

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
No. 97-CA-000188

ROCKWELL INTERNATIONAL CORPORATION, APPELLANT,

v.

VANCE WILHITE A/K/A VANCE WILLHITE,
BEVERLY WILHITE A/K/A BEVERLY JO WILLHITE, ET AL., APPELLEES.

APPEAL FROM LOGAN CIRCUIT COURT
NO. 93-CI-000158

BRIEF FOR APPELLANT ROCKWELL INTERNATIONAL CORPORATION

Andrew L. Frey
Evan M. Tager
Charles A. Rothfeld
MAYER, BROWN & PLATT
2000 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 463-2000

Co-Counsel for Appellant

M. Stephen Pitt
Virginia H. Snell
J. Anthony Goebel
Donald J. Kelly
WYATT, TARRANT & COMBS
Citizens Plaza
Louisville, Kentucky 40202-2898
(502) 589-5235

Co-Counsel for Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the Brief for Appellant was served upon Honorable Tyler L. Gill, Judge, Logan Circuit Court, P.O. Box 667, Russellville, Kentucky 42276; Charles L. Cunningham, Jr., Charles E. Fell, Jr., Suite 200, 304 West Liberty Street, Louisville, Kentucky 40202; John W. "Don" Barrett, Marc Boutwell, BARRETT LAW OFFICES, 404 Court Square North, P.O. Box 987, Lexington, Mississippi 390095; Thomas A. Noe, III, P.O. Box 608, 317 W. 4th Street, Russellville, Kentucky 42276; W. Patrick Murray, William H. Bartle, Steven C. Bechtel, MURRAY & MURRAY CO., L.P.A., P.O. Box 19, 111 East Shoreline Drive, Sandusky, Ohio 44871-0019; William Gordon Ball, NB Center, Suite 750, 550 West Main Avenue, Knoxville, Tennessee 37902; Gary E. Brewer, 1702 West Andrew Johnson Highway, P.O. Box 2046, Morristown, Tennessee 37816-2046; and Thomas M. Jessee, JESSEE & JESSEE, 412 East Unaka Avenue, P.O. Box 997, Johnson City, Tennessee 37605, by U.S. mail, postage prepaid, this 5th day of August, 1997.

One of the Counsel for Appellant

STATEMENT OF THE CASE

This is a negligence, trespass and nuisance case arising out of the escape of small quantities of polychlorinated biphenyls (PCBs) from Rockwell's Russellville facility into Town Branch Creek and from there into the Mud River. The plaintiffs are landowners whose properties abut Town Branch and Mud River. Although they have used and continue to this day to use the land for all its normal purposes, have sold produce grown there, have bought and sold the land at normal market values, and have placed loans on it at market rates, and although Rockwell has acknowledged full responsibility for any PCB cleanup that may be required, plaintiffs claimed that their land has been rendered less than worthless because of the theoretical possibility that they someday will be required to remediate their lands. On this basis, they asked for and received compensatory damages equaling the full market value of each plaintiff's property (a total of over \$7.5 million) and a lump sum award of punitive damages in the amount of **\$210 million**, representing plaintiffs' estimate of the cost of testing and remediating their properties.

Most of the facts necessary for the resolution of this appeal are not in dispute. Where there is a dispute, the facts are presented in the light most favorable to the verdict.

1. *The Russellville facility.* In 1956, Rockwell opened a die cast plant in Russellville to manufacture aluminum casings for natural gas meters, typewriters, and other products. Tape 7, 4/11/96, 17:02:48. Because die cast machines operate at high temperatures, a hydraulic fluid impervious to great heat is needed to prevent fires and resulting injuries to employees and property. *Id.*, 16:23:52. Rockwell purchased for this purpose a fluid manufactured and sold by Monsanto under the trade name "Pydraul." *Id.*, 16:24:02. Pydraul contained a PCB mixture with a 48% chlorine content known as Aroclor 1248. Tape 19, 5/10/96, 8:43:13. At that time and for many years thereafter, PCBs were not regarded as hazardous to the environment. *Id.*, 9:01:16; *id.*, 5/13/97, 9:51:46. Indeed, as late as 1970 Monsanto assured its customers that, while more highly chlorinated

PCBs might present a “potential problem of environmental contamination,” PCBs with a chlorine content of less than 54%, like the Aroclor 1248 Pydraul used by Rockwell, “have not been found in the environment and appear to present no potential problem to the environment.” D. Exh. 10, Appendix 8.

Though having no reason to believe that Pydraul might be dangerous, Rockwell took what at that time were elaborate precautions to prevent the escape of Pydraul into the environment. Specifically, Rockwell equipped the Russellville facility with a system of trenches to collect fluid leaking from the machinery so that it could be reclaimed. Tape 7, 4/16/96, 10:04:26. The trenches routed any substances that escaped from the machinery, including Pydraul, to a baffled area where the Pydraul was separated out for reuse. *Id.*, 10:05:36. Because Pydraul was expensive, Rockwell also endeavored to reduce the amounts escaping out of the machinery in the first place. *Id.*, 10:17:55.

Rockwell purchased Pydraul containing PCBs until 1971, when Monsanto reformulated the product to eliminate PCBs. *Id.*, 13:38:45. By 1975, Rockwell had drained all of its machines and completed its conversion to non-PCB-based hydraulic fluid. *Id.*, 11:11:46.

2. *The escape of PCBs from Rockwell’s property.* In 1985, Rockwell discovered that, despite its efforts to capture and reclaim the Pydraul, small quantities had escaped into Town Branch, a stream that empties into the Mud River about 3½ miles north of Russellville. Tape 2, 4/9/96, 9:43:47. Later it was learned that some PCBs apparently had washed ashore on various riparian properties. Based on the concentrations found in Town Branch and on the plaintiffs’ properties, Rockwell’s expert calculated that less than 86 gallons of Pydraul had escaped into Town Branch over a 30-year period (Tape 22, 5/17/96, 15:13:55) — or, on average, less than seven ounces per week — and that approximately 76-80% of the Pydraul that escaped into Town Branch remains within 0.7 miles of the

plant (Tape 21, 5/17/96, 14:54:03) — and thus far from plaintiffs’ properties. That testimony was unrebutted.

3. *The impact of PCBs on the properties at issue.* The escape of PCBs from the Russellville facility has had minimal real-world impact on the properties at issue in this case. As to 14 of the 54 properties for which damages were awarded, plaintiffs adduced no tests indicating the presence of any amount of PCBs. D. Exh. 35. Furthermore, testing revealed that an additional 11 properties have between 0 and 0.1 parts per million (“ppm”); 23 properties have between 0.1 and 1.0 ppm; and the remaining 6 have between 1.0 and 2.0 ppm. D. Exh. 174, Appendix 9.

Federal law treats these levels as *de minimis*. For example, U.S. Environmental Protection Agency (“EPA”) regulations permit sewage sludge containing 50 ppm of PCBs to be used as an agricultural fertilizer. 40 C.F.R. § 761.20(a)(4). Moreover, EPA does not require PCB-contaminated land to be decontaminated below a level of 10 ppm and permits excavated soil to be replaced with soil containing PCB levels of up to 1.0 ppm. *Id.* § 761.125(c)(4)(v). In other words, none of plaintiffs’ properties would require remediation under federal regulations governing PCB spills, and the PCB-containing soil on a substantial majority (48 of 54) could actually be used as replacement soil in a PCB cleanup!^{1/}

^{1/} Using a cancer risk factor ten times more stringent than the federal one, the Natural Resources and Environmental Protection Cabinet has attempted through litigation to require clean-up to a level of 0.1 ppm for floodplain soils on land that is unrestricted as to use. *See* Judgment at 19-20, *Commonwealth v. Rockwell Int’l Corp.*, No. 86-CI-1566 (Franklin Cir. Ct. Div. II. Mar. 24, 1997) (“Cabinet Judgment”). The Cabinet has acknowledged, however, that higher levels are acceptable for land used for agricultural, commercial, or industrial purposes (*id.*), as are all but two of the properties in this case. KDEP Commissioner Logan testified in this case that agricultural properties with levels of 1.0 ppm or lower need not be remediated if either (i) the affected areas have a vegetative cover (*i.e.*, grass or similar ground cover) or (ii) they have a buffer or are otherwise landscaped to prevent soil from washing into the river. Tape 10, 4/10/96, 15:41:29, 15:45:23, 16:07:37, 16:09:54, 16:12:34; 16:18:58. All of the agricultural properties involved in this case meet these conditions. Tape 23, (continued...)

The PCB levels on many of the properties also are lower than the federal standards for the sale of such foods as milk or manufactured dairy products (1.5 ppm), poultry (3.0 ppm), fish and shellfish (2.0 ppm), eggs (0.3 ppm), and even infant food (0.2 ppm). 21 C.F.R. § 109.30(a). Of course, the concentrations of PCBs found in agricultural products grown on plaintiffs' properties are far less than the already low levels found on the properties themselves. Tape 19, 5/13/96, 8:40:36. It was thus undisputed at trial that the small amounts of PCBs on plaintiffs' properties have in no way interfered with plaintiffs' ability to produce agricultural products and sell them at market prices. *Id.*, 8:47:38; Tape 13, 4/25/96, 10:04:09, 10:14:08; Tape 15, 4/29/96, 10:17:1. Indeed, only a few plaintiffs even thought it necessary to have their products tested. Those that did found them to be well within the permissible range for PCBs. Tape 8, 4/16/96, 16:34:17, 16:41:55; Tape 13, 4/25/96, 10:00:08, 10:03:38, 10:14:08, 15:44:20, 15:45:40; Tape 15, 4/29/96, 9:16:38, 9:18:56, 9:21:29; Tape 17, 5/7/96, 9:16:56, 9:18:03.

4. *The absence of any effect on property values.* It was undisputed at trial — indeed plaintiffs' counsel admitted during closing — that the presence of PCBs has had no negative effect on the values of Mud River and Town Branch properties. Tape 25, 5/28/96, 16:11:10; Tape 26, 5/28/96, 16:50:30, 16:51:13, 17:38:37. Specifically, the evidence was that, between 1986 and the time of trial, there were 55 sales of Mud River and Town Branch properties (Tape 20, 5/14/96, 10:18:50) and 90 loans collateralized by such properties (*id.*, 11:00:51) — all at fair market value. *Id.*, 10:45:18, 11:01:35. Several of those sales and loans took place after this lawsuit was filed (*id.*, 10:45:48), one

1(...continued)
5/21/96, 9:38:38.

The Cabinet Judgment, which is being appealed, generally requires sediments and floodplain soils along Town Branch to be remediated if the PCB level exceeds 0.1 ppm, subject to exceptions based on land use. As to the Mud River area (where 51 of the 54 properties involved here are located), it requires only that “[c]haracterization of sediments and floodplain soils along the Mud River must continue and all ‘hot spots’ must be remediated.” Cabinet Judgment at 43.

as recently as a few days before trial. *Id.*, 10:43:58. Many of the purchasers had actual knowledge of the presence of PCBs in the Mud River (*id.*, 10:47:25); indeed, several purchased additional floodplain acreage after joining this lawsuit (*see, e.g.*, Tape 15, 4/29/96, 8:41:11; Tape 15, 5/6/96, 8:08:19; Tape 16, 5/6/96, 17:00:41; Tape 17; 5/7/97, 9:11:36) (yet, amazingly, were nevertheless awarded the full market value of those properties as damages).

