1980

Lloyd Branch And Jeanne Branch v. Western Petroleum, Inc. : Reply Brief of Plaintiffs-Respondents And Brief On Cross Appeal

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

LLOYD BRANCH and JEANNE BRANCH,)

Plaintiffs-Respondents)
& Cross Appellants,
)

vs.
)

WESTERN PETROLEUM, INC., CASE NO. 17178
)

Defendant-Appellant
& Cross Respondent.)

REPLY BRIEF OF PLAINTIFFS-RESPONDENTS AND BRIEF ON CROSS APPEAL

Reply to Appeal & Brief on Cross Appeal
From the Judgment
of the Fourth Judicial District Court
of Duchesne County,
The Honorable J. Robert Bullock, Judge.

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IN THE SUPREME COURT OF THE STATE OF UTAH

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STATEMENT OF THE NATURE OF THE CASE

Plaintiffs-Respondents-Cross-Appellants (hereafter designated plaintiffs) brought this action claiming damages for trespass, pollution of a culinary water well, emotional distress, punitive damages and requesting a permanent injunction. [Note: All references to the transcript (T.) shall be to the sequential pages (pg.) as numbered by the County Clerk, commencing with Page 1 through 900.]

DISPOSITION IN LOWER COURT

The case was tried in part to the court and in part to the jury. The question of negligence per se was not presented to the jury. Rather, the court submitted certain questions to the jury which the jurors were required to answer. In effect, the trial

court treated the acts of the defendant as intentional torts and thus did not need to instruct the jury on the theories of negligence. The jury found that the dumping of certain "formation water" by the defendant caused 66% of the pollution of the plaintiffs' diligence well and 52% of the pollution of the plaintiffs' second well, which second well plaintiffs drilled because of the defendant's pollution of the diligence well. In each well, the remaining pollution was found to have been "caused by other parties or conditions." The jury was not asked to award damages as such, but rather to answer certain questions, without concern as to the legal effect of their answers. By answering all of the questions, the jury determined: the reasonable rental value of the plaintiffs' property without polluted wells and the rental value with the wells polluted; the amount of damages the plaintiffs sustained by reason of defendant's trespass; if plaintiffs were entitled to punitive damages, and if so, the amount the said punitive damages should be; if plaintiffs had suffered damages for mental suffering, discomfort and annoyance resulting from the defendant's pollution of their wells, and that plaintiffs were entitled to $10,000 for the same. The trial court originally awarded plaintiffs judgment based on all of the findings of the jury. Several months later, after some considerable delay and several motions by defendant, etc., the court entered an amended judgment, based on all of the findings of the jury, except on the finding of mental suffering in the sum

of $10,000.00, which damage the trial court then determined to disallow because:

> no separate cause of action for the tort of emotional distress was pled or proved by plaintiffs or if pled or proved that it was disallowed by the court on the additional ground that the jury was not adequately instructed on the question of such damages and therefore, the question was improperly framed for the jury or was framed in such a manner that the jury was allowed to improperly speculate as to such award and amount. (See Amended Special Verdict, T. Pgs. 270-72)

RELIEF SOUGHT ON APPEAL

Plaintiffs-Respondents-Cross Appellants seek to have this court affirm fully all findings made by the jury and thus of the trial court, including the jury finding that plaintiffs are entitled to damages for mental suffering in the sum of $10,000.00.

STATEMENT OF FACTS

Plaintiffs believe that in order for the court to better understand this case, the statement of facts suggested by the defendants should be amplified as follows:

This conflict involves intentional torts of trespass and the invasion of rights, i.e., "pollution of water," on property situated about 2 miles north of Roosevelt. Defendant purchased its 40 acres, which is just north of plaintiffs' property, in December, 1975. Defendants' property is primarily situated at an elevation of approximtely 200-300 feet higher than plaintiffs'

property, on what is known locally as "Harmston Bench." Neither plaintiffs' nor defendant's property is considered "farm land." Although part of plaintiffs' land is used for pasture and garden.

Defendant's property was previously used as a "gravel pit." Since 1975, defendant used its property for the disposal of "formation water." Formation water is waste or extra or unnecessary water removed from oil wells during the production of oil. It contains high levels of salts, chemicals and other objectionable materials, including oil and gas. None of this formation water is fit for human use. Plaintiffs' land is situated south of and at a considerably lower elevation than that of defendant. Plaintiffs' land is also in the direct flow or run-off line from defendant's property for the normal and natural drainage of water.

Plaintiffs purchased their property in December, 1976, for the sum of $37,000.00. Included in the purchase was 21 acres of ground, the "diligence" well, some out buildings, and an older home. The plaintiffs proceeded to make at least $60,000.00 (T. pg. 493, lines 4-15) worth of improvements to the home and premises. Culinary water for said home was furnished by the "diligence well" which had been in use since prior to 1929. From 1929 to December, 1976, the water from said well had been described as being sweet to the taste and of high quality. (T. pgs. 340, 341, 343 & 344). This well water was used to maintain a Grade "A" Dairy (T. pg. 367), and later a Grade "B" Dairy, both

of which required the water to be approved by the appropriate State agencies for health purposes. (T. pgs. 468, 515). When the plaintiffs bought the land, the water had a good taste to it and they had no difficulty using it. (T. pg. 347, lines 8-11). By February, 1977, the plaintiffs noticed that the water began to have a peculiar smell and taste, that they could not get soap to make suds in it, that they couldn't wash their bodies clean, and that there was a distinctive smell of petroleum products to the water. (T. pg. 347, lines 12-26). Branches further made a visual search of their property and found water percolating from the adjoining property belonging to the defendant (T. pg. 486, lines 24-29). They requested the defendant to cease and desist from dumping formation water so as to allow it to escape onto plaintiffs' property, but the defendant did nothing. Plaintiffs involved the State Sanitarian in the matter. Letters were delivered to the defendant's agent, George Gross, but still nothing was done about the problem. (T. pg. 358, lines 22-30, Ex. P-38; Pg. 402). Plaintiffs commenced legal action and sought to enjoin the defendants from further dumping on the property. However, defendant required plaintiff to post a $3,000.00 per day bond for each day that dumping was stopped and plaintiff was unable to raise the finances to do the same. (T. pg. 394). Defendant is a million dollar corporation (T. pg. 483, lines 11-12), and its agents admitted that it could have dumped the formation water at other approved locations, but didn't because

defendant would have had to pay a 25% surcharge to the owners of said pits (T. pg. 610, lines 1-5). Because defendant chose to ignore plaintiffs' requests and continued to dump formation water on its property, plaintiffs had to haul water for culinary use almost continuously from March, 1977 to the time of the trial (T. pg. 358, lines 22-30, pg. 359, lines 21-29). Plaintiffs lost their rabbits and 100 chickens from drinking the polluted water. Defendant's agents admitted that they did not know what the law was nor did they make any attempt to check the law relative to the dumping of formation waters (T. pg. 482). Dumping of formation waters is governed by Title 73-14-5 Utah Code Annotated, 1953, as amended. (See also, T. pg. 413). After defendant became aware of the laws relative to said dumping, defendant still took no affirmative action or steps to correct the same or to receive approval for further dumping. In fact, according to testimony of the defendant's agent, George Gross, no real steps were taken to secure approval of another site from the State of Utah until September of 1979, approximately two (2) weeks prior to the trial, and 30 months after plaintiffs' first protests (T. pg. 610, lines 5-30, pg. 611, 1-22).

