

1980

Lloyd Branch And Jeanne Branch v. Western Petroleum, Inc. : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

LLOYD BRANCH and JAMES
BRANCH,

Plaintiffs,

vs.

WESTERN PETROLEUM

Defendant.

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IN THE SUPREME COURT OF THE STATE OF UTAH

LLOYD BRANCH and
JEANNE BRANCH,

Plaintiffs and
Respondents,

v.

WESTERN PETROLEUM, INC.,

Defendant-Appellant.)

Case No. 17178

BRIEF OF APPELLANT

STATEMENT AND NATURE OF CASE

Respondents brought this action claiming damages for the alleged pollution of their water well by formation water percolating into the underground water system from the Appellant's evaporation pit.

DISPOSITION IN THE LOWER COURT

The case was tried to a jury which found that the Defendant's use of a formation water disposal pit was negligent and that the water from Defendant's pit had caused 66% of the pollution of the Plaintiffs' first well and 52% of the pollution of the Plaintiffs' second well. The remaining pollution was found to have been caused by other parties or conditions. The jury awarded general and special damages to the Plaintiffs together with a \$13,000.00 punitive damage

award.

RELIEF SOUGHT ON APPEAL

Appellant seeks to have this court remand the case for a new trial; or in the alternative, to apportion the damages awarded and to delete or reduce the punitive damage award.

STATEMENT OF FACTS

Plaintiffs-Respondents, Branches, filed this action alleging that formation water from the Defendant's evaporation pit had run onto the Plaintiffs' land causing damage to the Plaintiffs, and that the formation water had percolated into the underground water system causing the water in the Plaintiffs' water wells to become unfit for culinary use, causing damages including a decrease in the value of the Plaintiffs' land.

The Plaintiffs are the purchasers of a parcel of property located in a rural area North of Roosevelt, Utah. The property was purchased in December of 1976 at a purchase price of \$37,000.00. (T.17,163) On the property is a home occupied by the Plaintiffs. Water for the use of the home at the time of purchase was obtained from a well which had been drilled sometime prior to 1930. (T.17-18) In November of 1977, Plaintiffs drilled a new well next to their home to obtain water for household use. (T.32)

The land North of the Plaintiffs' property, is owned by

the Defendant. Prior to the time Plaintiffs purchased their property, Defendant maintained on its land a pit into which was placed formation waters. The Defendant's business consists of hauling formation waters from oil well sites and discharging that water into the pit for disposal. Formation water is underground water brought to the surface by producing oil wells. The use of evaporation pits to dispose of formation water is an accepted procedure in the oil industry. (T.170-171)

The Plaintiffs allege that soon after they moved into the home the water from the older well started to taste bad. It was their opinion that the water was being contaminated by water percolating from the evaporation pit into the underground water supply. Tests made of the water in Plaintiffs' well showed that it contained fluctuating amounts of minerals. The Plaintiffs then drilled a new well in November of 1977, obtaining good water. Plaintiffs alleged that after about two (2) months the water in the new well also started to taste bad.

In an attempt to ascertain whether the formation water in the Defendant's evaporation pit was contaminating the Plaintiffs' culinary water supply, the parties by agreement performed certain tests. Results of the tests failed to show that the water from the evaporation pit was contaminating the Plaintiffs' water supply. (T.45, 56 and 362) The parties also retained experts to study the geological

and underground water systems to determine whether the Plaintiffs' wells were being contaminated by the Defendant's evaporation pits or by other sources. One of those experts was Edward Ferris who made an extensive study of the underground water system and presented to the court and the jury his conclusions. (T.337)

Mr. Ferris' study showed that the naturally occurring underground water in the area around the Branch home consisted of two (2) sources. The first layer of underground water was referred to as "shallow ground water", which water was not suitable for culinary use. Some of the water from Defendant's pit was percolating into this natural shallow ground water. (T.345) The deeper source of underground water was referred to as the Duchesne Formation aquifer. This aquifer was pressurized and contained waters suitable for human consumption, but of substandard quality. Several homes in the area used water from this aquifer for culinary purposes. (T.453-55)

Mr. Ferris testified that the water in the Plaintiffs' old well was contaminated as a result of the casing having rusted away over the years. (T.342 and 345) As a result of the casing rusting away, extremely poor quality shallow ground water was entering the well through the casing thereby contaminating the suitable water in the well. Because of the rusted casing, the water from the old well would have been of substandard quality even if the Defendant's disposal

pit had not been in existence. (T.347) Even with the Defendant's pit, the contamination in the old well was 75 percent caused by the natural poor quality groundwater and only 25 percent from water percolating from the evaporation pit. (T.456-58)