5. *The Cabinet's lawsuit.* By suit filed in 1986, the Environmental Cabinet sought an injunction ordering Rockwell to test and possibly remediate property affected by the escape of Pydraul from the Russellville facility, including the properties at issue in this case. Cabinet Judgment at 1, 43. Rockwell remediated the plant site and its surroundings and offered several plans to remediate land along that part of Town Branch close to the plant where the vast bulk of the PCBs were and remain located. Tape 21, 5/17/96, 14:03:26. Rockwell disagreed with the Cabinet, however, on the scope of remediation needed along Town Branch and on whether remediation was necessary at all on the Mud River and adjacent properties. Tape 8, 4/18/96, 14:07:22. Because no overall agreement could be reached, the issue of the appropriate scope of testing and remediation was tried before the Honorable William Graham, Franklin Circuit Court, in December 1995 and January 1996. Judge Graham rendered his ruling on March 24, 1997. That ruling addressed, *inter alia*, the remediation of Mud River and Town Branch as well as adjacent floodplain properties.

6. *Proceedings below.* Several owners of Mud River and Town Branch properties filed suit against Rockwell on March 26, 1993, alleging trespass, nuisance, and negligence. Subsequently, the owners of several additional parcels joined the action. The properties involved are no closer than 3 miles and as far as 65 "river" miles from the plant. The case originally was assigned to the Honorable William G. Fuqua but, after he was appointed to this Court, the case was reassigned to the Honorable Tyler L. Gill, who had just succeeded Justice Fuqua on the circuit bench. Judge Gill set the trial for April 1996. On February 22, 1996, over five weeks before the trial date, Rockwell moved

unsuccessfully for a continuance on the ground that the trial should await the Franklin Circuit Court ruling, which would be highly relevant to the damages issues in this case. The case was tried to a jury in April and May 1996 without the court, parties, or jury knowing which, if any, of plaintiffs' properties might actually have to be further tested or remediated and to what degree.

In order to overcome the undisputed fact that the presence of PCBs had never had any negative effect on property values, plaintiffs relied on the testimony of Gil Snyder, an Ohio appraiser with extremely limited experience appraising environmentally impaired properties, no experience appraising PCB-contaminated properties, and no experience regarding property values in Logan and Butler Counties. Tape 12, 4/23/96, 14:12:34, 14:15:05, 14:12:50. Snyder failed to canvass the local real estate market (*id.*, 14:19:53), performed no comparative sales analysis (*id.*, 14:18:50), and disregarded the large volume of readily available market data reflecting that the PCBs in the streams have had no adverse impact on the value of floodplain properties (*id.*, 14:24:06). Taking the position that available market data on sales of Mud River and Town Branch properties were meaningless, Snyder testified over Rockwell's objections that the presence of even one PCB molecule on a property necessitates an expensive clean-up that (at least in this case) exceeds the value of the property and therefore renders the property valueless. Tape 12, 4/23/96, 14:49:40, 14:53:33. That opinion in turn was predicated on the testimony of Steve Hixson, a lawyer with no experience in environmental law (Tape 11, 4/22/96, 13:22:00, 13:35:08), who (again over Rockwell's objection) opined that the plaintiffs might have a legal obligation to remediate their properties and might not be able to invoke the "innocent landowner defense" embodied in KRS 224.01-400(25). *Id.*, 13:58:37.

For its part, Rockwell adduced the testimony of Commissioner Robert Logan, who stated unequivocally that, "because Rockwell is the responsible party," the Environmental Cabinet had no intention of suing the plaintiff landowners for remediation. Tape 10, 4/19/96, 15:09:36.

Nevertheless, on the strength of the dubious and highly speculative testimony of Snyder and Hixson, plaintiffs argued that the extremely small amounts of PCBs on their lands rendered those lands entirely worthless (Tape 26, 5/28/96, 17:50:40) — even though they continued to live on, farm, insure, and pay taxes on those properties. *See, e.g.*, Tape 8, 4/16/96, 17:09:34; Tape 14, 4/26/96, 8:11:23; Tape 15, 4/29/96, 9:09:07. They accordingly sought compensation equal to the full fair market value of their properties — adding up to over \$7.5 million. *Id.*, 18:12:38. And although the court ultimately barred recovery of alleged costs of future remediation (Hearing Tape 5, 4/1/96, 10:14:22, 10:20:19; Order (May 23, 1996) (Appendix 2)), plaintiffs asked the jury to award as punitive damages the \$210 million that their expert estimated it would cost to have those properties tested and remediated. Tape 26, 5/28/96, 18:12:38. After 3½ days of deliberation, the jury, by a 9-3 vote, awarded plaintiffs the precise amounts they requested.

Following entry of judgment, Rockwell moved for JNOV and/or a new trial. After the motions had been fully briefed, Rockwell learned that Judge Gill, despite having been on the circuit bench less than two years, had just been awarded the 1996 “Outstanding Trial Judge Award” from KATA, a plaintiff-oriented bar organization. Judge Gill was nominated for the award shortly after the verdict in this case, by attorneys who represented plaintiffs in this and related cases; his handling of this case was singled out for special commendation. Rockwell’s motion to recuse Judge Gill for receiving this award while the case was still pending before him was denied, as was its motion for appointment of a special judge pursuant to KRS 26A.020(1). Thereafter, Judge Gill heard the post-trial motions and denied them in their entirety without explanation, except for reducing the post-judgment interest rate from 12% to 10%.

ARGUMENT

If the General Assembly determined — on the basis of nothing more than the testimony of a real estate appraiser having no experience in appraising properties with low-level PCB contamination

and a lawyer with no knowledge of environmental law — to appropriate \$210 million to test and remediate farmland which, as a result of some activity of the Commonwealth's, contained levels of PCBs 25 times lower than the level at which federal law requires remediation, taxpayers would rightly wonder about such seemingly unnecessary and profligate use of taxpayer moneys. And if the General Assembly further provided that these moneys — together with an additional \$7.5 million of “compensation,” equaling the total value of the land — should be paid to individuals who could keep, use, or sell the land for their personal profit and would not have to spend a penny of the appropriation on remediation of the land, observers would no doubt conclude that the General Assembly had suffered a collective attack of insanity.

Yet that is precisely what the plaintiffs ask the courts to approve here. The award of compensatory damages would enrich plaintiffs by an amount equal to the full value of the land, yet would leave them in ownership and possession of what remains fully useful land valued by the market at unimpaired levels. And the jury's punitive verdict would transfer hundreds of millions of dollars to the plaintiffs for the ostensible purpose of remediating land that, if it needs any remediation at all, will be fully remediated by Rockwell. The plaintiffs would have not the slightest obligation to spend a penny of this money on remediation of the land, and would indeed be foolish to do so under the circumstances here.

This bizarre outcome is the product of a gravely flawed trial in which an “expert” appraiser was permitted to give testimony that completely ignored current market behavior and was rooted instead in his wholly unsubstantiated belief that even a molecule of PCB would render hundreds of acres of land entirely worthless; in which a lawyer with no expertise in environmental law was permitted to offer a legal opinion that is plainly and flatly erroneous, as a basis for conjuring up potential multi-million dollar cleanup liabilities for the plaintiffs; in which plaintiffs were permitted to accuse Rockwell of causing health problems that were not only not a proper part of the case but wholly without

evidentiary basis; in which the jury was invited to compensate the plaintiffs through punitive damages for amounts that are not recoverable as compensatory damages under Kentucky law; in which blatant appeals were made to juror bias against a large, out-of-state company — all of this wrapped up in peremptory rejection of Rockwell’s post-trial motions by a judge who, while the case was pending before him, received at the behest of the plaintiffs’ lawyers a prestigious award for his pro-plaintiff rulings in this very case.

Under these circumstances, as detailed more fully below, the judgments against Rockwell must be set aside.^{2/}

I. ROCKWELL IS ENTITLED TO JUDGMENT ON PLAINTIFFS’ CLAIMS

The compensatory verdict in this case may fairly be characterized as astonishing. Plaintiffs contended that their properties had been rendered entirely worthless. The jury agreed, and awarded plaintiffs the full fair market value of those properties — this despite the undisputed facts that, to date: (1) the presence of minute levels of PCBs has had absolutely no adverse effect on the sales prices of Mud River and Town Branch properties since 1986; (2) banks continue to accept those properties as collateral at values that are unaffected by the presence of PCBs; (3) plaintiffs continue to live on, pay taxes on, and insure their properties; (4) some of the plaintiffs have themselves purchased Mud River properties at full price subsequent to the filing of this lawsuit; (5) plaintiffs’ land continues to produce agricultural products that they sell at prices and in amounts that are undiminished by the presence of

^{2/} The arguments in Parts I and II were presented in Rockwell’s motions for directed verdict (Tape 17, 5/9/96, 8:19:53) and judgment notwithstanding the verdict (R. 2115-2117 and accompanying memorandum, which was not renumbered but is a part of the record). The argument in Part III.A was preserved in Rockwell’s motion for a continuance. R. 1502-1531. The argument in Part III.B was preserved through contemporaneous objections (*see, e.g.*, Tape 14, 4/25/96, 16:46:20; Tape 15, 4/29/96, 8:10:16, 11:05:22. The argument in Part III.C was preserved in Rockwell’s motion to recuse. R. 2171-2196. The arguments in Part IV were raised in Rockwell’s motion for new trial. R. 2115-2117 and accompanying memorandum.

PCBs and; (6) no PCBs at all have been found on many of the properties. Against this background, the finding that plaintiffs' properties are diminished in value — let alone entirely worthless — is self-evidently irrational, so that “even if after all the evidence is construed most favorably to the verdict winner[s], a finding in [their] favor would not be made by a reasonable man.” *First & Farmers Bank v. Henderson*, Ky. App., 763 S.W.2d 137, 143 (1988). The judgment below therefore must be set aside.

A. Plaintiffs Failed To Show That Their Properties Suffered Any Diminution in Value.

1. The undisputed evidence establishes that plaintiffs have suffered no injury.

The legal standard that governs plaintiffs' claim for compensatory damages has long been settled. “[T]he proper measure of permanent damage to real estate in Kentucky is the difference in the fair market value of the real estate just before and after the injury.” *Central Kentucky Drying Co. v. Commonwealth*, Ky., 858 S.W.2d 165, 167 (1993).^{3/} While plaintiffs have quibbled with elements of this test, they acknowledged in their opposition to Rockwell's post-trial motions (at 8) that “[t]he measure of damages to real property is the reduction in fair market value.” And “by definition ‘fair

^{3/} *Accord River Queen Coal Co. v. Mencer*, Ky., 379 S.W.2d 461 (1964); *United Fuel Gas Co. v. Rowe*, Ky., 375 S.W.2d 264, 265 (1964); *Chapman v. Beaver Dam Coal Co.*, Ky., 327 S.W.2d 397, 399-400 (1959); *Island Creek Coal Co. v. Rodgers*, Ky. App., 644 S.W.2d 339, 345 (1982) (citing cases). The trial court gave the jury an instruction that departed from this controlling standard, directing the jurors that damages “would be the difference, if any, in the current fair market value of [plaintiffs'] property, disregarding any PCB contamination, and the current fair market value of their property, taking into account any PCB contamination.” Tape 25, 5/28/96, 9:17:11. This instruction had the effect of removing any temporal limitation from the jury's damages calculation. Thus — although plaintiffs conceded that the statute of limitations permits recovery only of damages suffered within the five years immediately preceding filing of the action on March 26, 1993 (*see* Tape 24, 5/28/96, 14:17:50) — the charge permitted the jury to return an award even if it believed that the property damage had occurred as much as 30 years earlier, when PCBs first leaked into Town Branch. This error, at a minimum, requires a new trial.

market value' represents the price that a willing seller will take and a willing buyer will pay for property, neither being under any compulsion to sell or buy." *Central Kentucky Drying Co.*, 858 S.W.2d at 167.