Shortly after plaintiffs began complaining about the encroachment and trespass of defendant's polluted and contaminated water upon their land, defendant offered to build a pond on its property to contain the water from flowing down a gulch on plaintiffs' property which was below the hillside at one

of the locations where water had been percolating out (T. pg. 602, lines 9-14). Defendant, without seeking to establish its own boundary lines, entered upon the plaintiffs' property some 50-60 feet and then for another 80-100 feet, proceeded to build a pond entirely on plaintiffs' land. This pond acted as a partial containment of the water running onto plaintiff's land (T. pg. 353, lines 13-20). Plaintiffs had to hire a surveyor to prove to defendant that the pond was built on their land. With this knowledge, defendant built another containment pond on its own property. Neither containment pond was sufficient to retain the continued percolation of the water from trespassing onto plaintiffs' property. In fact, during the dryest time of the year, the water could be found 50-60 feet downhill and beyond the containment pond on plaintiffs' property, for a net encroachment of at least 200 feet inside plaintiffs' property. The rest of the time this polluted water would run several hundred more feet onto plaintiffs' property, usually reaching plaintiffs' wellhead and outer buildings. Once it even ran into the plaintiffs' basement, causing damage to the plaintiffs' food storage (T. Pg. 350, lines 25-30; Pg. 351, lines 1-5; Pg. 372, lines 5-25). During the summer of 1977, defendant's trucks entered across the neighbors property and onto the plaintiffs' property for the purpose of pumping out the containment ponds. However, once they were loaded, the trucks would go across plaintiffs' land with their discharge nozzles open, spraying the water on plaintiffs'

land, thus spreading the pollutants along the surface. The continued pressure of the blatant attitude and trespass by the defendant as well as the inability to have culinary water in her home, caused plaintiff Jeanne Branch, in particular, a great deal of emotional difficulty. It resulted in her leaving her husband for a three or four month period to go "back" to the plaintiffs' original home in Colorado so she could "pull herself together" (T. pg. 375, lines 1-14; pg. 385, lines 17-18; pg. 489, lines 9-14; pg. 799, lines 9-20; pg. 801, lines 13-20). During this period of time her husband made weekly trips to and from Colorado to be with his family and spent a great deal of time talking to his wife on the telephone while he maintained his contracting business in Roosevelt (T. pg. 810, lines 1-18).

In November, 1977, plaintiffs dug an additional well south of their home, (Exs. P-17 & 18) had the same tested and found it to have a satisfactory low level of suspended solids, such as to be able to be used for culinary purposes. At that time the water was tested and was found to have approximately 280 or less parts of suspended solids per million, which was well within the range of 500 parts of suspended solids per million established by the public health service as acceptable for human use (T. pg. 669, lines 13-14). Water from the new well continued to be useable until approximately February of 1978, at which time the water ceased to be useable or drinkable by humans. Suspended solids per million then rose to just under 1000 and upon advice of the

State Health Department, the plaintiffs ceased to use said water for eating, drinking, etc. (T. pgs. 369-70). Now both wells were polluted.

Both parties introduced expert witnesses who testified as to the manner in which the pollution might be reaching the culinary water supply of the plaintiffs. Both experts agreed that to some extent the formation water from the defendant's pit was entering the plaintiffs' water supply. The means by which and the extent to which it was penetrating the plaintiffs' water system were their main points of difference. Plaintiffs called Mr. Bryce Montgomery, a geologist for the Utah Division of Water Resources. The defendant called Mr. Ferris, a private geologist. Mr. Montgomery and Mr. Ferris were diametrically opposed in their opinions as to the manner in which "surface" water could enter into the culinary water-producing "Duchesne formation." Appellant in its Statement of Facts set forth the theories advanced by its witness, Mr. Ferris. However, Mr. Ferris acknowledged that despite all of his "testing," he was hypothesizing as to what the results might be (T. pg. 668, lines 28-30). The jury, as trier of the fact, apparently believed Mr. Montgomery, who, as a State Geologist had made a hydrology study, with several water tests, in the area over a two year period. Further, Mr. Montgomery had been a practicing geologist for over 20 years and had worked extensively in Utah, the past nine (9) years of which was for the Utah Division of Water Resources (T. pg. 367). Mr. Ferris,

though, was a comparative new-comer to the area with less than two (2) years experience in the Rocky Mountain area (T. pg. 377). Apparently, his theories were not believed by the jury. This assumption is based upon the answers the jury gave to the questions that were propounded to them by the court. Mr. Ferris held the theory that there was no way that surface waters could enter into the culinary water producing Duchesne formation. To the contrary, Mr. Montgomery testified, from his experience, that pollution and surface waters could and would enter the Duchesne formation through wells that were not properly plugged and through natural "joining or cracks" (T. pg. 538, lines 6-18) and if it entered through natural joints and cracks it could take up to two (2) years to travel from defendant's property to plaintiffs' property. It is only logical that by whatever means the polluted water enters, since the water with the larger number of suspended solids per million weighs more than good quality culinary water, the heavier or polluted water will settle to the bottom or lowest level it can reach. Defendant makes much of the fact that there could be many possible sources of contamination of the plaintiffs' culinary water system. Plaintiffs never denied that. Plaintiffs argued to the jury that there are both natural and unnatural sources of contamination, as was suggested by the experts. In fact, public health standards acknowledge that culinary water can safely have up to 500 parts of suspended solids per million, without a threat to health. The jury, after

listening to the facts presented by both parties, made a determination as to what percentage of the pollution or contamination was being introduced into each of the plaintiffs' wells by the defendant, as well as what percentage by other sources.

Plaintiffs assert that the court improperly found that plaintiffs' claim for damages for emotional distress must either be considered and plead as a "separate tort," and/or that plaintiffs had not properly plead the issue of emotional distress, etc. In plaintiffs' Fourth Cause of Action of their Second Amended Complaint, which was mailed to defendant's counsel on the 26th of February, 1979, that issue was clearly plead. (See T. pg. 41, paragraphs 11-13). Defendant responded to the same with its answer to plaintiffs' Second Amended Complaint on April 25, 1979. (See T. pg. 46, paragraphs 11, 12, 13). Whether sufficient proof was offered or whether the jury was adequately instructed, will be discussed in Point VI hereafter.

ARGUMENT

POINT I

UNDER THE FACTS OF THIS CASE, THE INSTRUCTIONS BY THE COURT WERE SUFFICIENT AND NO ADDITIONAL INSTRUCTIONS WERE NECESSARY

A. BACKGROUND

It is granted that one of the exact legal issues in dispute, which arose out of defendant's intentional trespass and pollution of plaintiffs' underground water system by the intentional and reckless dumping of formation waters in a pit, has not been considered per se by the Utah Supreme Court. Similar issues, however, have been considered in Utah, and basically the same issue has been settled by several jurisdictions other than only the states of Oklahoma and Texas suggested by defendant. [See Edwards v. Talent Irrigation District, 570 P.2d 1169, 280 Or. 307 (1977); Drake v. Smith, 337 P.2d 1059 (Wash. 1959); 142 A.L.R. 1322; 28 A.L.R. 2d 1075, 1087 (1953).] These jurisdictions do not treat the tort committed by the defendant in the manner nor reach the same conclusions that defendant now urges.

