than the one we address today. Because we are not interpreting a writing, but rather are determining how best to redress a trespass and taking, we deem the foregoing cases distinguishable and inapplicable to the scenario *sub judice*. Here, restricting Crutcher's recovery to the reduction in FMV of the surface of its land obviated the need for a trial because the removal did not occur at the surface—it occurred 300 to 400 feet *below* the surface—a fact Harrod admits.

Every trespass on land results in legal injury and nominal damages, at the very least, are recoverable. 87 C.J.S. *Trespass* § 137; *see also Hughett,* 230 S.W.2d at 96. "[W]rongful extraction and removal of coal or other mineral from the land of another is actionable trespass." 58 C.J.S. *Mines and Minerals* § 178. "Where there has been a trespass on plaintiff's property, plaintiff is entitled to

[6] In charting this path, Kentucky courts have relied upon *Beury v. Shelton*, 151 Va. 28, 37, 144 S.E. 629, 631 (Va. 1928), a Virginia case interpreting a deed, from which we quote, "[t]here is [no] doubt that limestone is a mineral in the scientific or geological sense, which classifies all matter as animal, vegetable or mineral."

compensation for the value of the real estate removed, as well [as] for injuries to the property not taken. If plaintiff suffered no actual loss, plaintiff may recover only nominal damages." 58 C.J.S. *Mines and Minerals* § 179. "Where the minerals are severed and removed from their position or bed by mining, they become personal property and are sold or pass like other personal chattels." 58 C.J.S. *Mines and Minerals* § 174. Under the trial court's pre-trial order, restricting recovery to the difference in before and after FMV, Crutcher could recover nothing. While Crutcher suffered no visible injury to the surface of its land, it is now without 164,000 tons of underground limestone it once owned—for which it deserves fair compensation.

To adequately and fairly compensate Crutcher for its loss, a measure of damages other than reduction in FMV is required. Limestone being a mineral, at least in a scientific sense, we choose to apply the same measure of damages to a trespass and taking of limestone that Kentucky courts have applied to a trespass and taking of coal and other minerals.[7] Ultimately, we do this not because limestone is the equivalent of coal but because it is the measure that will best compensate Crutcher for its loss.[8] Therefore, this case must be reversed, vacated

[7] According to the Kentucky Geological Society, clay, as well as coal, limestone and shale, are all sedimentary rocks which "are the most abundant rock type exposed at the surface of the earth and cover about 99 percent of Kentucky." http://www.uky.edu/KGS/rocksmn/sedrocks.htm. In *Patterson v. Waldman*, 20 Ky.L.Rptr. 514, 46 S.W. 17, 18 (1898), the measure of damages applied to the removal of clay and soil following a trespass was the "actual value of the clay and soil removed" plus the diminution of value of the lot by reason of the excavation and removal.

[8] *See Jim Thompson Coal Company v. Dentzell*, 216 Ky. 160, 287 S.W. 548 (1926), for a nearly identical fact pattern in the context of wrongful mining and removal of coal from a neighbor's land.

and remanded for further proceedings on the issue of compensatory damages allowing recovery of the market value of the 164,000 tons of limestone Harrod removed from Crutcher's property.

If the finding of an *innocent* trespass were still a possibility, proof of royalty value would also be admissible, but such a finding was foreclosed by the jury's verdict that Harrod acted with reckless disregard—a finding we have affirmed. Moreover, having found the trial court applied the wrong measure of damages to the calculation of compensatory damages, we need not address Harrod's allegations that the trial court should have: enforced a pre-trial stipulation in which Crutcher stated it would offer no evidence of compensatory damages as the trial court had restricted the measure of damages to the reduction in FMV of its land; granted a directed verdict on the issue of compensatory damages; and capped compensatory damages at the maximum FMV of Crutcher's land.

Kentucky courts award punitive damages "to punish and to discourage [the defendant] and others from similar conduct in the future." KRS 411.184(1)(f); *see also Schneider,* 15 S.W.3d at 375. They are an option only upon a clear and convincing showing that a defendant acted with "oppression, fraud or malice."[9] KRS 411.184(2). They "are allowed because the injury has been increased by the manner it was inflicted." *Chiles v. Drake*, 59 Ky. (2 Metc.) 146, 151, 74 Am.Dec. 406 (1859). They are "not awarded for mere inadvertence, mistake, errors of judgment and the like, which constitute ordinary negligence." Restatement (Second) of Torts § 908 cmt. b. (1979).

> One may fail to exercise slight, or any care, resulting in an accident, which will not make him liable for punitive damages; but in order to justify the assessment of such damages there must be the element, either of malice or willfulness, of such an utter and wanton disregard of the rights of others as from which it may be assumed he was acting either maliciously or willfully.

*W.T. Sistrunk & Co. v. Meisenheimer,* 205 Ky. 254, 265 S.W. 467, 468 (1924).