Plaintiffs are not entitled to any damages under this standard because it is undisputed that the prices paid for Mud River and Town Branch properties have not been affected at all by the presence of PCBs. Since the dispersal of PCBs was first publicized in 1985, some 55 sales of property in the Mud River flood plain have occurred; all have been at prices constituting fair market value for uncontaminated property. Indeed, plaintiffs' counsel acknowledged during closing arguments that, "[o]bviously, there is no impact on the market value of these properties."^{4/} Tape 26, 5/28/96, 16:50:30. Plaintiffs' valuation expert expressly agreed that "[w]e discovered no sales that their face conveyance amount, the dollars that were paid, that would support a loss in value." Tape 12, 4/23/96, 14:42:37. *See id.*, 15:28:02 ("The market sales that were out there do not show any — any perceivable loss in value."). Most strikingly, several plaintiffs bought or sold Mud River properties at full value after this suit was filed. *Id.*, 16:27:12, 16:28:17, 16:32:20, 16:53:51.

Other undisputed activity in the market likewise demonstrates that the minimal PCB presence has had no impact on property values. Some 18 banks have made more than 90 loans collateralized by Mud River property in the period after 1985 (Tape 20, 5/14/96, 11:00:19); as plaintiffs' valuation expert conceded, all of these properties were valued at the market rate and all of the loans were made at the usual market rate. Tape 12, 4/23/96, 15:53:50. Moreover, it is undisputed that the presence of PCBs has not at all affected farm income, crop sales or timber production, or any other productive use

^{4/} Tape 26, 5/28/96, 16:50:17. *See also id.* at 16:17:07 ("we haven't seen this affecting market values in properties"); *id.* at 16:51:10 ("The market has not been affected yet, but it is going to happen."). These statements are binding admissions of the absence of evidence of any actual adverse impact on the market. *See, e.g., Caplinger v. Werner*, Ky., 311 S.W.2d 201 (1958); *Samuels v. Spangler*, Ky., 441 S.W.2d 129, 131 (1969).

of plaintiffs' property. *Id.*, 14:55:13. This evidence is dispositive of plaintiffs' claim: we are aware of no Kentucky decision that ever has awarded damages in circumstances like those in this case, where the affirmative market evidence reflects no diminution of value in the plaintiff's property.

Plaintiffs' theory that all of the participants in these market-value transactions were ignorant of the impact of the presence of PCBs cannot save their case. It is uncontroverted that from mid-1985 there has been pervasive publicity about the release of PCBs from Rockwell's facility into Town Branch and the Mud River. Tape 12, 4/23/96, 14:37:48. The Commonwealth posted well-publicized fish advisories in the fall of 1985 and 1986. Tape 2, 4/9/96, 11:37:04; Tape 9, 4/19/96, 10:48:51; Tape 12, 4/23/96, 14:38:02, 14:38:16. And Dr. Wesley Birge issued a widely distributed report on PCB contamination in September 1988 (Tape 10, 4/19/96, 14:39:05; Tape 12, 4/23/96, 14:40:11), which the trial court expressly found put residents of the area on notice of the potential impact of PCBs on floodplain properties. *See* Appendix 1. Indeed, most of the plaintiffs admitted at trial that they became aware of PCB contamination in the streams in 1985-1986 (*see, e.g.*, Tape 13, 4/25/96, 8:38:08, 9:53:08; 11:38:18) and plaintiffs' own valuation expert expressly conceded that all of the post-1985 purchasers of Mud River property that he had been able to contact were aware of the "PCB problem." Tape 12, 4/23/96, 17:06:36. *See id.*, 16:00:14 ("there was disclosure that there was PCBs"), 16:04:56 (agreeing that seller told purchaser "that there was PCBs out there"); *see also* Tape 20, 5/14/96, 10:47:25 (testimony of experienced local appraiser Frank Newman).^{5/} Plaintiffs' expert also acknowledged that the banks making loans on the properties knew of the presence of PCBs in the Mud River flood plain. Tape 12, 4/23/96, 15:53:51.

^{5/} Thirteen sets of plaintiffs admitted purchasing their properties despite having actual knowledge that PCBs were in the streams. Appendix 10 provides a synopsis of the testimony of these plaintiffs and supporting citations to the record.

It should be added that the performance of the market is exactly what one would expect, given the minimal levels of PCBs found on plaintiffs' properties. As noted above (at pages 3-4), federal regulations tolerate far higher levels of PCB contamination before requiring cleanups, and even permit many foods to be eaten despite the presence of PCB levels higher than those found on any plaintiff's property.^{6/} Indeed, the soil on 48 of the 54 properties is so "clean" that it could be used to remediate soil contaminated by a PCB spill. In these circumstances, the suggestion that property values are affected plainly is "incredible and improbable and contrary to common observation and experience." *Coney Island Co. v. Brown*, 290 Ky. 750, 754, 162 S.W.2d 785, 788 (1942).

2. Plaintiffs' expert testimony lacks probative value.

Rather than advance any evidence of actual injury in the market, plaintiffs hinge their damages case almost entirely on the testimony of a single appraisal witness, Gil Snyder, who asserted that

^{6/} As Circuit Judge (now Supreme Court Justice) Breyer has explained, the EPA set a 20 ppm standard for soil on the assumption that "a) developers will build residential housing on the site, b) small children, playing in the backyard, will eat dirt containing PCBs, and c) the children will eat a little bit of dirt each day for 245 days per year for three and a half years." *United States v. Ottati & Goss, Inc.*, 900 F.2d 429, 441 (1st Cir. 1990). Even so, the court of appeals upheld the district court's ruling setting aside the EPA's 20 ppm cleanup standard as too stringent and directing adoption of a standard of 50 ppm. *Id.* Both levels greatly exceed the levels found on these plaintiffs' properties.

plaintiffs' property was valueless.^{7/} That testimony, however, was manifestly insupportable (and should have been excluded).^{8/}

Snyder took the position that, “[i]f there’s any negligible amount of PCBs whatsoever on these properties, the entire floodplain value is worthless.” Tape 12, 4/23/96, 14:50:00; *see id.*, 14:50:44 (“as long as there are PCBs on the property * * * there’s no value to it”). In expressing this opinion, Snyder recognized that the market did not reflect “any perceivable loss in value” (*id.*, 15:28:02), acknowledged that he was aware of 11 sales of Mud River properties in which the purchasers knew of the PCB situation (*id.*, 17:06:22), and conceded that he was unaware of any impact from PCBs on farm income, crops, cattle, timber, “or any of the other things that might be on this property.” *Id.*, 14:55:13. In nevertheless opining that the properties were valueless, Snyder explained that he simply

^{7/} The other expert called by plaintiffs to testify about activity in the market provides no support for their case. William Trent Spurlock, a loan officer at Southern Deposit Bank, acknowledged that there were “tolerable limits” for PCBs (Tape 16, 5/6/96, 13:28:03); indicated that, before knowing what his bank would do if approached for a loan collateralized by one of the properties, the bank would have to know the PCB levels on the property (*id.*, 13:28:39) and whether a government agency had ordered a clean-up (*id.*, 13:30:41); and stated that it would be “significant” to the bank both that Rockwell would be the one with responsibility for remediation and that the owner could assert an innocent landowner defense (*id.*, 13:35:19). This testimony plainly does not support the proposition that plaintiffs’ properties are worthless — a point dispositively proved by the fact that Spurlock’s bank has made loans or refinancings on floodplain properties on at least three occasions since this suit was filed. *Id.*, 13:40:20. Another of plaintiffs’ witnesses, Larkin Summers, testified that he did not know whether there had been any decrease in the fair market value of the properties as a result of PCB contamination. Tape 14, 4/26/96, 14:34:55.

^{8/} Snyder plainly was unqualified to give valuation testimony in this case. He developed his valuation methodology himself and had never used it before. Tape 26, 4/23/96, 14:32:16, 14:33:11. He had no experience involving contaminated properties, with the exception of two small projects for which he had been engaged by plaintiffs’ counsel. *Id.*, 14:12:52. Snyder had never done an appraisal of PCB-contaminated property (*id.*, 14:15:17) and conceded that he knows nothing about PCBs. *Id.*, 14:58:23. Rockwell challenged both Snyder’s qualifications and the reliability of his novel proffered testimony under KRE 702 at a pre-trial hearing held pursuant to *Mitchell v. Commonwealth*, Ky., 908 S.W.2d 100 (1995). The Court reserved its ruling until trial, but ultimately allowed Snyder to testify.

“chose to ignore” objective property sales at unimpaired values because in his opinion “those buyers just didn’t know what they were doing” (*id.*, 14:27:20; *see id.*, 17:06:22) — although Snyder did not talk to any of the purchasers to determine the actual state of their knowledge. *Id.*, 14:27:36. Snyder’s reasoning thus avowedly was circular: he began with the assumption that any property in the Mud River flood plain that has detectable levels of PCBs is worthless (*see id.*, 14:50:00, 14:50:58) and concluded on that basis that anyone who nevertheless purchased such property (even if he or she was aware of the presence of PCBs) must have been misguided.^{9/}

Snyder’s explanation for this opinion had a certain mystical, anti-scientific aspect. In substantial part, it was based on Snyder’s “personal belief that no one should use any of those flood plain properties for any reason at all if there are detectable [levels of PCBs]” (*id.*, 14:51:22); the property was worthless because “a reasonable and prudent person’s own conscience would tell them not to use that property.” *Id.*, 14:54:14. This followed from Snyder’s “own belief that PCBs aren’t good,” although he added, rather opaquely, that “beyond that * * * there’s the question of liability and obligation and morality and a variety of other things.” *Id.*, 14:57:28. *See id.*, 14:58:13 (“morally none of these people should be using [the property]”). Notwithstanding his forceful expression of these opinions founded in his “personal beliefs,” Snyder acknowledged that he does not “know anything about PCBs.” *Id.*, 14:58:23. That admission should have resulted in his exclusion as an expert and, at this point, calls for giving his opinions no weight. *See, e.g., Commonwealth v. Day, Ky.*, 499 S.W.2d 587, 591 (1973); *Bass v. Williams, Ky. App.*, 839 S.W.2d 559, 566 (1992); *United States v. Benson*, 941 F.2d 598, 604 (7th Cir. 1991) (“An expert’s opinion is helpful only to the extent the expert draws on some special skill, knowledge, or experience to formulate that opinion; the opinion

^{9/} Snyder stuck to this position with dogged determination even when discussing properties that were sold for very substantial sums to purchasers who were well aware of the presence of PCBs. *See* Tape 12, 4/23/96, 16:19:12 (although property sold for \$65,125, Snyder “still believe[s] it is [worthless]”); *id.*, 16:54:20 (although a plaintiff in this suit bought additional Mud River property for \$106,000 after suit was filed, Snyder opined that “[t]here’s no question it’s worthless”).

must be an *expert* opinion (that is, an opinion informed by the witness' expertise) rather than simply an opinion broached by a purported expert.”).

Snyder's lack of true expertise aside, his opinion — which the trial court itself politely characterized as “a little voodooish” (Tape 12, 4/23/96, 17:36:09) — manifestly cannot support the verdict. Kentucky courts consistently have held that “to have probative value [an expert's appraisal figures] should have some reasonable relationship to market value factors.” *Big Rivers Rural Elec. Coop. v. Browns Valley Land Co.*, Ky., 425 S.W.2d 752, 754 (1968). It thus “has long been the rule that to the extent that the valuation given by the expert witnesses is palpably extravagant and inconsistent with known comparable sales, it is without probative value.” *Commonwealth v. Mullins*, Ky., 510 S.W.2d 9, 11 (1973). In *Mullins*, the Court set aside a verdict because, “where the value fixed by expert testimony” differs greatly from “the value shown by nonopinion evidence, that testimony's lack of rational support will deny it the probative value required to support an award.” *Id.*

Similarly, in *Island Creek Coal Co. v. Rodgers*, Ky. App., 644 S.W.2d 339, 345 (1982), the jury accepted the testimony of the plaintiffs' expert that the plaintiffs' residence had been rendered “worthless” by blasting from a coal mining operation. This Court reversed, noting that “the [plaintiffs] continued to live in the house, had had it insured, and continued to pay taxes on it.” *Id.* at 346. It explained:

Because the expert's calculations as to the cost of repair of the property and its resulting value were patently extravagant, and because by his own testimony he made no canvass of the local market to determine what the property would bring at sale, it is our opinion that the expert witness's opinion will not support the verdict in this case.