B. NEGLIGENCE INSTRUCTION INAPPROPRIATE

From a reading of plaintiffs' Second Amended Complaint (See T. pgs. 39-44), it is obvious that the plaintiffs proceeded on the basis of an intentional tort, i.e., trespass, alleging that defendant had acted with an intentional disregard for the safety and well-being of the plaintiffs' property and personal rights, by persisting in dumping formation waters in an unlawful manner.

Defendant's brief makes much of the point that it is a "common practice to dispose of formation waters by dumping them in pits." Plaintiffs cannot object or disagree with that, but respond that the statutes of this State (§78-14-5, U.C.A., 1953) are clear and complete as to the obligation of the defendant to receive prior approval of the sites where such water is dumped. In short, defendant's brief ignores the fact that the law requires that "formation waters" and all other polluted or contaminated substances, be dumped in accordance with the laws and regulations of the State of Utah and that the dumping site have prior approval. Defendant's agents claimed they had no knowledge of said law, to which plaintiffs retort "ignorance of the law is no excuse." It is incredible that individuals engaged in a million dollar or more business of "dumping formation waters" did not believe their activity could be governed by appropriate laws and statutes - even after the law was brought to their attention. Appellant's brief persists in the idea that the claim of the plaintiffs and the judgment of the court was based on the theory of negligence. Plaintiffs' position is that defendant was strictly liable for the results of its act of intentionally conducting an ultra hazardous activity in disregard of applicable state law. Therefore, negligence, per se, was not or should not have been the issue. Over plaintiffs' objections defendant insisted that negligence should be the theory upon which the dispute was to be submitted to the jury. At the end of the

trial, while the jury was considering the matter, the following exchange occurred between plaintiffs' counsel and the court:

> Court: You mean the question of the negligence is not a proper question in this case?
>
> Mr. Mangan: Yes, because the question of negligence is not a proper --
>
> The court: And the record will show we discussed that prior hereto, the court has not fully made up its mind in that regard and in order to preserve the defendant's theory of the case, I thought it would not be harmful to submit the question to the jury. For that reason it has been submitted, but the matter is still open.
>
> Mr. Mangan: And for that purpose, your honor, I also object to the instructions on negligence for that reason and that particular number is --
>
> The court: 6, 7 and 8 isn't it. Oh, you mean the question?
>
> Mr. Mangan: And I object to the question of negligence. (emphasis added). (T. pg. 877, lines 16-30+)

Thus, the theory of negligence is one propounded by the defendant and objected to by the plaintiffs on the basis that the defendant should be strictly liable for its conduct. Plaintiffs requested the court to instruct the jury on the issue of strict liability. Plaintiffs desired the court to determine or rule as a matter of law that reasonable men do not do lawful acts in an unlawful manner, i.e., they do not dump formation water, which is a lawful act, without complying with the laws of the State of Utah as to site, manner of dumping, etc. The defendant insisted on dumping at an unapproved and hazardous site despite warnings from plaintiffs and others from and after February, 1977, to the time

of the trial, i.e., over 32 months. In fact, defendant continued to dump for nearly one (1) month after the trial. The plaintiffs' theory of the wrong was not founded on negligence, but upon strict liability as defendant intentionally conducted a dangerous activity, contrary to state law, which trespassed upon property of plaintiffs. The question then is simply whether defendant "caused" the pollution, trespass, etc., complained of by plaintiffs. The question properly to be submitted to the jury was simply that of causation.

C. COMPARATIVE NEGLIGENCE IS INAPPLICABLE.

An instruction on comparative negligence is only appropriate where there is some substantial evidence upon which the jury could make a finding of either negligence on the part of plaintiff, contributing to the harm, or else that the trespass of defendant was unavoidable and was an accident. [See Chrysler Corp. v. Todorovich, 580 P.2d 1123, 1135 (Wyom, 1978); Hasson v. Ford Motor Co., 564 P.2d 857, 868 (Cal, 1977); Woodhouse v. Johnson, 436 P.2d 442 (Utah, 1968); Johnson v. Hartvigsen, 373 P.2d 908 (Utah, 1962)]. Although urged by defendant at the time of the trial, the court rightly ruled that there was, as a matter of law, no substantial evidence to support the position that defendant's trespass was either unavoidable or an accident.

The harm done to plaintiffs, i.e., the tort committed by defendant, arose from both nuisance and trespass. For the sake of argument, let it be assumed that plaintiffs could perhaps have

better "sealed" their wells from defendant's contaminants - the fact still is that plaintiffs were under no alleged or tendered duty to do so. Defendant absolutely had no right to dump, dispose of, etc., oil field "wastes," foundation water, etc., in such a manner that the pollutants could pass or trespass upon or into plaintiffs' land and culinary water. Were the court to have instructed the jury that the negligence of plaintiffs must be measured by reason of their not anticipating and preparing for defendant's interference with plaintiffs' right to the exclusive possession, use and enjoyment of their lands, then a reversable miscarriage of justice would have resulted. As a matter of law, any alleged "negligence" of plaintiff was irrelevant as to defendant's trespass and disregard of plaintiffs' rights.

The defendant's acts were neither accidental nor unavoidable. They were intentional and avoidable. There was, as a matter of law, no substantial evidence upon which a reasonable jury could have based a finding of negligence by the plaintiffs. To have submitted such a question or instruction to the jury, in light of the evidence before the court, would have, at best, confused and mislead the jury, and, in any event, have constituted error.

D. PROXIMATE CAUSE INSTRUCTION INAPPROPRIATE.

The use of the word "cause" by a lay juror would undoubtedly mean, at the very least, "cause in fact." Assuming that the court did err as urged by defendants, in failing to instruct the

jury as to "proximate cause," such error must be disregarded under Rule 61 of the Utah Rules of Civil Procedure, which states that "the court at every stage of the proceedings must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties." Defendant has entirely failed to show that the failure to give an instruction on proximate cause affected its substantial rights.

For a proximate cause instruction to be relevant, defendant would first have to establish some evidence that plaintiffs were in some way negligent. This cannot be done because defendant did not and could not point to any duty, owed by plaintiffs to defendant, that plaintiffs allegedly breached. If we assume, for the sake of argument, that plaintiffs' negligence could first be established, then defendant could argue that although it too was a "cause" of the trespass and pollution to plaintiff's culinary water supply in the percentages found by the jury, nevertheless plaintiffs' negligence was an intervening and/or a superceeding cause, thereby making plaintiffs' negligence, rather than defendant's, the proximate cause of the injury to plaintiff. Of course, such a situation, as defendant contends, would best be dealt with by applying the comparative negligence law, rather than delving into the abyss which is the theory of proximate cause.