Unlike the goal of compensatory damages, which is to make an injured party whole by allowing him to recover all the actual damage he has sustained, punitive damages are not intended to make the plaintiff whole. They serve a broader function; they are aimed at deterrence and retribution. *State Farm*

[9] Instruction No. 4 included the following definitions: "'Fraud' means an intentional misrepresentation, deceit, or concealment of material fact known to the defendant and made with the intention of causing injury to the Plaintiffs. 'Oppression' means conduct which is specifically intended by the defendant to subject the plaintiff to cruel and unjust hardship." No definition of "malice" was provided.

*Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003). "[A]lthough usually awarded at the same time by the same decisionmaker, (they) serve different purposes." *Campbell,* 538 U.S. at 416, 123 S.Ct. 1519 (citing *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.,* 532 U.S. 424, 432, 121 S.Ct. 1678, 149 L.Ed.2d 674 (2001)). When awarded, punitive damages provide a windfall to a plaintiff who has already been fully compensated and a punishment to the defendant whose outrageous conduct society seeks to prevent from recurring.

Harrod's actions were particularly reprehensible because the encroachment and taking were hidden from view and could have been avoided had Harrod verified its aboveground boundaries and correlated them to its underground mining activities. We heard no testimony at trial that technology was nonexistent to accomplish that feat in 2002, only that techniques subsequently employed were "cutting edge." It seems curious that the Kentucky Office of Surface Mining Regulation and Enforcement, not Harrod, discovered the encroachment and apprised Harrod he had mined Crutcher's land without a permit by issuing a citation. Thus, Harrod should expect no praise for its confession of error to Crutcher. But for issuance of that citation and the subsequent events associated with this case, Harrod may still be blissfully unaware of its precise underground location and Crutcher's ground could be minus even more limestone.

As expressed in the Restatement (Second) of Torts § 908(2) (1979), "[p]unitive damages may be awarded for conduct that is outrageous, because of the

defendant's evil motive or his reckless indifference to the rights of others." *See also Hensley v. Paul Miller Ford Inc*., 508 S.W.2d 759, 762 (Ky. 1974). In a tort case, the threshold for determining whether punitive damages are authorized is not whether the injury was inflicted negligently or intentionally, but whether it had "the character of outrage[.]" *Id.* A proper instruction defines this as "a wanton or reckless disregard for the lives, safety or property of other persons." *Horton v. Union Light, Heat & Power Co*., 690 S.W.2d 382, 389 (Ky. 1985) (citing *Fowler v. Mantooth*, 683 S.W.2d 250 (Ky. 1984)). The instruction given on punitive damages in this case required jurors to find that Harrod "acted in reckless disregard for the property of others." However, before reaching this instruction, jurors had already found Harrod had committed a trespass[10]—the equivalent of failing to exercise reasonable care. *States Corporation v. Shull*, 216 Ky. 57, 287 S.W. 210 (1926) (Evidence of a trespass tends "to show the want of reasonable care[.]").

> As further explained in *Horton,*
>
> to justify punitive damages there must be first a finding of failure to exercise reasonable care, and then an additional finding that this negligence was accompanied by "wanton or reckless disregard for the lives, safety or property of others." This bears an element not distinguishable from malice implied from the facts.
>
> . . . .

[10] Instruction No. 1 read: "You will find for [Crutcher] if you are satisfied from the evidence that in the course of [Harrod's] quarrying operations adjacent to [Crutcher's] property, [Harrod] trespassed onto [Crutcher's] property. Otherwise, you will find for [Harrod]." Jurors unanimously answered "Yes" to the questions, "Do you believe from the evidence that [Harrod] trespassed onto [Crutcher's] property?" and "Do you believe that [Crutcher] suffered any injury as a result of the trespass?"

> The concept of punitive damages represents more than mere blind adherence to ancient precedent. It is as just a principle and as fair to the litigants today as it ever was. Improperly applied, it may indeed be nothing more than a windfall or a double recovery. But there are few if any principles of law which could not be criticized as sometimes misapplied.
>
> > It would be simplistic to characterize this virtual unanimity [among the states in adhering to the concept of punitive damages] as mere blind adherence to an outmoded principle. Rather, the doctrine of punitive damages survives because it continues to serve the useful purposes of expressing society's disapproval of intolerable conduct and deterring such conduct where no other remedy would suffice. Mallor and Roberts, *Punitive Damages Toward a Principled Approach*, 31 Hastings L.J. 639, 641 (1980).

*Horton,* 690 S.W.2d at 389-90.

According to the proof developed at trial, Harrod knew its mining operation was headed toward Crutcher's land, but rather than confirming its proximity to Crutcher's land, it *assumed*—always a dangerous strategy—it was well within its own sizeable acreage and continued mining. Harrod's actions were unacceptable and can be neither condoned nor encouraged.

In *Holliday v. Campbell,* 873 S.W.2d 839, 841-42 (Ky. App. 1994), "not tak[ing] the trouble to locate" a property line marked by a partial wire fence was sufficient evidence on which to award punitive damages for trespass and unauthorized logging. The similarities in *Holliday*, involving logging, and the case

*sub judice,* involving unobservable underground mining, are too compelling to ignore. Harrod's conduct in not bothering to confirm its precise location was outrageous and, therefore, an award of punitive damages was appropriate.

Having determined an award of punitive damages was authorized in this case, we cannot, however, agree that an award of $902,000.00 was appropriate.