Id. at 347. See also *Commonwealth v. Dillon*, Ky., 525 S.W.2d 658, 659 (1975); *Chapman v. Beaver Dam Coal Co.*, Ky., 327 S.W.2d 397, 400 (1959).^{10/}

^{10/} These holdings are applications of the general principle that “[t]he opinions of the experts must be supported by proven facts.” *Fischer v. Heckerman*, Ky. App., 772 S.W.2d 642, 645 (1989). *Accord Gatliff v. White*, Ky., 424 S.W.2d 843, 844 (1968) (“if an expert opinion is based upon
(continued...)

These holdings are dispositive here. They establish that an “expert” appraiser’s opinion cannot support a jury verdict where the appraiser ignored the reality of the local market — and where the appraiser labeled as worthless properties on which the owners continue to live and farm, that they continue to insure, and for which they continue to pay taxes. In such circumstances, Kentucky courts have held the opinion evidence or conclusions of experts can not sufficiently sustain a case of a litigant, when such opinions or conclusions of experts are not supported by the proven facts as they existed. Under such circumstances, a directed verdict is proper if the expert evidence forms the foundation of such a case.

Sloan v. Sloan, 303 Ky. 180, 185, 197 S.W.2d 77, 80 (1946). *Accord Kentucky Trust Co. v. Gore*, 302 Ky., 1, 8, 192 S.W.2d 749, 752 (1946) (upholding directed verdict where expert testimony was “not supported by the proven facts”); *Dillon*, 525 S.W.2d at 659 (reversing a jury verdict based on incompetent appraisal); *Mullins*, 510 S.W.2d at 11 (same). Because Snyder’s conclusions were the sole basis for the verdict here — and because “the hard evidence of value so belies the opinion evidence * * * as to deprive it of its probative value” (*Mullins*, 510 S.W.2d at 11) — Rockwell is entitled to judgment.

B. Plaintiffs Cannot Recover On The Theory That They May Be Forced To Test Or Remediate Their Properties.

Evidently recognizing that they had to offer some support for their claim beyond Snyder’s “voodooish” views about the moral evils of PCBs, plaintiffs sought to bolster their case by arguing to the jury that their property actually has “negative value” because they may be forced by the federal or

10(...continued)

erroneous facts or assumptions, or fails to take into account indispensable factors that are otherwise established, it lacks probative value”); *Louisville Gas & Elec. Co. v. Sanders*, Ky. 249 S.W.2d 747 (1952) (“expert evidence * * * is neither conclusive nor controlling as against evidence of facts”); *Kentucky-Tennessee Light & Power Co. v. Fitch*, 304 Ky. 574, 591, 201 S.W.2d 702, 711 (1946) (“The opinion even of an expert, which admits ignoring much of the best evidence available, is, for that reason alone, entitled to no weight.”); *Prudential Ins. Co. of America v. Howard's Assignee*, 258 Ky. 366, 372, 80 S.W.2d 21, 24 (1935) (“conclusion of expert witnesses will not control when not supported by the proven facts”).

state governments to test and remediate their land. Plaintiffs relied for this proposition upon the testimony of a single “expert” witness, Stephen Hixson. We note at the outset that this contention cannot be squared with the record evidence of continued sales at fair market value, which establishes that plaintiffs’ expert evidence “is without probative value.” *Mullins*, 510 S.W.2d at 11. But even leaving aside that threshold flaw in plaintiffs’ claim, their argument must fail for two other reasons: Hixson’s opinion was inadmissible; and it was wrong as a matter of law.

1. As plaintiffs themselves described Hixson’s testimony in their opposition to the post-trial motions (at 6), he opined “concerning the Plaintiffs’ liability to third parties as a result of the PCB contamination.” But this presentation of testimony regarding a legal conclusion was improper; KRE 702 permits experts only to assist “the trier of fact to understand the evidence or to determine a fact in issue.” The Rule does not permit an expert witness to testify as to the law: “[e]xperts, like lay witnesses, are not qualified to express opinions as to matters of law.” ROBERT G. LAWSON, THE KENTUCKY EVIDENCE LAW HANDBOOK § 6.15, at 291 (3d ed. Supp. 1995); *see also Humana of Kentucky, Inc. v. McKee*, Ky. App., 834 S.W.2d 711, 724 (1992) (witness may not “express an opinion as to a legal issue”).

As a consequence, “[e]xpert testimony is not proper for issues of law. Experts interpret and analyze factual evidence. They do not testify about the law.” *Crow Tribe v. Racicot*, 87 F.3d 1039, 1045 (9th Cir. 1996) (internal quotation marks and citation omitted). “While an expert witness may testify as to an ultimate fact issue the jury will decide, * * * the general rule is that an expert may not testify as to what the law is, because such testimony would impinge on the trial court’s function.” *In re Air Disaster at Lockerbie, Scotland on Dec. 21, 1988*, 37 F.3d 804, 826 (2d Cir. 1994). *Accord Berry v. City of Detroit*, 25 F.3d 1342, 1354 (6th Cir. 1994); *Estes v. Moore*, 993 F.2d

161, 163 (8th Cir. 1993). Hixson's testimony therefore should have been excluded altogether and cannot serve as the foundation for the verdict.^{11/}

2. In any event, courts have both the ability and the duty to determine questions of law. Accordingly, if a witness has given an erroneous opinion on a material legal point, a verdict in favor of the party sponsoring such testimony must be set aside. Here, Hixson's assertion that there is a realistic risk that plaintiffs would have to remediate their lands is patently wrong, for several reasons.

First, there is no such possibility because Rockwell will undertake whatever remediation is required by Kentucky law (and is doing so at this time). The Franklin Circuit Court has now ordered Rockwell to remediate sediments and floodplain soils along Town Branch, but only to continue characterization and to remediate any "hot spots" along the Mud River. Cabinet Judgment at 43.^{12/} If that decision is upheld on appeal, any remediation obligation necessarily will be Rockwell's; if the decision is set aside, it will be because Kentucky law does not impose any remediation obligation with respect to such minimal levels of PCBs. In either case, neither plaintiffs nor any future purchasers of plaintiffs' properties will have any liability for remediation. The specter of remediation therefore can

^{11/} Even if expert testimony on legal questions were admissible, it is plain that Hixson would not be qualified to give such testimony here. He is a self-described general practitioner, not an expert in environmental law, and he has not represented clients involved in cleanup or remediation matters. Tape 11, 4/22/96, 13:20:25, 13:22:00. In fact, he demonstrated a complete lack of familiarity with the statutes that are controlling in this case. *Id.*, 13:34:40, 13:46:32. Hixson's legal testimony, moreover, came as a complete and unfair surprise to Rockwell. Plaintiffs gave no indication in discovery that Hixson would offer opinions regarding plaintiffs' liability under complex environmental laws. Permitting such surprise testimony was reversible error. *Smith v. Ford Motor Co.*, 626 F.2d 784, 794 (10th Cir. 1980). And this error was compounded by the trial court's refusal to allow Rockwell to offer an expert witness in response (Tape 21, 5/17/96, 8:03:04), which enabled plaintiffs to tell the jury that Hixson's preposterous testimony was un rebutted. Tape 26, 5/28/96, 17:43:18. The prejudice to Rockwell from this "Through the Looking Glass" mode of proceeding is manifest.

^{12/} KDEP has never taken the position that the extremely low PCB levels in the Mud River floodplain amount to "hot spots."

have little or no impact on the value of plaintiffs' property. Certainly it had had no such effect as of the time of trial.

Second, there is no possibility that plaintiffs (or Rockwell, for that matter) will be required by the federal government to remediate the properties here at issue, because the levels of PCBs on those properties are well within safety limits established by federal law. *See* pages 3-4, *supra*. Indeed, a federal appellate court has upheld the adequacy of a cleanup to a PCB level 25 times greater than the highest level present here. *See United States v. Ottati & Goss, Inc.*, 900 F.2d 429, 440-442 (1st Cir. 1990) (Breyer, J.) (affirming cleanup standard of 50 ppm for soil and 20 ppm for stream, pond, and marsh sediment).

Nor — even ignoring the reality that Rockwell itself will have remediated the property to the extent required by state law — is there any possibility that the Commonwealth would attempt to require plaintiffs to remediate their properties. In fact, when asked whether the Commonwealth had sued the plaintiffs, Commissioner Logan testified: “No we haven't. We wouldn't because Rockwell is the responsible party.” Tape 10, 4/19/96, 15:10:06 (emphasis added). Commissioner Logan later elaborated: “I would say that, currently, we have a responsible party in Rockwell. That's where the contamination originated from. That's what has contaminated the stream system. I think they should be responsible for the characterization, mitigation, and clean up of that. And that's the direction we're at right now.” *Id.*, 15:11:31.

Third, entirely apart from the impact of the current Cabinet proceeding, plaintiffs unquestionably would be able to successfully assert an innocent owner defense in the extremely unlikely event that a remediation claim were ever brought against them. So far as hazardous materials are concerned, Kentucky law provides that “[d]efenses to liability * * * shall be determined in accordance with Sections 107(a) to (d) and 113(f)(1) of the [federal] Comprehensive Environmental Response Compensation and Liability Act, as amended, and the Federal Clean Water Act, as amended.” KRS 224.01-400(25). The federal statute, in turn, provides that “[t]here shall be no liability * * * for a

person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and damages resulting therefrom were caused solely by — * * * an act or omission of a third party other than an employee or agent of the defendant * * * .” 42 U.S.C. § 9607(b)(3) (emphasis added). As a matter of law, this defense would provide complete protection to landowners where, as here, Rockwell acknowledges that its “act or omission” was responsible for the PCBs. *See, e.g., New York v. Lashins Arcade Co.*, 91 F.3d 353, 362 (2d Cir. 1996); *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1508 (11th Cir. 1996).^{13/}

Fourth, if plaintiffs somehow were obligated to remediate their properties, they unquestionably would be entitled to obtain indemnification from Rockwell. *See, e.g., Schuster v. Steedley*, Ky., 406 S.W.2d 387, 390 (1966). Indeed, plaintiffs have never denied that they have such a right to indemnification. That indisputable fact makes it clear that plaintiffs’ properties would not have a “negative value” even if the property owners could be said to have a contingent remediation obligation.

Fifth, even if plaintiffs somehow did face the remote and contingent possibility of liability for remediation, the wholly speculative nature of any such prospect — and of the further prospect that the value of their properties might be affected — would preclude an award of damages at this time. It is long-settled law in Kentucky that “[a]n award of damages based on speculation is not permitted.” *Michals v. William T. Watkins Mem’l Methodist Church*, Ky. App., 873 S.W.2d 217, 220 (1994).

^{13/} Hixson’s testimony on this point was flatly and inarguably wrong. The trial court allowed him to tell the jury that the innocent landowner defense is not available “to people who have their property contaminated while they own it” but only to a person who acquires already polluted property, and then “only if he does a due diligence inquiry [into whether the property is polluted] and fails to get the proper information.” Tape 10, 4/22/96, 9:12:00, 9:13:10. *See* Tape 11, 4/22/96, 11:00:15 (defense “applies only to somebody who buys [the property] as [sic] it’s already polluted”). Otherwise, Hixson continued, the property owner and his estate remain obligated in perpetuity to remediate the property. *Id.*, 10:47:44. The plain terms of the statute, of course, say no such thing, and Rockwell accordingly objected strenuously at trial. *Id.*, 9:22:39, 9:23:21, 9:24:26, 9:25:27.