In this case, an instruction as to proximate cause is inappropriate for the same reason that comparative negligence is

inapplicable. Defendant had a duty to refrain from interfering with plaintiffs' exclusive use, enjoyment, and possession of their property. Defendant intentionally and knowingly breached its duty, and, therefore, was either strictly liable for the damages that flowed from its conduct, or at the very least, negligent. By awarding punitive damages against defendant, the jury found defendant's disregard of the law and of the personal and property rights of plaintiffs to be sufficiently reckless to constitute willfulness or malice, and, therefore, for defendant to be strictly liable to plaintiffs.

Plaintiffs, however, owed no duty to anticipate and prepare for the trespassing or pollutants of defendant. Since plaintiffs breached no duties as a matter of law, they could not be found negligent by any jury. To instruct the jury as to "proximate cause" would only have resulted in confusing the jurors.

E. PLAINTIFFS' CLAIMS AGAINST ROSS.

Whether plaintiffs may also recover damages from their second well-driller, Ross, in another action is totally irrelevant here. If Ross also had a duty to plaintiffs, and Ross breached the same, and said breach resulted in damage to plaintiffs, then plaintiffs have a right to recover from Ross the damage he caused. If, hypothetically speaking, plaintiffs anticipated defendant's trespass, and hired Ross to defend against the same, and Ross failed to do so, then Ross is liable to plaintiffs for the damages caused by his failure. However,

Ross' failure does not relieve defendant of its liability to plaintiffs inasmuch as plaintiffs still had no duty to anticipate and defend against defendant's trespassing. Regardless of how Ross drilled the well, it was defendant's pollutants that made the water unuseable.

Defendants entirely misspeak the facts, however, in alleging that plaintiffs were suing a third party (Ross) for drilling the second well in a negligent or defective manner. The facts are that plaintiffs paid Ross for the second well and used it for a few months. The pump Ross installed in the second well malfunctioned and plaintiffs had Ross do subsequent or follow-up work on the pump in the second well. A dispute arose as to what the charges or costs should be for such work. Plaintiffs felt that Ross had over-billed them and then wrongfully liened their property for an amount far in excess of the value of the work done. Plaintiffs also reasonably believed that Ross' efforts should have been "warranty" work, and sued Ross to remove his lien, etc. Clearly the plaintiffs' dispute with Ross has nothing to do with the issues before this court.

F. SUMMARY ON CAUSATION.

The trial court correctly stated to counsel in chambers during the trial the current and better reasoned opinion relative to the terms "cause," "causation," "proximate cause," etc.; namely, that there are a variety of definitions and applications of the term. What we are dealing with in Branch v. Western

Petroleum is the simple question, "has the conduct of the defendant caused the plaintiffs harm?" This is a question of fact. It is a matter upon which a layman is as competent to sit in judgment as the most experienced court. Causation is a fact. It is a matter of what happened. By adding to the jury instructions such legalistic terms as "proximate cause," "sole cause," or "dominant cause," we tend only to mislead and confuse a jury, especially in a case like this one. (See Prosser, Handbook of the Law of Torts, 1971, pgs. 236-250). This jury was well instructed, very diversified and competent; it should be presumed that the jury understood what the term "cause" means in our language, and found accordingly.

In short, when we clear the sophistry of legalisms aside, the trial court did not commit error in refusing to confuse the jury by instructing further on the issues of either negligence or proximate cause, etc. If any error did occur, it was by even suggesting the term "negligence" to the jury, as indicated above.

POINT II

A FINDING OF A PERCENTAGE OF NEGLIGENCE OF THE PLAINTIFFS WOULD NEITHER BE PROPER NOR HELPFUL, AND IS NOT MANDATED BY UTAH LAW UNDER THE FACTS OF THIS DISPUTE.

A. FAILURE TO INSTRUCT WOULD BE "HARMLESS ERROR."

Plaintiffs believe that even if there was an error by the trial court in not instructing the jury as to plaintiff's alleged negligence, the same would be in the category of harmless error, and therefore must be disregarded under Rule 61 of the Utah Rules of Civil Procedure. Plaintiff further points out that any alleged negligence of plaintiff is no defense to willful, wanton, or reckless misconduct of a defendant. [See Ferguson v. Jongsma, 350 P.2d 404 (Utah, 1960); Butane Corp. v. Kirby, 187 P.2d 325 (Ariz., 1948); Ewing v. Cloverleaf Bowl, 572 P.2d 1155 (Calif, 1978)].

B. AN INSTRUCTION ON COMPARATIVE NEGLIGENCE OR PLAINTIFFS' NEGLIGENCE, UNDER THESE FACTS WOULD BE REVERSABLE ERROR.

Defendant's urging of the application of the comparative negligence statute (§78-27-38) to this case presupposes that plaintiffs' claim only lies in a "negligence" act, and ignores plaintiffs' theory and pleading of defendant's intentional trespass and/or reckless disregard of plaintiffs' rights, etc., resulting in defendant being strictly liable to plaintiffs. The Wyoming Court stated in Chrysler Corp. v. Todorovich, 580 P.2d 1123, (Wyom, 1978)]:

> it is prejudicial error to give instructions on contributory negligence if defense of such negligence is not supported by substantial evidence. (Cit. Omitted). The same rule would apply with respect to negligence of a plaintiff in a comparative negligence context. (at pg. 1135)(emphasis added).

Defendant neither tendered nor offered any substantial evidence of plaintiffs' negligence or that plaintiffs contributed to the pollution of their well. Theories and suggestions of what "might" have happened or how the surface water "could have" entered the well, certainly is not evidence of negligence.

By reading instruction #10, and the jury's answer to Question #15, it is obvious that since the jury awarded $10,000.00 punitive damages against defendant, the jury found defendant's conduct to be in reckless disregard of the rights and property of plaintiffs, and therefore defendant's conduct was, as a matter of law, wilful or with malice. Comparative negligence does not apply to such a factual case. It would be like comparing apples and oranges to try to equate, on a percentage basis, any negligence of plaintiffs with defendant's willful and wanton actions or reckless disregard of the rights of the plaintiffs.

C. PLAINTIFFS OWED NO DUTY TO PROTECT AGAINST DEFENDANT'S INTENTIONAL ACTS.

The issues in Branch v. Western Petroleum are whether defendant violated the rights of plaintiffs, and, if so, to what extent plaintiffs were damaged. While defendant hypothecated as to different sources of pollution, the evidence was clear that

defendant was the only active agent in accomplishing either the trespass or creating the polluting nuisance. Plaintiffs are not negligent simply because they did not foresee defendant's disregard of their rights and take sufficient defensive countermeasures. Defendant had no right to pollute plaintiffs' wells or dump anything that would go onto plaintiffs' property. Whether better well casing or installation could have lessened the damage to plaintiffs is totally irrelevant, as defendant had no right, at all, to do what it did. Plaintiffs were under no obligation to anticipate defendant's "reckless disregard" of their rights to the exclusive possession and enjoyment of their land and culinary water.