The study on the new well showed that if it was properly drilled and cased into the Duchesne Formation aquifer it was impossible for water from the Defendant's disposal pit to enter it. (T.454-458) The water samples from the new well showed that in fact the new well had not been contaminated by the Defendant's evaporation pit, but rather contained only water found in the Duchesne Formation aquifer which, in its natural state, is of substandard quality. (T.455)

Testimony of the various witnesses was that any contamination of the Plaintiffs' well could come from several sources including natural salts contained in the earth, (T.128,450), improper casing of the wells, (T.342), the septic tank system of the Plaintiffs located near the wells (T. 68), and activities of third parties which may affect the underground water system.

The case was submitted to the jury in the form of special interrogatories. The court instructed the jury regarding negligence and the standard of care of a reasonably prudent person. It refused, however, to instruct the jury as to proximate cause as requested by the defendant.

dant. (Defendant's Proposed Jury Instructions R.94) The trial court also had the jury find the percentage of pollution of the Plaintiffs' well caused by the Defendant and the percentage of pollution caused by other parties or conditions. The court, however, refused to submit to the jury the question of the percentage of negligence attributable to each party as requested by the Defendant and as required by Utah Code Ann. §78-27-38. (Special Interrogatories R.140) The jury, in reply to the question on percentage of causation, found that in relation to the Plaintiffs' first well, the Defendant had caused 66 percent of the pollution and other parties or conditions 34 percent of the pollution. In relation to the Plaintiffs' new well, the jury found the Defendant had caused 52 percent of the pollution, and other parties or conditions 48 percent of the pollution. (R.147-151) The court, however, refused to reduce the amount of damages found by the jury by the percentage of pollution caused by other parties. The court awarded to the Plaintiffs \$3,250.00 for the decrease in value of their property; \$700.00 for costs of water tests, surveying, etc.; \$3,000.00 for the cost of drilling the new well; \$13,000.00 for punitive damages; and \$10,000.00 for inconvenience, annoyance and mental suffering. (R.270) The \$10,000.00 award for inconvenience, annoyance and mental suffering was deleted by the court for the reason that it had not been pled nor proven, nor had the jury been properly instructed on that issue.

(R.259,270) The court, however, refused to delete or reduce the award of punitive damages.

ARGUMENT

POINT I

WHERE THE DEFENDANT WAS CHARGED WITH NEGLIGENCE THE DEFENDANT WAS ENTITLED TO AN INSTRUCTION REGARDING PROXIMATE CAUSE AND A FINDING BY THE JURY THAT THE DEFENDANT'S NEGLIGENT ACTIONS WERE THE PROXIMATE CAUSE OF THE PLAINTIFFS' INJURIES.

The legal issues arising out of the alleged pollution of underground water systems through the operation of pits to dispose of formation waters, have not previously been considered by the Utah Supreme Court, insofar as counsel can determine. Those issues have been considered, however, by states such as Oklahoma and Texas which have had extensive oil well development and where the use of pits is a common practice in disposing of formation waters. In the jurisdictions which have considered similar cases, the courts have held that the plaintiff must base its case for recovery either on the theory of nuisance or negligence and in a few jurisdictions the theory of trespass has been allowed. General Crude Oil Co. v. Aiken 344 S.W.2d 668 (Tex. 1961), Ross v. Fink 378 P.2d 1011 (Okla. 1963), Turner v. Big Lake Oil Co. 128 Tex. 155, 96 S.W.2d 221 (1936), United Fuel Gas Co. v. Sawyers 259 S.W.2d 466 (Ken. 1951), 38 A.L.R.2d. 1261, 1285 and 39 A.L.R.3d. 910, 921.

The verdict found by the jury and the judgment of the trial court in this case were apparently based on the theory of negligence. The trial court instructed the jury

as to negligence and there was a finding by the jury that the Defendant had been negligent in dumping formation water in the evaporation pit. (Jury Instructions Numbers 6, 7 and 8 and Interrogatory Number 17, R. 116-139) Since the Plaintiffs did not claim that their theory was based on nuisance or trespass and furthermore, since the Plaintiffs did not request the trial court to instruct the jury as to nuisance or trespass, those theories were waived by the Plaintiffs and could not have been used by the trial court or the jury in reaching its verdict. Therefore, the only accepted theory upon which this case could be based is negligence.