See, e.g., Barley's Adm'x v. Clover Splint Coal Co., 286 Ky. 218, 321, 150 S.W.2d 670, 671 (1941); *Mitchell v. Transamerica Ins. Co.*, Ky. App., 551 S.W.2d 586 (1977). Here, the liability (and attendant decline in property values) hypothesized by plaintiffs could come to pass only if (1) the properties are found to require remediation; (2) Rockwell were to refuse to do it; (3) the Cabinet and the Franklin Circuit Court were unable to compel Rockwell to do it; (4) the Cabinet were to fail to extract sufficient penalties from Rockwell to pay for the remediation; (5) the Cabinet were to sue the plaintiffs despite Commissioner Logan's testimony that it has no present intention of doing that; (6) the innocent landowner defense were to be rejected; and — finally — (7) plaintiffs were to be unsuccessful in obtaining indemnification from Rockwell for any costs of remediation. The possibility of liability thus “depends upon numberless unknown contingencies, and can be nothing more than a matter of conjecture.” *Barley's Adm'x*, 286 Ky. at 221, 150 S.W.2d at 671. Damages cannot be awarded on the basis of this sort of overactive imagination.

This principle is illustrated by *Chapman, supra*. In that case, the farmer-plaintiff claimed that mine run-off reduced the value of his property. He produced two experts to testify that the run-off “would in the indefinite future destroy” his land (327 S.W.2d at 399); several witnesses also testified that, as a result of the run-off, Chapman's farm “would not be worth much.” *Id.* at 400. The Court nevertheless held that Chapman could not recover, explaining that

the evidence revealed Chapman's farm is still as productive as ever. It cannot be known when and if its productivity will diminish as a result of acts attributable to [the defendant mining company]. This Court, as well as the lower court, cannot presume a future total destruction when there is no concrete evidence of past or present damage to Chapman's land.

Id. That conclusion is fully applicable here: every recorded sale of affected property has been at full market value, plaintiffs' land remains productive, and it is not known when (if ever) the value of the property will fall. Indeed, as noted above (at page 11 and note 4), plaintiffs' counsel conceded that

there had been no adverse affect on property values “yet.” It follows that, as in *Chapman*, “the evidence introduced in this case was simply inadequate to sustain the allegation of damages.” *Id.*

C. Plaintiffs Cannot Recover Because Their Own Evidence Showed That There Was No Decline In The Value Of Their Properties Within The Period Of Limitations.

Even if plaintiffs were correct in their absurd assertion that their property is now valueless, the verdict would nonetheless have to be set aside. As we have explained (at note 3, *supra*), plaintiffs concede that the applicable statute of limitations bars them from recovering for damages occurring more than five years before the action was filed. Yet according to plaintiffs’ own theory — and Snyder’s testimony — plaintiffs’ property became worthless as soon as there was any detectable PCB presence. PCBs were present on plaintiffs’ properties, of course, well before the commencement of the limitations period on March 26, 1988. This means that, under plaintiffs’ own view of the case, the land was valueless prior to 1988. As a consequence, plaintiffs could not have suffered any additional injury within the limitations period. They accordingly have no recoverable damages.

Perhaps for this reason, plaintiffs have not even attempted to make the showing necessary for recovery in cases alleging permanent injury to real property. As we have explained (at page 10, supra), it has long been the law that “the measure of permanent damage to real estate in Kentucky is the difference in the fair market value of the real estate just before and after the injury.” *Central Kentucky Drying Co.*, 858 S.W.2d at 167. Yet plaintiffs offered no evidence to establish the value of their properties either before or just after the injury. In these circumstances, plaintiffs altogether failed to establish an element essential to their claim.

D. Plaintiffs’ Claims Are Unsustainable For Additional Reasons.

The claims of over half of the plaintiffs are unsustainable for additional reasons. First, plaintiffs failed to introduce test results to show the presence of any amount of PCBs on 14 of the properties

involved in this case. See Appendix 9. “Kentucky courts have consistently rejected claims for diminution of the value of property allegedly caused by undesirable activities nearby where a defendant’s conduct has not physically invaded or harmed the plaintiff’s property.” *Lamb v. Martin Marietta Energy Sys., Inc.*, 835 F. Supp. 959, 970 (W.D. Ky. 1993) (internal quotation marks and citations omitted). Indeed, on facts virtually identical to those in this case, the Sixth Circuit held that Kentucky law does not permit recovery. In *McGinnis v. Tennessee Gas Pipeline Co.*, 1994 U.S. App. LEXIS 12781 (6th Cir. May 31, 1994), PCB contamination occurred at an industrial facility; the PCBs “migrated off [the industrial] property and onto the property of certain downstream landowners” (*id.* at *3); the plaintiff found an expert to testify that “there was a high probability of contamination on [her] property” (*id.* at *4), although no PCBs had actually been detected there (*id.* at *3). The court held (*id.* at *9 (footnote omitted)):

As we read the record, it does not indicate any basis on which a trier of fact could find that there has been physical harm to the plaintiff’s property. Although [the expert’s] affidavit states that there is a high probability of contamination, it is undisputed that there is, as yet, no physical evidence of contamination. Kentucky law requires more than a risk of contamination before plaintiff can prevail in a nuisance action.

This holding, which correctly states Kentucky law, requires judgment for Rockwell on the claims of the owners of the 14 properties as to which no test results were introduced.

Second, 11 other properties involved in this case have PCB levels lower than 0.1 ppm. See Appendix 9. The Cabinet Judgment rendered since this verdict does not require remediation of any property, anywhere, having a PCB level lower than 0.1 ppm. Moreover, Commissioner Logan testified that such levels are not cause for concern and would not require remediation under any circumstances. Tape 9, 4/19/96, 11:32:17, 15:36:47, 16:05:31, 16:07:38, 16:11:19. Accordingly, even supposing that the mere possibility of having to remediate would render property worthless, there is no basis for the jury’s finding that these properties, which will in no event require remediation, are entirely worthless.

Third, the trial court found that by September 1988 “persons in the floodplain area” were on notice that the release of PCBs may have “substantially affected” floodplain properties. Appendix 1. Seventeen of the 54 properties at issue here were acquired after that date. Indeed, the owners of five of the subject properties acquired some or all of their properties after suit was filed against Rockwell in 1993. See Appendix 11. The owners of thirteen properties admitted that they purchased their floodplain properties with actual notice that the Mud River contained PCBs. See Appendix 10.^{14/} It is long-settled law in Kentucky that plaintiffs cannot “recover for any damages growing out of conditions which existed at the time they purchased the [property], and which conditions were known, or might, by the exercise of ordinary prudence, have been known, by them.” *Norton Coal Mining Co. v. Wilkie*, 224 Ky. 192, 196, 5 S.W.2d 1058, 1060 (1928). See also *Fourseam Coal Corp. v. Combs*, Ky., 246 S.W.2d 988 (1952); *O’Brien v. Marvin*, Ky., 387 S.W.2d 282 (1965). Accordingly, Rockwell is entitled to judgment with respect to all plaintiffs who purchased their properties with actual or constructive notice of the presence of PCBs in the Mud River.

The fact that Rockwell is entitled to judgment with regard to some (if not all) of the plaintiffs is fatal to the punitive damages judgment. Because the jury did not make separate punitive awards for each plaintiff and because the punitive judgment was premised (improperly) on aggregate remediation costs for each and every one of the properties, reversal of any of the compensatory judgments necessitates a new trial on punitive damages, remittitur being unavailable. See *Hanson v. American Nat’l Bank & Trust Co.*, Ky., 865 S.W. 2nd 302, 310 (1993).

^{14/} To recite but one example, plaintiffs Carlos and Jackie Houchens, purchased property in 1992. Tape 17, 5/7/96, 8:23:52. Mr. Houchens testified that, because of the perceived PCB problem, his wife tried to talk him out of making the purchase. *Id.*, 83:34:38. They nevertheless bought the property for \$70,000, despite his knowledge about the PCBs (*id.*, 8:27:02), sued Rockwell, and were awarded the full 1994 appraised market value of the property — \$123,260 — (while, of course, being allowed to retain the property). Judgment (June 24, 1996), Appendix 3.

II. ROCKWELL IS ENTITLED TO JUDGMENT WITH RESPECT TO PUNITIVE DAMAGES

KRS 411.184(2) provides that a plaintiff may not recover punitive damages absent proof by clear and convincing evidence that the defendant “acted toward the plaintiff with oppression, fraud or malice.” As defined by the statute, each of these mental states entails a specific intent to injure. *See* KRS 411.184(1)(a)-(c). The trial court recognized that there was no evidence that Rockwell specifically intended to injure plaintiffs. Tape 24, 5/23/96, 9:22:07. Thus, if the statute applies, Rockwell would have been entitled to a directed verdict on punitive damages. The court concluded, however, that the limitation of punitive damages to cases in which there is evidence of a specific intent to injure runs afoul of Section 54 of the Kentucky Constitution. Accordingly, the court instructed the jury on what it believed to be the common-law standard for imposition of punitive damages — one under which a showing of “recklessness” suffices to support punishment.

The constitutionality of the punitive damages statute is now under review by the Kentucky Supreme Court in *Williams v. Wilson*, No. 96-SC-1122-D (review granted Apr. 16, 1997), a personal injury case involving drunk driving. If the Court concludes in *Williams* that the punitive damages statute does not violate Section 54, that holding would be dispositive here and would require reversal of the punitive damages award. But even if the Supreme Court were to rule that the punitive damages statute violates Section 54 in the personal injury context, the punitive damages in this case nevertheless could not stand, for two reasons. First, KRS 411.184 cannot be said to change the standard for punitive damages in property damage cases, which have always required intentional harms. Because the statutory and common law standards are congruent in cases like this one, any unconstitutionality of KRS 411.184 in personal injury cases cannot alter the conclusion that there was no evidence supporting punitive liability in this property damage case. Second, even if the statute is

found to be unconstitutional and if recklessness suffices for infliction of punishment in property damage cases, the evidence in this case does not support a finding that Rockwell was reckless during the time period for which the jury was entitled to exact punishment (if indeed it ever was).

A. Punitive Damages May Not Be Imposed In Property Cases Absent Proof Of Specific Intent To Harm.

Section 54 of the Kentucky Constitution provides that “[t]he General Assembly shall have no power to limit the amount to be recovered for injuries resulting in death, or for injuries to person or property.” The argument that the punitive damages statute violates Section 54 is predicated upon four propositions, each of which must be established before a finding of unconstitutionality may be reached: (1) that Section 54 applies to punitive, as well as compensatory, damages; (2) that, despite the plain language of Section 54, restrictions on the circumstances in which punitive damages may be imposed “limit the amount” of punitive damages; (3) that, under the “jural rights” doctrine, Section 54 prohibits deviations from standards adopted prior to its enactment in 1891; and (4) that KRS 411.184 is a deviation from the standard for obtaining punitive damages that existed in 1891. Even if the Kentucky Supreme Court accepts the first three propositions and even if it then goes on to conclude that KRS 411.184 changes the standard for imposing punitive damages in personal injury cases, however, the statute does not change the standard for property damages cases, and the statute is therefore fully valid in such cases.