Defendant insisted from the onset of the trial that the court should instruct the jury on the issue of comparative negligence. The trial court stated that it felt the instruction urged by defendant was inappropriate and not applicable, but invited the defendant to produce any authority to the contrary. Defendant did not then and does not on appeal present the requisite authority to establish the need for the instruction.

D. RESTATEMENT'S POSITION ON ALLOCATION.

Perhaps, if any apportionment or allocation of damages should occur, then the better reasoned approach to allocation of damages is set forth in the Restatement of Torts, Second §433B (1965). Under that approach, once plaintiffs have met their burden of proving the defendant's tortious pollution caused harm,

the defendant wrongdoer has the burden of proving the proper allocation of the damages. In Branch v. Western Petroleum, the defendant did not meet this burden. The plaintiffs argued allocation to the jurors in their closing argument, (See T. pgs. 818, 865). The argument is set forth in Point III hereafter.

In short plaintiffs' argument was that in the absence of defendant's pollution, plaintiffs' diligence well would be safe for human consumption.

E. SUMMARY.

In short, not only is the requested instruction improper, but the findings of the jury precludes the necessity of considering the issue of proximate cause or of comparative negligence any further, and defendant's appeal should fail on the same.

POINT III

INASMUCH AS DEFENDANT'S POLLUTION OF PLAINTIFFS' WATER RENDERED THE WATER UNUSEABLE, THERE IS NEITHER MERIT NOR EQUITY IN REDUCING THE AMOUNT TO BE AWARDED TO PLAINTIFFS

Plaintiffs referred to this argument in Point II above. It is as follows:

A. All the experts agreed that culinary well water in the subject area "naturally" had some solids [pollutants] in it;

B. Federal health standards indicate that 500 parts of solids [pollutants] per million is the highest "safe" level (T. pg. 669, lines 13 & 14);

C. Based on the historic use of plaintiffs' diligence well, the water was normally safe for human use and consumption;

D. The latest chemical test (Sept., 1979) of plaintiffs' diligence well indicated that it still contained approximately 980 parts of solids [pollutants] per million (M.), which was very similar to the amount in the water in March, 1977;

E. Based on the jury's finding (Answer to Question #4), since defendant was responsible for 66% of the solids or pollutants in plaintiffs' diligence well then defendant introduced approximately 646.8 parts of the 980 solids per M. in that well. Approximately 333.2 parts per M. was there from either natural or other means.

F. Plaintiffs' diligence well would thus meet acceptable

health standards, but for defendant's introduction of approximately 646.8 parts of solds per M. into that well;

G. The latest chemical tests from plaintiffs' new well indicated that it contained approximately 920 parts of solids or pollutants per M.;

H. Based on the jury's findings (Answer to Question #9), that defendant was responsible for 52% of the solids or pollutants in plaintiffs' new well, then defendant introduced approximately 478.4 parts of the 920 solids per M. in that well, and 441.6 parts were there from either natural or other means;

I. Plaintiffs' new well would meet acceptable health standards, but for defendant's introduction of approximately 478.4 parts of solids per M. into that well.

Thus, but for the actions of the defendant, both of plaintiffs' wells would have met acceptable health standards. Defendant should be responsible for the full consequences that naturally flow from its' tortious conduct. Based on the findings of the jury, plaintiffs could have satisfactorily used the water from either of their wells in the absence of defendant's pollutants. There is no evidence that there was any other person or party, other than defendant, contributing to the pollution in plaintiff's wells. Since plaintiffs' water would be acceptable without defendant's pollutants, defendant should be fully liable for all of the damages awarded to the plaintiffs.

POINT IV

THE SO-CALLED EXCLUSION OF "ELK HUNTERS" AS JURORS WAS NOT PREJUDICIAL TO DEFENDANT AND WAS NOT A SUBSTANTIAL FAILURE TO COMPLY WITH THE LAW

A. ANY ERROR WAS NEITHER "SUBSTANTIAL" NOR PREJUDICIAL.

Defendant alleges that the procedure used by the Duchesne County Clerk's office to impanel the jury in this case violated the requirements of Section 78-46-13, Utah Code Annotated (1953), as amended. However, Section 78-46-16 requires that for relief to be granted for violation of the first named section, there must be both (1) a "substantial failure" to comply with this act, and (2) "actual and substantial injustice and prejudice" must result.

Assuming arguendo that such conduct by either or both the clerk's office or the sheriff's office, as suggested by defendant, actually took place in selecting the jurors, and further assuming that, by some stretch of the imagination, said conduct was found by this court to constitute a substantial failure to comply with the statute, defendants would still have to show that such an irregularity as eliminating potential "elk hunters," caused "actual and substantial injustice and prejudice" to the defendant. Plaintiffs urge that defendant has made no serious attempt to show that it has sustained "actual and substantial injustice and prejudice." If it has, plaintiffs

cannot readily perceive the same.

Certainly elk hunters are not the type of class or group, the exclusion of which would tend to evidence discrimination or tend to make the jury other than what it was, i.e., fair, competent and impartial. Elk hunters are drawn from all religious, cultural, racial, sexual, and socio-economic classes. Certainly elk hunters, as a group, cannot be presumed to be more sympathetic to activities of a company which may tend to infringe on the rights of neighboring land owners than the population at large. It is a general rule in criminal cases that a conviction will not be reversed or verdict set aside, unless error in the selection of the jury was more than merely a disregard of a formal provision of the law regarding the manner of jury selection, and the moving party can show "actual prejudice," so that a "fair and impartial jury was not selected." [See the decisions regarding selections of jurys in criminal cases State v. Welt, 419 P.2d 101 (Ariz, 1966); State v. McGee, 370 P.2d 261 (Ariz, 1962), cert. den. 371 US 844; State v. Dodge, 365 P.2d 798 (Utah, 1961)]. Surely, a more exacting standard would be required in selecting a jury in criminal cases than is required in civil cases. Since, under the facts of Branch v. Western Petroleum, the standards established in criminal cases would not require a new trial, no greater standard should be required in a civil case. In the present case, defendant has not and cannot show prejudice from the fact that the clerk may have, out of

concern for the Duchesne County taxpayers, neglected to require a few persons, with firm elk hunting plans, to appear for jury selection because of the clerk's experience that such persons would probably be excused by the court.

B. DEFENDANT "PASSED THE JURY FOR CAUSE."

In any event, it is to be recalled that after the court and counsel for both parties had voir dired the prospective jurors, and all individuals with potential conflicts of any kind were excused, counsel for both parties passed the jury for cause. Defendant should not now be heard to say that the jury was unfair, prejudicial, etc. If such were the case, the jury should never have been passed for cause.

C. DEFENDANT "WAIVED" RIGHT TO OBJECT TO JURY.

Furthermore, defendant's counsel learned of the so-called "exclusion" of elk hunters, prior to the issue being submitted to the jury, and made no protests officially or unofficially. Having been charged with the knowledge prior to the jury deliberations and chosing not to object to the Clerk's actions until after the jury had deliberated and reached a verdict unfavorable to defendant, is simply unfair. Plaintiffs believe defendant waived its right to object both at that time and on appeal.