The trial court instructed the jury as to negligence, but it refused to instruct the jury as to proximate cause as requested by the Defendant. Proximate cause is a question of fact for the jury and not an issue to be decided by the court. Rallow v. Ogden City 66 Utah 475,243 P.791 (1926). As stated in Haarstrick v. Oregon Short Line Railroad Co. 70 Utah 552,262 P. 100 (1927),

[I]t is a fundamental principal of the law of negligence that no matter how gross the negligence complained of may be, it creates no liability unless it is the proximate cause of the injury. Id. at 559.

In cases involving the alleged pollution of water wells, the plaintiff has the burden of showing that the defendant's negligence is the proximate cause of the pollution of the Plaintiffs' well and the resulting damages. Rain v. Balph 293 P.2d 359 (Okla. 1956), SunRay Mid-

Continental Oil Co. Trial 366 P.2d 614 (Okla. 1961).

The trial court's refusal to instruct the jury on proximate cause was error. This error was not corrected by requesting the jury to find whether the Defendant's use of the disposal pit was a cause of the pollution of the water in Plaintiffs' well. (R.136, Question No. 2 and R. 138, Question No. 7) The jury's answers to those questions are not meaningful when one must apply the answers in trying to formulate a judgment which requires that one's negligence be the proximate cause of the harm.

In some cases, a cause and proximate cause would be synonymous. However, in the instant case that is not true. The testimony at the trial showed that there were several possible causes of the pollution of the Plaintiffs' well, including poor subsurface ground water, rusted casings, the Plaintiffs' septic tank system, and unknown third parties. The jury also found that there were other causes of the pollution of the well. Furthermore, the Plaintiffs themselves, in a separate lawsuit, sued the person who drilled the well, claiming that he was the cause of the pollution of the well. (R. 206-07)

Because there was evidence indicating that there were several possible causes of the pollution of the Plaintiffs' well, it was imperative that the jury be instructed on proximate cause and be allowed to make a factual determination of that issue. The Court's refusal to instruct the

jury on proximate cause and the failure of the jury to find that the Defendant's actions were the proximate cause of the Plaintiffs' injury, is not in accordance with the established law of this jurisdiction or other jurisdictions. Both precedent and reason support a reversal of the verdict in this case and a remand for a new trial.

POINT II.

THE TRIAL COURT'S FAILURE TO DIRECT
THE JURY TO FIND THE PERCENTAGE OF
NEGLIGENCE ATTRIBUTABLE TO EACH PARTY
AS REQUIRED BY UTAH CODE ANN. §78-27-
38 WAS REVERSIBLE ERROR.

The comparative negligence statute, Utah Code Ann. §78-27-38 provides that,

The Court may, and when requested by any party, shall, direct the jury to find separate special verdicts determining... (2) the percentage of negligence attributable to each party; and the Court shall then reduce the amount of the damages in proportion to the amount of negligence attributable to the person seeking recovery. (Emphasis added).

In the present case, the Defendant requested the trial court to direct the jury to find separate special verdicts determining the percentage of negligence attributable to each party. (Plaintiffs' Proposed Verdict Form, R.113) The trial court, however, refused the request to find the percentage of negligence attributable to each party. Instead it instructed the jury to determine (1) whether the Defendant was negligent "in dumping formation water in its evaporation pit." (R.139, Question No. 17) and (2) the percentage of the pollution of Plaintiffs' well caused by the Defendant's dumping and the percentage caused by third parties. The trial court refused to instruct the jury to determine whether the Plaintiffs were negligent and if so, the percent of negligence attributable to the Plaintiffs. The evidence showed that the Plaintiffs or their agents may

have been negligent in the maintenance of the casings of the wells and that the Plaintiffs' septic tank system may have contributed to the pollution of the well. It is possible that the jury, if asked, could have found Plaintiffs more negligent than Defendant.

Utah Code Ann. §78-27-38 specifically requires that the Court direct the jury to enter separate verdicts as to the percent of negligence attributable to each party. The trial court's failure to instruct the jury makes it impossible for the court to use the interrogatories answered by the jury as a basis for the judgment. Therefore, a new trial should be granted so that the jury can be properly instructed and proper questions submitted to the jury relating to the percentage of negligence attributable to each party.