We have not found (and plaintiffs have never cited) a single property damage case from around the time of adoption of Section 54 in which punitive damages were permitted upon a mere finding of recklessness. Rather, the Kentucky Court of Appeals consistently indicated that the relevant standard was one of intentional misconduct. For example, in *Ohio Valley Tel. Co. v. Meyer*, 22 Ky. L. Rep. 36, 56 S.W. 673 (1900), a trespass case, the Court set aside the punitive damages because the trial court allowed their imposition upon a finding of wantonness (the highest degree of wrongfulness short

of intentional harm). The Court concluded that punitive damages could not be imposed unless the trespass was accompanied by “oppression, fraud or malice” — the same three states of mind embodied in KRS 411.184 — and that malice means “the intentional doing of a wrongful act without legal right.” 22 Ky. L. Rep. at 37, 56 S.W. at 674 (emphasis added). Accordingly, it held that “[t]he word ‘intentional’ should have been used in the instruction” and that the use of a wantonness standard improperly “authorized the jury to give punitive damages if they believed the entry upon the premises was a wrongful act, and without legal right, regardless of the question of intention or the manner of the entry.” *Id.*^{15/}

In sum, when Section 54 was adopted, punitive damages could be awarded in property damage cases only upon proof of an intent to harm. KRS 411.184 does no more, in the case of property torts, than to codify that longstanding limitation. Accordingly, at least as applied in property damages cases, KRS 411.184 does not run afoul of Section 54. Because plaintiffs adduced no evidence of an intent to injure in this case, Rockwell is entitled to judgment on the punitive damages. At a minimum, it should receive a new trial in which the jury would be instructed on the correct standard.

^{15/} See also *Wilcox v. Alley*, 140 Ky. 187, 188-189, 130 S.W. 1115, 1116 (1910) (“if the trespass complained of was done in the violent, high-handed and oppressive manner detailed by the witnesses, the jury were fully authorized to award punitive damages”) (emphasis added); *Louisville Gas Co. v. Kentucky Heating Co.*, 33 Ky. L. Rep. 912, 915, 111 S.W. 374, 377 (1908) (in action alleging waste of natural gas, plaintiff could recover punitive damages upon a showing that defendants “acted maliciously and with a design of injuring [plaintiff] in its business”) (emphasis added); *Gerkins v. Kentucky Salt Co.*, 23 Ky. L. Rep. 2415, 2417, 67 S.W. 821, 822 (1902) (“[e]xemplary damages are not allowed in [cases claiming a conversion of mineral rights] where there has not been a willful trespass or taking, or fraudulent conduct”) (emphasis added); *Jennings v. Maddox*, 47 Ky. Rep. (8 B. Mon.) 430, 432 (summer term 1848) (“if the defendants, knowingly, opened the road over the plaintiff’s land, where it had not been viewed, and against his consent, and in a highhanded and violent manner, the jury might, certainly, have found vindictive damages, and with such qualification, the instruction should have been given”) (emphasis added).

B. There Is Insufficient Evidence To Support Imposition Of Punitive Damages Even Under A Recklessness Standard.

Assuming *arguendo* that the trial court was correct in applying a recklessness standard, the record contains nothing approaching clear and convincing evidence that Rockwell acted recklessly during the time period for which the jury was entitled to punish it. Although plaintiffs focused heavily during the trial on conduct occurring from the late 1950s through the mid-1980s, Rockwell could be punished only for conduct occurring within the five-year limitations period prescribed in KRS 413.120 — *i.e.*, after March 26, 1988.

Perhaps because there have not been previous efforts to punish for conduct occurring in the remote past, this commonsense point has not been definitively established by the Kentucky courts. However, courts elsewhere have reached this precise conclusion under facts similar to those involved here. For example, in *Fisher v. Space of Pensacola, Inc.*, 483 So. 2d 392 (Ala. 1986), a landowner sought actual and punitive damages against an adjoining property owner, alleging that the defendant had channeled surface waters onto his property, causing the property to be flooded and littered with sediment and debris. In support of his punitive damages claim, the plaintiff pointed to evidence that the defendant had deliberately graded its property so that storm water would flow toward the plaintiff's land and that the defendant had paved three times the area that was permitted under local law. The Alabama Supreme Court held that, even though the plaintiff continued to suffer injuries as a result of this conduct, the plaintiff could not recover punitive damages because the conduct took place outside of the one-year limitations period, stating:

This may have been enough evidence to reach the jury, had these acts occurred before the expiration of the statute of limitations; however, it is undisputed that there is no evidence of wantonness on the part of Space during the year prior to the filing of Fisher's complaint. Essentially, Fisher contends that his action for punitive damages continues to run for as long as his property continues to be injured. We disagree. His only damages are for a continuing tort against his land. Recovery in Alabama for a continuing tort is limited to each injury occurring during the statutory

period. The wantonness alleged did not occur during the statutory period. Therefore, Fisher cannot recover punitive damages.

Id. at 395-396 (citations omitted).

A federal district court recently reached the same conclusion in *Johansen v. Combustion Eng'g, Inc.*, 1997 U.S. Dist. LEXIS 10781 (S.D. Ga. June 9, 1997). In that case, owners of properties located downstream from a former mine site alleged that acidic water from the site had damaged their streams. The jury awarded them compensatory and punitive damages. Like the *Fisher* court, the *Johansen* court recognized that the defendant could be punished only for conduct occurring within the state's four-year limitations period:

At the outset * * *, it is essential to determine the nature of the offense or the conduct of the defendant that is being punished.

The relevant conduct in this case involves only the four years preceding the filing of Plaintiffs' Complaint in September of 1991.

Id. at *8. Because the defendant had ceased mining operations before the beginning of the limitations period, it could not be punished for "creat[ing] the situation through decades of mining." *Id.* at *11. Rather, the only conduct that could give rise to punishment involved the escape of acidic water after mining had ceased. *Id.* at *8-*9, *11.

The present case is remarkably like *Johansen*. Here, Rockwell stopped using hydraulic fluid containing PCBs in 1975 — 13 years before the beginning of the limitations period. The only "conduct" that occurred during the limitations period — *i.e.*, after March 26, 1988 — was Rockwell's failure to remediate the entirety of Town Branch, Mud River, and the adjacent floodplain properties on demand and, as in *Johansen*, the passive failure to do more to prevent minuscule additional amounts of PCBs from escaping. Neither of these categories of "conduct" constitutes recklessness.

As for the former, a conclusion that the failure to remedy the effects of past recklessness could itself constitute reckless conduct would eviscerate the principle that defendants may be punished only

for conduct occurring within the limitations period. We are aware of no case (and plaintiffs have never cited one) holding that punitive damages may be awarded for the failure to remediate property that was damaged by conduct occurring outside the limitations period. Such punishment is particularly unwarranted when, as here, the failure to remediate is the result of a good-faith disagreement over the appropriate scope of remediation that had been submitted to the Franklin Circuit Court for resolution.

As for the latter category of “conduct,” the evidence reflects that Rockwell has spent millions of dollars attempting to prevent PCBs from escaping from the Russellville site. Tape 8, 4/18/96, 14:03:53; Tape 9, 4/18/96, 14:40:28, 14:47:40, 15:23:45. Short of tearing down the facility (which it sold as a going concern in 1989) and putting several hundred employees out of work, there is little that can be practicably done to prevent some minuscule amounts of PCBs from periodically being carried off by storm water. Tape 21, 5/17/96, 9:59:43, 10:29:48. Plaintiffs adduced no evidence whatever of reasonable steps that Rockwell could have taken after March 26, 1988, but failed to take, that would have entirely prevented the escape of PCBs. In the absence of such evidence, there is no basis for a finding that Rockwell was reckless in failing to prevent contamination of plaintiffs’ properties during the relevant time frame.

Because there is no evidence (let alone clear and convincing evidence) of recklessness during the period after March 26, 1988, Rockwell is entitled to judgment on punitive damages. At a minimum, it should receive a new trial because the finding of recklessness is against the weight of the evidence. CR 59.01(f).

III. HIGHLY PREJUDICIAL TRIAL ERRORS REQUIRE A NEW TRIAL

A. It Was Reversible Error To Refuse A Continuance Pending Adjudication Of The Cabinet’s Case Against Rockwell.

On February 22, 1996, more than five weeks prior to trial, Rockwell moved for a continuance pending a decision in the Cabinet’s case against Rockwell. The motion pointed out that the decision of the Franklin Circuit Court as to the scope of any obligation on the part of Rockwell to remediate the

floodplain properties along Town Branch and the Mud River would have direct relevance to the issues in this case. As subsequent events reflect, the trial court's denial of Rockwell's motion was an abuse of discretion that has resulted in a serious miscarriage of justice.

The jury's verdict is necessarily predicated upon a finding that every parcel of land involved in this case (1) will have to be tested and remediated (2) by plaintiffs. But the very question of whether, which, and to what extent floodplain properties would necessitate remediation had already been tried and was awaiting a decision from the Franklin Circuit Court. That court has now held that Rockwell must remediate "[s]oils subject to flooding along Town Branch * * * to meet a clean-up standard of 0.1 ppm, or Rockwell must impose the institutional controls necessary to meet the Cabinet's clean-up standards." Cabinet Judgment at 43 (emphasis added). As for Mud River (where 51 of the 54 properties involved in this case are located), Rockwell is required only to remediate "hot spots" and to continue "[c]haracterization" of the floodplain soils. *Id.* Thus, under that judgment, the vast majority of plaintiffs' properties will in all likelihood not require remediation at all; the small number of remaining properties along Town Branch will be remediated by Rockwell.

No reasonable jury with knowledge of the Franklin Circuit Court decision conceivably would conclude that these plaintiffs will have to test and remediate their own properties and that those properties therefore are less than worthless. Because the existence of this critical information was readily foreseeable, there was no sound reason for declining to await Judge Graham's decision and instead permitting the erroneous speculation that resulted in this verdict. The trial court's refusal to grant a continuance in a case involving no overriding need for expedition was an abuse of discretion that directly resulted in the unfair awards in this case. This Court should award Rockwell a new trial in which it is permitted to introduce evidence of the Franklin Circuit Court's decision.

B. The Trial Court Erred In Allowing Plaintiffs' Evidence And Argument Regarding Physical Harm To Humans And Animals.

During the trial, many plaintiffs were permitted to give inflammatory and highly prejudicial testimony about serious health problems in their families and physical harm to fish and livestock around Town Branch and Mud River. This testimony was designed, and invoked by plaintiffs' lawyers, to insinuate that PCBs are responsible for these misfortunes even though there was no evidence to support any such connection. For example, Fred Stratton testified that his sister died of cancer at age 35 after working in the vicinity of the Rockwell plant and that his brother died of cancer after working for Rockwell for eight years. Tape 13, 4/25/96, 9:36:37. Mike Baugh testified that his brother, who worked with him on his farm, died of cancer in 1994. Tape 14, 4/25/96, 16:44:32. Betty Grise said that she learned that Mud River was contaminated with PCBs when her husband became ill. *Id.*, 10:59:04.

Many plaintiffs also expressed concern about future health problems. For example, Harry Goodman said that "Rockwell was playing Russian roulette with us" (Tape 13, 4/25/96, 8:35:03) and mentioned that he had advised his pregnant daughter to be tested for PCBs (*id.*, 8:04:06). Several plaintiffs testified that their cattle had died. *See, e.g.*, Tape 7, 4/16/96, 15:44:15; Tape 15, 4/29/96, 11:05:18. Others said that the fish in Mud River were "skinny" (*id.*, 11:40:22), had died (Tape 17, 5/7/96, 8:27:53), or had sores (*id.*, 8:29:45; Tape 15, 4/29/96, 8:09:59).

Plaintiffs' testimony regarding purported harm to their families and to animals was totally irrelevant to the issues in the case. Plaintiffs had withdrawn their unsupportable personal injury claims, and they did not allege lost agricultural income. More importantly, there was no legitimate scientific basis for suggesting that PCBs had any role in the unhappy events plaintiffs described. For these reasons, Rockwell had prevailed in its motion *in limine* to exclude such testimony. Hearing Tape 5,

4/1/96, 10:32:36. That the court nevertheless allowed this testimony (over Rockwell's objections) was manifest error of the most prejudicial kind.