POINT V

THE AWARD OF PUNITIVE DAMAGES WAS PROPER AND THERE WAS SUFFICIENT EVIDENCE FOR THE JURY TO AWARD THE SAME.

A. JURY'S ROLE IN THIS CASE.

Defendant misses the point of the jury's role in this case. The jury was not asked to assess the damages in the manner defendant suggests. The jury's function was to first determine certain facts by answering certain questions. The questions the jurors answered were primarily framed by the defendant's counsel, which the court modified in order to comply with the direction the trial had taken. The jurors were specifically cautioned not to worry about the legal consequences of their answers (See T. pgs. 875, lines 27-30; and 876, lines 1-9), but to answer each question from the facts as they found them.

B. GROUNDS FOR AWARDING PUNITIVE DAMAGES.

While plaintiffs agree with defendant that "wilful and malicious" are grounds for awarding punitive damages, plaintiffs hasten to draw defendant's attention to the fact that a "reckless indifference and disregard for the rights of the plaintiffs" may establish the willful conduct. This court has stated the principle as follows:

> It is true that punitive damages are usually associated with other types of tortious injury. But under proper circumstances they may be allowed in cases of trespass. . . If the wrongful act by which one injures another is done wilfully and maliciously our law allows

> the imposition of punitive damages as a punishment to the defendant for such conduct and as a warning to him and others against it. In view of the fact that the plaintiff's evidence showed that even after repeated warnings and remonstrances the defendant's wrong continually persisted with an indifference to the consequences and to plaintiff's rights, the trial court correctly submitted the issue to the jury as to whether his conduct was wilful and malicious and allowed the assessment of punitive damages. Powers v. Taylor, 379 P.2d 380, 14 Ut.2d 152, pg. 382). (emphasis added).

C. MALICE "IMPLIED" FROM CONDUCT.

In Terry v. Zions Co-op Mercantile Institution, 605 P.2d 314 (Utah, 1979), the Utah court makes an even clearer statement as to what is required to establish the malice essential for an award of punitive damages:

> This presumed malice or malice in law does not consist of personal hate or ill will of one person towards another, but rather refers to that state of mind which is reckless of law and of the legal rights of the citizen in a person's conduct towards that citizen. . . In such cases malice in law will be implied from unjustifiable conduct which causes the injury complained of or from a wrongful act intentionally done without cause or excuse. (at pg. 327) (emphasis added).

Plaintiffs argued to the jury that defendant's actions of continually dumping pollution, after warnings by the plaintiffs, by State officials, and others, were evidence of a reckless indifference to plaintiffs' rights. The court correctly instructed the jury as to what they had to find in order to recommend an amount for punitive damages (See Instruction No. 10). Presumably the jury found defendant's unjustifiable conduct and disregard for plaintiffs' property rights constituted the wilful and malicious conduct required in order to award punitive

damages. Defendant has made no showing that the evidence would not support that finding by the triers of the fact. Certainly the defendant has the burden of showing there was no evidence to support an award for punitive damages if it is going to object to the same.

D. PURPOSE OF EXEMPLARY OR PUNITIVE DAMAGES.

The real question involved is whether passion rather than reason dictated the answers of the jury. Driesbach v. Lynch, 259 P.2d 1039 (Idaho, 1953). The purpose of exemplary damages is to punish the defendant, and to deter the defendant and others from engaging in similar conduct, and the jury was so instructed. [See Nash v. Craig Co., Inc., 585 P.2d 775 (Utah 1978); Terry v. Zions Co-op Mercantile Inst., op cit.; Palombi v. D & C Builders, 452 P.2d 325 (Utah, 1969); Evans v. Gaisford, 247 P.2d 431 (Utah, 1952)]. While historically exemplary damages should bear a reasonable relation to actual damages, other factors, such as wealth of the wrongdoer, the ability of the wrongdoer to pay and culpability of defendant must be considered. In Terry v. Zions Co-op Mercantile Institute, this court said:

> This court recently stated that "while the cases generally hold that the amount of punitive damages must bear some reasonable relation to the amount of actual damages awarded, this is not necessarily true." The purpose of a punitive or exemplary damage award is not to compensate the party harmed but rather to punish the wrongdoer, to deter him from similar acts in the future, and to provide fair warning to others similarly situated that such conduct is not tolerated.
>
> Due to the purposes underlying the award of punitive damages many factors contribute in determining their

> appropriate measure. While the amount of compensatory damages awarded is one such factor, it is not the exclusive one. The jury in its original decision or the court in its review of that decision must also consider the particular nature of the defendant's acts, the probability of those acts being repeated in the future, and the relative wealth of the particular defendant. (at 328) (emphasis added)

In the Terry case, the majority opinion also quoted approvingly from a California decision of Neal v. Farmers Insurance Exchange, 582 P.2d 980, 990 (Calif., 1978) relative to punitive damages as follows:

> obviously the function of deterence. . . will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort.

[See also Prince v. Peterson, 538 P.2d 1325, (Utah, 1975), Wilson v. Oldroyd, 267 P.2d 759 (Utah, 1954); Holdaway v. Hall, 505 P.2d 295 (Utah, 1973)]. Needless to say, if large corporations or wealthy individuals can at will engage in culpable conduct, such as we have in Branch v. Western Petroleum, where the defendant persists in unlawful actions which pollute the culinary water and/or land of its neighbor, and then expect no substantial punishment, other than to merely pay the reasonable rental value of that land and the consequential damage, then such parties would, in effect, be at liberty to engage in private condemnations of neighboring lands with impunity.

E. JURY VERDICT PRESUMED TO BE FAIR AND MADE WITHOUT PREJUDICE.

The jury was the trier of the facts. They heard the testimony. They observed the demeanor of the witnesses. They heard and judged the "particular nature" of the defendant's acts

and found them wilful and wanton, based on defendant's "reckless disregard of plaintiffs' rights." The jury was asked to assess what the punitive damages should be, without considering the effects of their decision. They did so, and defendant now protests without any showing of actual prejudice, passion or unfairness on the part of the jury. A jury is to be presumed to have acted properly and rationally and mere disapproval of their verdict should not be grounds for a reversal, without a showing that the amount awarded is so "shocking to one's conscience" as to "constitute passion, prejudice or corruption." (See Terry v. Zions Co-op Mercantile Institute, supra, at 328).

F. JURY AWARD WAS NOT EXCESSIVE.

The amount of the punitive damages awarded to plaintiffs was clearly not much more than minimal, when the brazenness of defendant's acts, the period of time involved, the wealth of the defendant, and all of the damages, including the amount the jury felt should be given for mental suffering, are considered. Considering the purpose of punishing culpable conduct, and effectively detering such conduct in the future, which purposes necessitate the consideration of defendant's ability to pay, and that defendant is a million dollar corporation, then perhaps the amount of punitive damages should have been four or five times larger than it was. Based on the stated criteria, as well as the defendant's wealth and the blatant nature of its actions, an even larger award than was given by the jury would still have

reasonably related both to the actual damages and served as an effective deterent to the defendant and others from repeating their acts.