POINT III

NOTWITHSTANDING THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY TO FIND THE PERCENTAGE OF NEGLIGENCE OF THE PLAINTIFFS AND APPORTION THE DAMAGES, THE TRIAL COURT SHOULD HAVE AT LEAST REDUCED THE DAMAGES BY THE PERCENTAGE OF POLLUTION FOUND BY THE JURY TO BE CAUSED BY OTHER PARTIES OR CONDITIONS.

Utah Code Ann. §78-27-37 and Utah Code Ann. §78-27-38 require that the damages be reduced by the proportion of negligence attributable to the party seeking recovery.

Not having the requisite finding by the jury to formulate the judgment in accordance with Utah Statute, the Court should have followed the common law rule of apportionment.

The rule is that if an independent tort-feasor pollutes a water supply, damages are apportioned according to the percent of pollution attributable to that party. Monroe Carp Pond Co. v. River Raisin Paper Co. 240 Mich. 279, 215 N.W. 325 (1927). As stated in R. Clark, Water and Water Rights, §219.3(B),

The division of apportionable harm among several defendants is undoubtedly based upon considerations of fairness. It seems wrong to hold a defendant liable for the entire damages where it is known that he is responsible for only a part. Whatever apportionment is permitted by the nature of the case, although inexact, is usually better than no apportionment at all.... Id. at 186.

In the present case, the trial court did ask the jury to find the percent of pollution caused by the Defendant and the percent of the pollution caused by other parties or

conditions. The jury, in response to those questions, found that the Defendant had caused 66% of the pollution of Plaintiffs' old well with other parties or conditions causing 34% of the pollution in that well. The jury further found that the Defendant had caused 52% of the pollution of the Plaintiffs' new well and that other parties or conditions had caused 48% of the pollution of that well. (R.147-151)

Since the trial court failed to instruct the jury to find the percentage of negligence attributable to the Plaintiffs, it was impossible to apportion the damages found by the jury as required by Utah Code Ann. §78-27-37. Not only did the Court not apportion the damages according to the negligence of the parties, it failed to reduce the damage award against Defendant by the percentage pollution the jury found caused by parties other than Defendant. Fairness and precedent require that the damages be reduced by the percent of pollution attributable to others so that the Defendant is not required to pay for damages which were not caused by it. The trial court's refusal to apportion the damages, as found by the jury, was error, and the case should be remanded with instructions by this Court to apportion the damages in accordance with the findings of the jury.

POINT IV

THE ACTIONS OF THE DUCHESNE COUNTY CLERK'S OFFICE IN EXCUSING ALL PROSPECTIVE JURORS WHO DESIRED TO GO ELK HUNTING VIOLATED THE JURY SELECTION AND SERVICE ACT, AND THE DEFENDANT IS ENTITLED TO NEW TRIAL WITH A PROPERLY SELECTED JURY OR A HEARING TO DETERMINE IF THE DEFENDANT WAS PREJUDICED.

The procedure for qualification and selection of juries in the State of Utah is set forth in the Jury Selection and Service Act. Utah Code Ann. §78-46-1, et seq. Utah Code Ann. §78-46-13 provides that the clerk of the court, under the direction of the judge, shall draw a jury panel at random from the qualified jury wheel. The persons then selected for jury service are to be notified by the court when and where they are to report for service. Section 78-46-15 provides that if a prospective juror desires to be excused from jury service, the court shall make that determination based upon the information provided on the jury qualification form or by an interview with the prospective juror. If it is determined that the juror should be excused, that should be entered on the jury qualification form.

Section 78-46-16 sets forth the procedure by which a party challenges the selection of the jury. That Section provides that the challenge should be made within seven (7)

days after the party discovers the grounds for the challenge and in any event before the jury is sworn to try the case. Upon a motion filed setting forth a sworn statement of facts which if true would constitute a substantial failure to comply with the act, the moving party is entitled to present testimony on the question of whether the jury was properly selected and on the question of whether the moving party was prejudiced as a result of the improper selection of jury.