Counsel for plaintiffs aggravated the impact of this improper testimony in their summations. Mr. Cunningham asserted falsely (*see* Agreed Order (Nov. 29, 1994)) that plaintiffs did not file personal injury claims because they are not "greedy" or "whiney":

I represent a lot of folks around the state of Kentucky on this kind of stuff. Most of them want to come in and start whining to me about how sick they are, and they're dying of this and they're dying of that. * * * [I]f I wanted to * * * I could have found somebody who would come in here as an expert * * * to say my people have health problems because of this. Now, they've got colds and immunosuppression and that kind of stuff. I could find an expert to say * * * you can find an expert to say anything.

Tape 26, 5/28/96, 16:55:36. Mr. Barrett repeatedly argued — in an outrageous appeal to xenophobia that should be entirely unacceptable in Kentucky's courts — that Rockwell had subjected plaintiffs to unreasonable health risks:

Who are these people — whose own children are safe with them out in Seal Beach or wherever they live — to come in here and tell these plaintiffs that these risks to their children of cancer, birth defects, hormone problems, immune system effects are acceptable. They are not acceptable. * * *

Only you have the power to say to Rockwell, through your verdict, that what you have done, Rockwell, the risks that you have created for these plaintiffs and their children, their families, are just not acceptable.

Id., 17:29:30, 17:30:02. Plaintiffs, he added, should not be "forced to endure" these risks. *Id.*, 17:28:24.

These arguments leave no doubt that the improper admission of evidence of harm to humans and animals was seriously prejudicial to Rockwell.

C. Judge Gill's Acceptance Of KATA's "Outstanding Trial Judge Award" During The Pendency Of The Post-Trial Motions Infected Rockwell's Right To Impartial Review Of The Jury's Verdict.

A litigant is entitled to the assurance that any judicial decision made concerning him is "the offspring of a fair and impartial mind." *Wells v. Walter*, Ky., 501 S.W.2d 259, 260 (1973) (internal quotation marks omitted). For this reason, both the Code of Judicial Conduct and Kentucky law provide that a judge should disqualify himself in any proceeding in which "his impartiality might possibly be questioned." SCR 4.300, Canon 3(C)(1)(d); KRS §26A.015(2)(e). The need for recusal is measured, not by whether the judge believes he can be fair, but by whether others might reasonably question his impartiality. *See Sommers v. Commonwealth*, Ky., 843 S.W.2d 879, 882 (1992); *Evans v. Humphrey*, 281 Ky. 254, 261, 135 S.W.2d 915, 919 (1940) (litigant should not be left with "just ground for the suspicion" that he has not had a fair trial). The Supreme Court has stated that it would not hesitate to reverse where there should have been a recusal. *Poorman v. Commonwealth*, Ky., 782 S.W.2d 603, 606 (1989).

Under these principles, Judge Gill's acceptance of the KATA "Outstanding Trial Judge Award" during the pendency of the post-trial motions necessitates reversal for a new trial. KATA, an affiliate of the Association of Trial Lawyers of America ("ATLA"), is committed to advancing the interests of plaintiffs (and their attorneys). *See* KATA's Motion to File Amicus Brief at 2, *Williams v. Wilson*, No. 96-SC-1122-D (Ky. filed July 2, 1997). KATA's lack of neutrality, while appropriate enough for an advocacy organization, should alone have caused Judge Gill to decline the award while Rockwell's post-trial motions were pending. Significantly, the American Bar Association advises specialized bar associations against giving awards to judges before whom their members may appear, because "giving of the award would give an appearance of inappropriate influence and impaired impartiality." ABA Informal Op., 86-1516.

But the concerns attending Judge Gill's acceptance of the award go far beyond the general appearance of impropriety attributable to KATA's pro-plaintiff stance. Judge Gill was nominated for the award by two of the attorneys for plaintiffs in this case. R. 2174 - 2196. Judge Gill's handling of this case, by far the most significant one during his brief stint on the circuit court bench, was a dominant factor in his selection for the award. *See* Transcript of KATA Award Ceremony at 7-17 (Appendix 12). Indeed, this case was the main focus of the public remarks of KATA's president at the awards ceremony. Describing the verdict as "spectacular," the speaker praised many of Judge Gill's pro-plaintiff rulings in the case, including his refusal to apply the punitive damages statute; his denial of Rockwell's request for a continuance; and his admission, over Rockwell's objections, of the testimony of plaintiffs' appraiser, Gil Snyder, which, in the words of KATA's president, "proved to be highly effective and very important to the jury's deliberations and the outcome of the case." *Id.* at 10, 13, 14-15.

Judge Gill himself acknowledged that, under these circumstances, the award might raise questions in the minds of outsiders. At the hearing on Rockwell's motion for recusal, he stated: "Is this a situation where my impartiality might reasonably be questioned? * * * Maybe to somebody who has not been involved in the case, who hasn't been with us on a day-to-day basis, they might feel that way." Tape 28, 10/30/96, 9:45:40 (emphasis added). Although Judge Gill refused to recuse himself, other judges have been disqualified under similar or less serious circumstances. *See Cameron v. General Motors Corp.*, 1994 WL 159408 (D.S.C. Feb. 28, 1994) (granting defendant's motion to disqualify based on attendance at seminar with attorneys for plaintiffs); *Adams v. Commission on Judicial Performance*, 897 P.2d 544, 557 (Cal. 1995) (judge's attendance at dinner given in celebration of satisfaction of judgment in litigation "indisputably gave rise to the appearance of partiality"); *In re School Asbestos Litig.*, 977 F.2d 764, 781 (3rd Cir. 1992) (where judge attended "predominantly

pro-plaintiff conference on key merits issue,” the court was “convinced that a reasonable person might question [the judge’s] ability to remain impartial”); *Spires v. Hearst Corp.*, 420 F. Supp. 304 (C.D. Cal. 1976) (newspaper article generally praising judge created appearance of partiality where judge was handling case in which newspaper was a party).

Despite acknowledging the perception of partiality created by his acceptance of the KATA award, Judge Gill proceeded to consider Rockwell’s post-trial motions (and deny them without a word of explanation). Rockwell was thus deprived of its right to judicial review of the huge verdicts in this case (*see Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994)) by a judge whose impartiality could not reasonably be questioned.

In this case, the need for impartial trial court review of the jury’s startling verdict — by far the largest in Kentucky history — is apparent. Rockwell was entitled to have such review performed by an impartial judge who had seen the entire trial first-hand. That it did not receive this is, by itself, grounds for granting a new trial.

IV. THE DAMAGES AWARDS ARE UNSUSTAINABLE

A. The Compensatory Damages Are Excessive.

If Rockwell is not granted judgment outright, it is entitled to a new trial because the compensatory damages were manifestly excessive. The controlling standard is familiar: “the ‘first blush’ rule used by the courts as it relates to excessive damages simply means that the judicial mind immediately is shocked and surprised at the great discrepancy between the size of the verdict to that which evidence in the case would authorize.” *Wilson v. Redken Labs.*, Ky., 562 S.W.2d 633, 636 (1978). And there surely is such a discrepancy here. The jury’s awards were premised on the assumption that plaintiffs’ properties have been rendered entirely valueless. That conclusion is patently absurd when (a) some of plaintiffs’ properties have not been shown to have any PCBs at all; (b) the presence of tiny amounts of PCBs has, to date, had no discernible adverse effect on sale prices; (c) plaintiffs continue to live on the properties; (d) plaintiffs continue to farm the properties profitably; (e) plaintiffs continue to insure

and pay taxes on the properties; and (f) owners of floodplain properties continue to mortgage and finance those properties. In this setting, even assuming that the PCBs have affected the value of plaintiffs' land, "it is manifest at first blush that [the award here] was arbitrarily excessive for the diminution in the value." *Adams Constr. Co. v. Bentley, Ky.*, 335 S.W.2d 912, 914 (1960).

B. The Punitive Damages Are Based On Improper Considerations And Are Grossly Excessive.

Although punitive damages are a traditional component of the tort law, "[i]mproperly applied, [they] may * * * be nothing more than a windfall or double recovery." *Horton v. Union Light, Heat & Power Co., Ky.*, 690 S.W.2d 382, 390 (1985). The present case is a stark example. The jury's gargantuan \$210 million punitive verdict (more than **36** times the largest punitive award ever approved by a Kentucky appellate court) is the product of an improper suggestion that the jury use the punitive damages to compensate plaintiffs for the cost of testing and remediating their properties and an unabashed appeal to prejudice against a California-based company that had recently sold its local Russellville operations. The result of these improper considerations is a punishment that is grossly excessive, and hence unconstitutional, under any fair view of the law, and specifically under the factors identified in *BMW of North America, Inc. v. Gore*, 116 S. Ct. 1589 (1996).

1. The punitive damages constitute an improper effort to award plaintiffs the cost of testing and remediating their properties.

The allowable compensatory damages in a case like this one are well established. Plaintiffs are entitled to the diminution in the value of their properties resulting from the presence of PCBs. That amount is capped at the total market value of their properties. Under Kentucky common law, property owners are not entitled to receive the cost of remediating their properties if (as here) that cost exceeds the market value of the properties, although that cost may be considered in determining the diminution

in value. *Young v. Tennessee Gas & Transmission Co.*, Ky., 367 S.W.2d 270, 273 (1963); *Edwards & Webb Constr. Co. v. Duff*, Ky. App., 554 S.W.2d 909, 911-912 (1977).

Unsatisfied with a measure of damages that (if the compensatory verdict is legally sustainable) could put millions of dollars into their own and their clients' pockets, while allowing their clients to keep their properties and continue using them for their traditional agricultural and residential purposes, plaintiffs' counsel embarked on a thinly veiled effort to circumvent the legal limit on recoverable damages to real property. Despite the clear prohibition against recovering remediation costs, counsel specifically urged the jurors to award as punitive damages "a sum that is equal to the total testing and clean up cost of all the plaintiffs' properties," which he informed them amounted to \$210 million. Tape 26, 5/28/96, 18:12:06, 18:12:45. The jury returned a punitive award of precisely that amount, leaving no doubt that it had acquiesced in plaintiffs' proposal that it award testing and remediation costs in the guise of punitive damages.

Counsel's successful effort at jury nullification at a minimum necessitates a new trial. The law in Kentucky, as elsewhere, is crystal clear. The purposes of punitive damages are solely to punish and deter, not to make up for some perceived deficiency in the measure of compensatory damages. KRS 411.184(1)(f); *Harrod v. Fraley*, Ky., 289 S.W.2d 203, 205 (1956). As the Indiana Supreme Court has explained:

Punitive damages are not compensatory in nature but are designed to punish the wrongdoer and to dissuade him and others from similar conduct in the future. * * * They are awarded in addition to the awards for financial loss, pain and suffering and other such considerations. Hence, when the question of whether or not punitive damages should be given is considered, it must be done with the realization that the plaintiff has already been awarded all that he is entitled to receive as a matter of law. What, if anything, he may be given in addition is a windfall, and in making that decision all thoughts of benefiting the injured party should be laid aside * * *.

Orkin Exterminating Co. v. Traina, 486 N.E.2d 1019, 1022 (Ind. 1986) (emphasis added). Thus, the fact that the plaintiff may feel that the compensatory damages are inadequate is no ground for either awarding punitive damages or selecting an amount that bears no reasonable relationship to the deterrent

and retributive purposes of the punitive sanction. *See Terfehr v. Kleinfehn*, 352 N.W.2d 470, 474 (Minn. Ct. App. 1984) (because “[p]unitive damages are not designed to compensate but rather to punish,” argument that failure to award punitive damages left plaintiffs inadequately compensated is not well taken).