G. DEFENDANT'S SUGGESTION OF PASSION AND/OR PREJUDICE UNFOUNDED.

Response should also be made to defendant's unsubstantiated and passing suggestion or allegation that the jury's award was made under the influence of passion or prejudice. Surely defendant had its tongue in cheek with such a comment. It should be recalled that: 1) the defendant passed the jury for cause when the trial commenced; 2) the jury promised under oath, to be fair and impartial. (Plaintiffs believe that in absence of evidence to the contrary, each juror should be presumed to have answered that promise truthfully and honestly); 3) there is no evidence, and defendant does not suggest there is any, that any juror, singularly, or collectively was prejudicial against the defendant, either before, during the trial, or during jury deliberations; 4) this jury was an outstanding cross section of the community. [There were four males and four females. It consisted of the Superintendent of Schools, a highway patrolman, a former deputy sheriff (currently a Department of Transportation employee), a farmer-rancher, the county recorder, a high school secretary, and two housewives, one of whose husband was a pharmicist and the other whose husband was retired. Four were from the Roosevelt area and four were from the Duchesne area.] Few juries anywhere could be much more representative of a county

than this jury was; 5) just because the defendant doesn't agree with the conclusion of the eight jurors does not make the jury prejudiced.

H. SUMMARY.

Defendant suggests that the jury was prejudiced because the jury awarded plaintiff punitive damages and damages for mental suffering or annoyance, even though "everything the defendant did was on its own land." Defendant overlooks that while the harm started on its own land, it soon moved to the plaintiffs' land. Perhaps defendant's tunnel vision is why we had to have a lawsuit to begin with. If defendant had been more considerate of others and had looked beyond how much money it was saving by literally dumping its pollutants on top of the plaintiffs, this lawsuit would never have been necessary. Now that the jury has required the defendant to compensate the plaintiffs for defendant's profitable, but tortious acts, defendant claims that the jury was unfair, the verdict was excessive, etc. Defendant should broaden its perspective by thinking and listening to what others in the community feel about its conduct and actions. Plaintiffs feel that under the circumstances, i.e., since for 32 months defendant persisted in its unlawful activities, knowing what it was doing, the jury was conservative in its award. With another jury and another trial, the aggregate damages might well be considerably more. Furthermore, defendant's trespass and polluting was not a singular act, but a continuing one from February, 1977, through

November, 1979. Surely defendant did not think that a reasonable jury would limit its award to a single incident.

- PLAINTIFFS' CROSS APPEAL -

POINT VI

THE COURT ERRED IN STRIKING THE JURY AWARD FOR MENTAL SUFFERING AND SAID AWARD SHOULD BE REINSTATED

A. INTRODUCTION.

At the end of plaintiffs' case, the court ruled that as a matter of law it would not permit plaintiffs' claim for emotional distress, discomfort and annoyance. However, after reviewing numerous cases [See Daluiso v Boone, 455 P.2d 811 (Calif., 1969); Acadia, Calif., Ltd. v. Herbert, 353 P.2d 294 (Calif., 1960); Valley Development Co. v. Weeks, 364 P.2d 730 (Colo., 1961); Rodriguez v. State, 472 P.2d 509 (Hawaii, 1970); Murphy v. City of Tacoma, 374 P.2d 976 (Wash., 1962); Gruenberg v. Aetnalus Co., 510 P.2d 1032 (Calif. 1973); Edwards v. Talent Irrigation Dis., supra; Drake v. Smith, supra] the court was convinced of the error of its earlier ruling as to what the law was on the issue of mental suffering and agreed to submit the question to the jury.

B. ISSUE OF MENTAL SUFFERING PROPERLY PLEAD AND TRIED.

Defendant had long known of plaintiffs' claim for such relief as is set forth in the Fourth Cause of Action in plaintiffs' Second Amended Complaint. In addition, at the end of defendant's defense, plaintiffs asked to re-open their case in chief, and without objection from the defendant, the court

authorized the same. (See T. Pg. 796, lines 3-6). Thus, when plaintiffs re-opened their case, the plaintiffs were entitled to present such evidence as they felt necessary to substantiate their damage claims. Defendant made no objection to that testimony, but rather acknowledged plaintiffs' right to do so by cross-examining the plaintiffs and witnesses on the matters raised on direct examination. (See T. pg. 803, lines 27+).

The plaintiffs' statement of facts sets forth the evidence that the jury heard to conclude that the plaintiffs had suffered "emotional distress, discomfort and annoyance," because of defendant's wrongful acts. The defendant made no attempt to offer any evidence to rebut the clear and consise evidence presented by the plaintiffs.

C. JURY ADEQUATELY INSTRUCTED ON ISSUE

Plaintiffs believe and urge that by reading all of the jury instructions, as the jury was instructed to do in Instruction #16, the jurors, as the triers of the fact, were adequately instructed so as to answer the question on mental suffering or emotional stress. While defendant did object to question #18 on mental suffering, etc., being put to the jurors, defendant did not object to the lack of jury instructions on the subject. Thus, the "form" of the question and the jury instructions was apparently approved by the defendant. Apparently it was the remedy, i.e., the question of mental suffering itself that is and was objectionable to the defendant. Why the trial court would

subsequently hold that plaintiffs had not plead mental suffering, discomfort or annoyance or if plead and proved, that the jury was not adequately instructed, is beyond the plaintiffs. Plaintiffs urge that the record is clear that: plaintiffs properly plead the matter; proved the matter; and, the jury was adequately instructed in the law so as to answer the relatively simple questions submitted by the court.

D. FINDINGS OF JURY.

The jury could only answer Question 18 on mental suffering, etc., if it answered questions 2 and 7. When Question 18 is read in conjunction with Questions 2 and 7, to which specific reference is made in the language introducing Question 18, no possible doubt could exist in the mind of a reasonable juror as to what action of the defendant was being referred to in said Question 18. Question 2 stated:

> Do you find defendant's use of its evaporation pits for the dumping of formation water is a cause of the pollution of the water in plaintiff's diligence well?

Interrogatory 7 stated:

> Do you find that defendant's use of the evaporation pit by the dumping of formation water is a cause of the pollution of the water in plaintiff's new well?

The fact that interrogatories 2 and 7 were referenced to interrogatory 18, and the fact that no other interrogatories dealt with any other possible causes of pollution, makes clear that the jury was to only find the damages resulting from defendant's actions and no one elses. The jurors, as intelligent

men and women, and even in the absence of any reference to interrogatories 2 and 7, would no doubt have realized that, as they were to find the damages which defendant caused, and in so doing, defendant's culpable actions and the effects of those actions were the only factors being weighed. The defendant, and impliedly the court, passed each of the eight (8) jurors for cause. Neither should now "back door" that approval by questioning the capacity of the jury to reason and think in determining whether plaintiffs sustained "emotional distress, discomfort or annoyance," i.e., emotional distress by reason of defendant's actions. Each of those words are of such general use and understanding that an instruction defining them was then and still is unnecessary. Reasonable jurors could reasonably be expected to understand what those words meant. As indicated in Point V, Subpoint G-4, when considering the exceptional cross-section of the community that this jury represented, it surely is to be presumed they understood what those "everyday" words meant. Again, when the trial judge gave the jury instructions, the defendant did not object to the lack of instructions defining the meaning of the words, and no objection should now be heard.