The trial in this case was scheduled so as to include the opening day of elk hunting season in Utah. After the jury was sworn, passed for cause and impaneled and after the trial had started, counsel for the Defendant was informed by the Duchesne County Clerk's Office that since the opening day of elk season was the same day as the trial, the clerk's office had contacted all prospective jurors and inquired as to whether or not they desired to go elk hunting. (R.173) Any prospective jurors who expressed a desire to go elk hunting were then removed from the jury list and not summoned for jury duty. The Defendant was not aware of these facts prior to the time the jury was sworn, and, therefore, was unable to file a motion challenging the selection of the jury. However, on receipt of this information, Defendant filed, with the trial court, a motion requesting a new trial or a hearing to determine whether the jury selection was proper. If the determination was made that the jury selection

was not proper and the Defendant had been prejudiced, the Defendant should have been granted a new trial. The court denied the Defendant's motion and refused to hold a hearing or grant a new trial.

The right of a party to be judged by a properly selected jury is an important facet of the American legal system. The excusing of all prospective jurors who desired to go elk hunting by the Duchesne County Clerk's Office deprived the Defendant of a proper jury leaving the Defendant with a jury composed of parties not familiar with the oil industry. The Defendant is at least entitled to a hearing to determine whether the jury selection was proper and if not, whether the Defendant was prejudiced. The failure of the trial court to grant such a hearing, or in the alternative to grant to the Defendant a new trial with a properly selected jury, was error and the case should be remanded for a new trial.

POINT V

THE AWARD OF PUNITIVE DAMAGES BY THE JURY WITHOUT A SHOWING THAT THE DEFENDANT'S ACTIONS WERE WILLFUL AND MALICIOUS, WAS IMPROPER AND UNDER THE INFLUENCE OF PASSION OR PREJUDICE AND THEREFORE THE PUNITIVE DAMAGE AWARD SHOULD BE DELETED OR AT LEAST REDUCED.

Punitive damages must not be awarded unless the evidence shows that the defendant's actions were willful and malicious.

Kesler v. Rogers 542 P.2d 354 (Utah 1975), Palombi v. D & C

Builders 22 Utah 2d 297,452 P.2d 325 (1969), Powers v.

Taylor 14 Utah 2d 152,379 P.2d 380, (1963), Smoot v. Lund 13

Utah 2d 168, 369 P.2d 933 (1962) and Evans v. Gaisford 122

Utah 156, 247 P.2d 431 (1952). Punitive damages are not to be awarded if the conduct of the Plaintiff was just wrongful,

Kesler v. Rogers at 356, or if the defendant's conduct was

careless. Palombi v. D & C Builders at 328. The court in

allowing punitive damages must do so with caution, lest

engendered by passion or prejudice, the award becomes un-

realistic or unreasonable. Kesler v. Rogers at 359. As

this Court has stated,

[T]he damages so assessed must appear to have some basis in reason in relation to the wrongful act, the manner and intent with which it was done, the injury inflicted and the actual damage suffered.

Powers v. Taylor at 383.

In Kesler v. Rogers, this Court compared the \$10,000.00 punitive damage award to the \$25,403.17 actual damage and

the wrongful taking by the defendant of plaintiff's cattle and held that the \$10,000.00 punitive damage award was disproportionate to the actual damages and the injury caused and reduced the punitive damage award to \$5,000.00.

Lawsuits involving pollution of water systems by oil companies have often result in large punitive damage awards as a result of passion or prejudice, and the courts have felt compelled to either reduce or delete those damages. In Cities Service Oil Co. v. Merritt 332 P.2d 677 (Okla. 1958), the court, in reviewing the actual damage suffered by the plaintiff, reduced the punitive damage awards from \$500.00 to \$200.00 and from \$4,500.00 to \$1,800.00. In Cooperative Refinery Ass'n. v. Young 393 P.2d 537 (Okla. 1964), the court deleted from the judgment the \$600.00 punitive damage award on the basis that the defendant had not acted willfully and maliciously, but had acted in good faith. Furthermore, it has been held that in applying the doctrine of comparative negligence, the punitive damage award should be reduced by the percent of negligence attributable to other parties. Pedernales Electric Cooperative, Inc. v. Schulz 583 S.W.2d. 882 (Tex. 1979). Contra. Tampa Electric Co. v. Stone & Webster Engineering Corp. (DC Fla.) 367 F.Supp 27.