> In Kentucky, the assessment of punitive damages requires consideration of not only the nature of the defendant's act, but also the extent of the harm resulting to the plaintiff. *Fowler v. Mantooth*, Ky., 683 S.W.2d 250, 253 (1984). In other words, the jury is to consider not only the defendant's conduct, but the relationship of that conduct to the injury suffered by this particular plaintiff.

*Owens-Corning Fiberglas Corp. v. Golightly,* 976 S.W.2d 409, 412 (Ky. 1998). It was appropriate for jurors to know the market value of the limestone Harrod removed, both to determine the award of compensatory damages, and to quantify the nature of Crutcher's harm. However, it was erroneous to award Crutcher the market value of the limestone as punitive damages because there is no direct correlation between punitive damages and Crutcher's loss, *Campbell,* 538 U.S. at 416. More importantly, punitive damages cannot be transformed into compensatory damages without negating the specific purpose of the award. While there is no standard for setting punitive damages, Kentucky's legislature identified five factors in KRS 411.186(2) that jurors are to consider:

> (a) The likelihood at the relevant time that serious harm would arise from the defendant's misconduct;

(b) The degree of the defendant's awareness of that likelihood;

(c) The profitability of the misconduct to the defendant;

(d) The duration of the misconduct and any concealment of it by the defendant; and

(e) Any actions by the defendant to remedy the misconduct once it became known to the defendant.

Since we are vacating and remanding the case for a new determination of punitive damages, we need not address whether the trial court correctly reduced the jury verdict from $902,000.00 to $144,000.00 other than to say an award of punitive damages at a rate 25 times the award of compensatory damages could easily "cross the line into the area of constitutional impropriety" when it has been recognized that a ratio of just 4:1 "might be 'close to the line[.]'" *McDonald's Corporation,* 309 S.W.3d at 300 (quoting *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 581, 116 S.Ct. 1589, 1602, 134 L.Ed.2d 809 (1996) (citing *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23-24, 111 S.Ct. 1032, 1046, 113 L.Ed.2d 1) (1991)).

In the event the parties are unable to reach a resolution and retrial is necessary, we comment on an additional issue raised in the cross-appeal that may be repeated. The trial court did not err in allowing Gardner to testify as an expert witness. Harrod challenged Gardner's qualifications—he is not a real estate appraiser and he is a licensed surveyor in West Virginia, but not in Kentucky—and argued his methods of data collection about the value of limestone were unscientific. Contrary to Harrod's allegations, Gardner's testimony was relevant

and aided jurors by providing insight into the value, both royalty and market, of limestone—something the average juror would unlikely know but need to know to accurately assess damages.

Gardner, a licensed engineer since 1979, testified he began working in mines 35 years ago and during that time had: been involved with appraisals of mining properties; studied royalties, rights and market prices to determine the value of minerals; calculated royalties for companies; assisted operators in developing mine plans; and, performed surveys and produced maps. In developing his opinion that the market price of a ton of shot rock averaged $7.30 in 2006 and that 6% per ton was a common royalty rate, he relied on various sources of data, including a list maintained by the Kentucky Transportation Cabinet of entities selling limestone and their sales prices (on which Harrod was listed at $5.00 a ton in 2002), and a telephone survey of quarries and their prices that was conducted by himself and his staff. He testified industry professionals typically rely on this type of data to determine market and royalty values. On cross-examination, Gardner stated he did not recall $5.50 per ton being the market value of limestone in 2002, the year the encroachment and taking occurred and was discovered, but acknowledged it may have been.

KRE[11] 702 governs admission of expert testimony in Kentucky. It directs:

[11] Kentucky Rules of Evidence.

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if:
>
> (1) the testimony is based upon sufficient facts or data,
>
> (2) the testimony is the product of reliable principles and methods, and
>
> (3) the witness has applied the principles and methods reliably to the facts of the case.

We find guidance in applying the rule in *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), wherein it is stated that trial courts have flexibility in admitting expert testimony and experts are "permitted wide latitude to offer opinions, including those that are not based on firsthand knowledge or observation." *Id.,* 509 U.S. at 592, 113 S.Ct. 2796. Furthermore, if the proffered testimony is at all questionable, rather than depriving jurors of the benefit of hearing it,

> [v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.

*Id.,* 509 U.S. at 596, 113 S.Ct. 2798.

Gardner had sufficient credentials to qualify as an expert. His testimony was relevant and assisted the jury in awarding damages. Harrod subjected him to vigorous cross-examination, and finally, Harrod testified about his own "survey" of competitors and the prices they were paying. As the

testimony developed, there was no error under KRE 702 or *Daubert.* Therefore, we hold that if offered at a retrial, Gardner's testimony as an expert should be admitted.

THEREFORE, the Opinion and Order of the Franklin Circuit Court entered on August 27, 2010, as well as the Order entered on September 20, 2006, are reversed, vacated and remanded for further proceedings consistent with this Opinion. We also reverse, vacate and remand those portions of the Trial, Verdict and Judgment entered on June 2, 2010, that pertain to the award of damages, both compensatory and punitive. In all other respects, the Judgment is affirmed.

ALL CONCUR.

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