This jury, as representatives of a broad spectrum of the community, were not and are not the kind of individuals who would be given to passion, prejudice, etc. Remember there was the Superintendent of Schools, a highway patrolman, a former deputy sheriff, the County Recorder, a school secretary, a farmer-

rancher, and two housewives. They tried the case well and based their decision only upon the evidence before them. Their unanimous finding was fair, just, and equitable and should not have been disturbed.

E. PLAINTIFFS NOT OBLIGATED TO PLEAD AND PROVE ELEMENTS OF TORT OF INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS; RATHER, PLAINTIFFS ONLY OBLIGATED TO PLEAD AND PROVE EMOTIONAL DISTRESS AS AN ELEMENT OF DAMAGES.

It should again be stressed that defendant did not object to the court's failure to instruct the jury on emotional distress at the time of trial.

Defendant's reckless indifference to the plaintiffs' rights was specifically found by the jury to be "wilful and malicious." Because the jury found defendant's conduct more than negligent, i.e., "willful, malicious or reckless," then under Section 46 of the Restatement of Torts 2nd (1965), physical injury is not a prerequisite to awarding damages for mental suffering. Likewise, the court's suggestion that a "separate cause of action" was necessary, is a misstatement or misapplication of the law. [See Murphy v. City of Tocoma, supra, and Drake v. Smith, supra, in which damages for "annoyance and inconveniences" were allowed to a plaintiff where a domestic water supply had been polluted. Arguably, the basis for these above decisions was that pollution of a household water supply may be regarded as a physical invasion of the person or the occupant. Also of interest is Edwards v. Talent Irrigation Dist, supra, which held that damages for mental anguish are recoverable in a negligent action when

they are a result of defendant's interference with the use and enjoyment of plaintiff's land.]

The California Court in Gruenburg v. Aetna Life Insurance Co., 510 P.2d 1032, 1041 (Calif., 1973), quoted its earlier decision in Crisci v. Security Ins. Co., 426 P.2d 173 (Calif, 1967), as follows:

> Defendants mistakenly rely on Section 46 Restatement Torts 2nd. . . Comment "a" to that section states that it is intended to apply only to the independent tort of intentional infliction of emotional distress. To be distinguished, comment "b" explains are those cases in which "emotional distress may be an element of damages. . . where other interests have been invaded, and tort liability has arisen apart from emotional distress.

The court went on to explain that

> The more exacting requirements of Section 46 are applied, the same comment states, to the independent tort (i.e., intentional infliction of emotional distress) "[b]ecause of the fear of fictitious or trivial claims, distrust of proof offered, and the difficulty of setting up any satisfactory boundaries to liability. . . " Since in the present case we are concerned with mental distress resulting from a substantial invasion of property interests of the insured and not with the independent tort of intentional infliction of emotional distress, we deem Section 46 to be inapplicable." at 1041 (emphasis added).

Plaintiffs believe that decision to be good law for this Court to apply in this case as hereafter suggested.

F. INTERFERENCE WITH PERSONAL AND/OR PROPERTY RIGHTS.

In Branch v. Western Petroleum, plaintiffs are suing for substantial interference with their property rights. Mental suffering, emotional distress, discomfort, and annoyance were

feelings, conditions, etc., that naturally arose or flowed from defendant's wrongful acts and invasion of plaintiffs' rights. The court's conclusion, six months after the fact, that the jury was not properly instructed on this issue is simply incorrect. An instruction as to the requirements for the independent tort of intentional infliction of emotional distress would definitely have been out of place and error, because that was neither plaintiffs' theory nor the proof plaintiffs offered.

Furthermore, it should be pointed out that the landmark Utah Case of Samms v. Eccles, 358 P.2d 344 (1961), which was argued extensively by defendant to the trial court, deals exclusively with the independent tort of intentional infliction of emotional distress and not with mental suffering arising or flowing from a reckless or intentional invasion of plaintiffs' personal or property rights. At the time of the trial the court agreed that Eccles did not govern this factual situation. But, six months later, the court reversed itself and adopted the defendant's theory, as set forth in the Eccles case, without apparent regard for the facts. The holding in the Eccles case should not be applicable to this factual situation for the reasons set forth in the Restatement and as applied by the California court which stated:

> In accordance with the general rule, it is settled in this state that mental suffering constitutes an aggravation of damages when it naturally ensues from the act complained of. . . damages for mental distress have also been awarded in cases where the tortious conduct was in interference with property rights

without any personal injuries apart from the mental distress. Crisci v. Security Ins. Co., supra.

Plaintiffs further urge that while any award by a jury or a court can easily be dismissed as being "speculative," that before the court summarily dismisses such an award, a specific finding of that "speculation" should be reached. Originally the court's judgment awarded plaintiffs the damages for mental suffering, etc. However, defendant persisted in its original objections. More than six months later, after the issues and facts were "stale" in the mind of the court, and numerous other cases had passed under the bridge, the trial court reversed itself and struck the finding by the jury. Why? Surely a conclusionary statement that the award was speculative is not enough. At the time of the trial, with the evidence fresh in its mind, the claim was allowed. Now on appeal, with the relevant evidence being recalled, and the reasoning behind the claim for damages being re-examined, this court should reinstate that claim.

G. SUMMARY.

Plaintiffs urge on cross-appeal that the jury award for mental suffering, discomfort or annoyance be reinstated. The plaintiffs properly plead and proved the same. In this case the mental suffering is not an independent tort, but is one that arises from defendant's wilful and wanton damage to plaintiffs' property. The jury was adequately instructed so as to be able to answer the questions of the court, including the amount necessary to compensate plaintiffs for mental suffering, discomfort or annoyance. The jury award should be reinstated.

CONCLUSION

Plaintiffs urge the court to find that:

1. Plaintiffs properly plead, proved and established all of their claims;

2. The jury was properly selected and even if not, defendant can show no actual prejudice so that a fair and impartial jury was not selected;

3. The instructions of the trial court were adequate and sufficient to assist the jury in answering all questions posed by the court;

4. The jury was fair, competent, impartial and an outstanding cross-section of the entire community;

5. The claim for mental suffering, discomfort or annoyance is not an independent tort, but one which "flows" from the wilful and reckless acts of the wrongdoer by invading plaintiffs' rights and property;

6. All of the jury findings were fair, reasonable and have no appearance of being subject to passion, prejudice or emotion;

7. All of the jury findings should be approved by this court, including the mental suffering, discomfort and/or annoyance suffered by the plaintiffs, together with damages arising from the same;

8. Defendant's appeal should be denied and plaintiffs' cross-appeal should be granted.

Respectfully submitted this 5th day of November, 1980.

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CERTIFICATE OF MAILING

I hereby certify that on the 5th day of November, 1980, I mailed a true copy of the foregoing Reply Brief of Plaintiffs-Respondents and Brief on Cross Appeal to Gayle F. McKeachnie and Clark B. Allred, Attorneys for Defendant-Appellant, 53 South 200 East, Vernal, Utah 84078, postage prepaid.

Secretary