The Plaintiffs failed to produce any evidence showing

that the actions of the Defendant were willful and malicious. Rather, the evidence showed that the Defendant's evaporation pit was in operation when the Plaintiffs first purchased their property, and that when the Plaintiffs complained to the Defendant claiming that their water well was being polluted, the Defendant went to great lengths and expense to determine if the pit was the cause of any pollution. Defendant met with the Plaintiffs and agreed to institute a dye test and a water sampling test to determine whether the water in the evaporation pit was polluting the Plaintiffs' water system. Both of those tests failed to show that the water from Defendant's pit was polluting the Plaintiffs' well. In addition, the Defendant hired two (2) different experts in the field to run tests and to examine the geology of the area to determine whether or not the evaporation pit was polluting the Plaintiffs' well. The conclusion of both of those experts was that the Defendant was not polluting the Plaintiffs' water well, but rather the pollution was from some other source. In addition, the Defendant constructed catch ponds to prevent seepage from the pit from running onto the Plaintiffs' property and expended a great amount of money hauling water from the catch ponds so as to prevent the water from running onto the Plaintiffs' property. Even the Plaintiffs' counsel admitted in his closing arguments that the actions of the Defendant were not willful and

malicious, but were at best a reckless indifference for the Plaintiffs' rights. (T.502-03)

The instruction given to the jury by the trial court was improper and not in accordance with Utah law in that it allowed the jury to assess punitive damages on a showing by the Plaintiffs that the Defendant's conduct was with reckless indifference and disregard of the rights of the Plaintiffs. It was this improper language in the instruction that the Plaintiffs' counsel relied on when arguing to the jury that punitive damages should be awarded. Since there was no showing that the Defendant's actions were willful and malicious, the Defendant requested the court to instruct the jury that punitive damages were not allowed in this case. (T.398-99, and Defendant's Proposed Jury Instruction R.108) The court refused the proposed instruction by the Defendant. The court did, however, state to Defendant's counsel that it would instruct the jury that it could only award punitive damages if there was a showing that the action of the Defendant was willful, malicious and wanton. (T.402-04, 412 and 414) However, when the court instructed the jury, it added the additional language relating to reckless indifference and disregard. The jury instruction was erroneous, not in accordance with Utah law, and the punitive damage award should be deleted.

In the event the Court determines that the punitive

damage award should not be deleted, the award should at least be reduced since it was obviously awarded under passion or prejudice. As noted supra, punitive damage awards under similar factual situations have shown that the verdicts awarded by the jury were under the influence of passion or prejudice. Furthermore, the trial court indicated in an earlier ruling that it considered the punitive damage award excessive when it reduced that award to \$5,000.00, but later reinstated it when deleting the award for inconvenience, annoyance and mental suffering. (R.258)

A comparison of the punitive damages of \$13,000.00 to the actual damages awarded to the Plaintiffs of approximately \$9,000.00, shows that the punitive damage award is disproportionate to the injury and was awarded under passion or prejudice especially in light of the fact that the jury panel had been improperly selected. Fairness to the Defendant requires that the punitive damages be deleted or at least reduced.

CONCLUSION

The trial court's failure to adequately instruct the jury regarding proximate cause and punitive damages and its failure to have the jury answer interrogatories to provide the necessary information needed to apply the law of negligence and comparative negligence resulted in a meaningless jury verdict. It is in the best interest of the parties that this Court remand this case to the trial court with instructions regarding the correct law to be applied. A jury verdict which decides whether the Defendant's negligence was the proximate cause rather than a cause of the Plaintiffs' injury, together with a finding regarding the percentage of negligence of the Plaintiffs, would allow the Court to enter a judgment fair to both parties. A new trial would also remove the question as to whether the Defendant received a fair trial due to the improper manner in which the jury was selected.

In the event the Court does not remand the case for a new trial, justice requires a reduction in the damages awarded. The Defendant should not be required to pay for the damages attributable to pollution which the jury found to be caused by other parties and conditions, especially when the other parties could have been the Plaintiffs and the other conditions could have been the poor quality of the underground water in its natural state.

Punitive damages should only be awarded when the Defen-

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dant's actions are wilful and malicious. The Plaintiffs' counsel in the closing arguments admitted that the Defendant's actions were not wilful and malicious. The award of punitive damages by the jury resulted from the improper jury instruction and passion or prejudice. Such an award of punitive damages should be deleted or at least reduced.

Appellant, therefore, submits that the jury verdict should be reversed and the matter remanded for a new trial.

Respectfully submitted this 17th day of September, 1980.

By: Gayle McKeachnie
Gayle F. McKeachnie

By: Clark B. Allred
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