After an objection by Rockwell, plaintiffs’ counsel did make a token effort to squeeze his request for remediation costs into the factors identified in KRS 411.186, specifically “[t]he likelihood at the relevant time that serious harm would arise from the defendant’s misconduct.” *See* Tape 26, 5/28/96, 18:11:46. As with Cinderella’s step-sisters, however, no amount of struggling will make that slipper fit.

It is clear from its face that this factor in no way constitutes an invitation to circumvent the rule that punitive damages are not to be used to provide additional compensation; rather, it is simply an aid to gauging the degree of reprehensibility of the misconduct.^{16/} As we explain below, the conduct in this case was not highly reprehensible. But for present purposes, the question whether Rockwell was aware of a high likelihood of serious harm at the relevant time and hence was a reprehensible wrongdoer is beside the point because the amount of the verdict unambiguously reflects that the jury’s goal was to afford additional compensation, not to tailor punishment to the degree of wrongfulness of

^{16/} The “serious harm” factor is plainly intended to address the situation in which threatened but unrealized harm to the plaintiffs is inherent in the defendant’s conduct — *i.e.*, the failed attempt — and to focus upon the extent to which a serious harm is both foreseeable and likely. Here, however, Rockwell could have had no reason to anticipate that its handling of the Pydraul or any of its other acts were likely to cause serious damage to plaintiffs’ property, even as late as the 1990s, given the fact that the contamination was far below EPA cleanup levels. Nor is there any risk of future harm. Even before the Cabinet Judgment, and certainly after, the probability that these plaintiffs would have to remediate their properties was infinitesimal. As discussed above (at pages 21-22), a series of utterly speculative events would have to take place before plaintiffs could even potentially be obliged to pay to remediate their properties. Given the improbability of these events occurring, it is preposterous to suggest that it has ever been likely that plaintiffs would be required to spend any part of the \$210 million they requested and received from the jury (which, of course, they are under no obligation whatever to use for remediation of their land).

the conduct. Accordingly, a new trial is required so that any punishment can be set without regard to the improper consideration that fatally tainted this verdict.

2. The jury was animated by passion and prejudice.

This Court has indicated that punitive awards that are the product of passion and prejudice should be set aside on appeal. *Simpson County Steeplechase Ass'n v. Roberts*, Ky. App., 898 S.W.2d 523, 528 (1995). In determining whether an award is so infected, Kentucky appellate courts consider both the size of the award and any indication from the trial record that the jury may have been inflamed. *See, e.g., Clement Bros. Co. v. Everett*, Ky., 414 S.W.2d 576, 577-578 (1967); *Commonwealth v. Riley*, Ky., 414 S.W.2d 885, 886-887 (1967); *Field Packing Co. v. Denham*, Ky., 342 S.W.2d 524, 527 (1961). Both indicia of an improperly motivated award are unmistakably present here.

To begin with, the punitive damages are so enormous as to suggest an abandonment by the jury of fair and reasoned decisionmaking. Not only are they **36** times the largest punishment ever permitted by a Kentucky appellate court; they very likely are among the five or ten largest punitive verdicts ever to be handed down anywhere. Yet, as discussed more fully below, the conduct at issue here — which even plaintiffs would have to agree involved no intentional effort to cause them harm — is low on the reprehensibility spectrum. The rhetoric of plaintiffs' counsel notwithstanding, the \$210 million punishment bears no relationship to either the egregiousness of Rockwell's conduct or the actual injury suffered by plaintiffs. This disparity alone should be sufficient to persuade the Court that the verdict in this case was the product of passion and prejudice. *See, e.g., Maiorino v. Schering-Plough Corp.*, 1997 N.J. Super. LEXIS 298, at *51-*52, *56 (N.J. Super. Ct. App. Div. June 25, 1997) (finding passion and prejudice and granting new trial where \$8 million punitive award was “so disproportionate to the injury inflicted and the wrong committed as to shock the court's conscience”).

But this is not a case in which the Court is obliged to infer passion and prejudice merely from the size of the verdict. Rather, the record reflects that plaintiffs' counsel repeatedly attempted to prejudice the jury against Rockwell by reminding the jurors that Rockwell had sold the Russellville facility and by harping on the fact that Rockwell is headquartered in California and on the assertedly lavish lifestyles of its employees (as to which, apart from its manifest irrelevance for any proper purpose, there was not a whit of evidence in the record). Mr. Cunningham gratuitously referred to Rockwell's location in "Seal Beach, California" three times during his summation (Tape 25, 5/28/96, 15:32:58) and once referred to Rockwell's mythical "golfing buddies" who supposedly live downstream from its facility in Columbus, Ohio. *Id.* at 15:32:58. Mr. Barrett took this tactic to a whole different level. He managed to refer to Seal Beach six times in less than an hour. Tape 26, 5/28/96, 17:20:50, 17:25:15, 17:29:34, 18:02:58, 18:03:36, 18:13:24. And each of those references was calculated to generate maximum prejudice. For example, he characterized Rockwell's belief that the levels of PCBs on plaintiffs' properties presented no significant risk as: "We're not worried out **in Seal Beach, California, where everybody has got a tan and a \$60 haircut and life is good.**" *Id.*, 17:20:49. Later, playing on the fact that Rockwell had sold its local operations, he made the classically inflammatory "send-a-message" speech, stating:

Rockwell came to Logan County, took advantage of the attractive wage scale, as they call it, fouled its nest, fouled its neighbors, and they pulled out. If they were driving a car, it would be a hit and run.

Logan County is yesterday's news to Rockwell. They won't be back. They just plain don't care.

The plaintiffs respectfully ask you to make them care, to render a verdict that will get their attention, to **make a statement from the people of Kentucky that they will hear loudly and clearly in Seal Beach, California.**

Id., 18:02:16.^{17/} Not one for subtlety, he then asserted that, were the jury not to impose punitive damages, “**they will be popping champagne corks in Seal Beach, California.**” *Id.*, 18:03:32. And he concluded his summation by telling that jury that, were it to award the requested \$210 million in punitive damages, “you will have made a statement that they will hear clearly in Seal Beach, California * * *.” *Id.*, 18:13:21.

These kinds of appeals to bias against out-of-state residents or companies are universally regarded as grossly improper. *See, e.g., Clement Bros.*, 414 S.W.2d at 577-578; *Pappas v. Middle Earth Condominium Ass’n*, 963 F.2d 534, 539-541 (2d Cir. 1992); *Westbrook v. General Tire & Rubber Co.*, 754 F.2d 1233, 1238-1239 (5th Cir. 1985); *City of Cleveland v. Peter Kiewit Sons’ Co.*, 624 F.2d 749, 757-758 (6th Cir. 1980). *Cf. Beasley v. Evans’ Adm’x.*, Ky., 311 S.W.2d 195, 198 (1958) (concluding that verdict was result of jury’s bias against out-of-state defendant and in favor of in-state co-defendant); *Stanley v. Ellegood*, Ky., 382 S.W.2d 572, 575 (1964) (condemning “invidious allusions to the nature and financial condition of the defendant”). Indeed, the U.S. Supreme Court repeatedly has recognized that such arguments have the propensity to produce excessive punitive awards. *See Oberg*, 512 U.S. at 432 (expressing concern about juries “us[ing] their verdicts to express biases against big businesses, particularly those without strong local presences”); *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 464 (1993) (plurality opinion) (risk that a punitive award may have been influenced by prejudice against large corporations “is of special concern when the defendant is a nonresident”).

^{17/} Mr. Barrett’s diatribe blatantly misrepresented Rockwell’s continuing role in addressing the PCB situation. The evidence is that, between 1986 and the time of trial, Rockwell had spent over \$20 million in remediating the plant site (Tape 8, 4/18/86, 14:03:53), which was the apparent source of the minuscule amounts of PCBs on plaintiffs’ properties. Moreover, plaintiffs adduced no evidence that Rockwell intended to shirk whatever legal obligation to do additional remediation ultimately is imposed upon it.

Not satisfied with simply stoking the jurors' prejudice against out-of-state corporations, Mr. Barrett told the jury that corporations like Rockwell have no souls and hence have nothing to fear except punitive damages:

The great American statesman and Christian, William Jennings Bryan, has instructed us on some of the differences between people and corporations.

First, he said there's a difference in the purpose of creation. God made man and placed him upon his footstool to carry out a divine purpose. Man made the corporation as a money-making machine only.

When God made man, he set a limit to his existence, so that if he was a bad man he wouldn't be bad too long. But when the corporation was created, this limit on age was abolished, and now these corporations live for generation after generation.

When God made man, he gave him a soul and he warned him that in the next world he would be held accountable for deeds done in the flesh. When man created the corporation, he couldn't endow that corporation with a soul, so if it escapes punishment here, it need not fear the hereafter.

Tape 26, 5/28/96, 18:05:05. This kind of summation has been long condemned in Kentucky and elsewhere as being an incitement to prejudice against corporate defendants. *See, e.g., Carter Coal Co. v. Hill*, 166 Ky. 213, 218, 179 S.W. 2, 4-5 (1915); *Louisville & N. R. Co. v. Smith*, 27 Ky. L. Rep. 257, 261, 84 S.W. 755, 757-758 (1905); *Gordon v. Nall*, 379 So. 2d 585, 587 (Ala. 1980); *Shell Oil Co. v. Pou*, 204 So. 2d 155, 157 (Miss. 1967). *See also* Annotation, *Counsel's Appeal to Racial, Religious, Social or Political Prejudices or Prejudice Against Corporations as Ground for a New Trial or Reversal*, 78 A.L.R. 1438, 1477-1478 (1932) (collecting cases).^{18/}

^{18/} It is irrelevant that counsel for Rockwell did not object to each and every one of the inflammatory statements of plaintiffs' counsel. "[W]e are not concerned here with whether the improper argument is reversible error; we simply are identifying it as an obvious source of the passion and prejudice that appears to have influenced the jury in fixing damages." *Clement Bros.*, 414 S.W.2d at 578.

In short, considering the size and disproportionality of the punitive award and the grossly inflammatory tactics employed during summations, the conclusion is manifest that this unprecedented award was the product of passion and prejudice. See *Clement Bros.*, 414 S.W.2d at 577-578; *Stanley*, 382 S.W.2d at 575 (“when [improper argument] is reiterated in colorful variety by an accomplished orator its deadly effect cannot be ignored”). If judgment is not awarded Rockwell on the punitive damages issue, a new trial is necessary.

3. The punitive damages are unconstitutionally excessive.

In *BMW*, the Supreme Court struck down a \$2 million punitive damages award as being unconstitutionally excessive. The Court indicated that “[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice * * * of the severity of the penalty that a State may impose.” *Id.* at 1598 (footnote omitted). It then proceeded to identify three “guideposts” for evaluating whether a defendant had adequate notice of the magnitude of the punishment to which it could be exposed: (1) the degree of reprehensibility of the defendant's conduct (*id.* at 1599); (2) the ratio of the punitive damages to the actual harm inflicted on the plaintiff (*id.* at 1601); and (3) the relationship between the punitive damages and the statutorily prescribed civil and/or criminal penalty for comparable misconduct (*id.* at 1603). Since *BMW* was decided, the great majority of courts that have applied these criteria have concluded that the punitive exactions under consideration

were unconstitutionally excessive.^{19/} Here, as well, application of the *BMW* guideposts demonstrates the excessiveness of the \$210 million punitive award at issue.

a. The degree of reprehensibility of the conduct. One of the most significant aspects of the *BMW* decision is the Supreme Court's explicit reminder that not every punishable act is “sufficiently reprehensible to justify a significant sanction in addition to compensatory damages.” 116 S. Ct. at 1599. Rather, there is a spectrum of misconduct, and deeply rooted concepts of fairness dictate that “punitive damages may not be grossly out of proportion to the severity of the offense.” *Id.* (internal quotation marks and citation omitted). That principle has especial force here.

^{19/} See, e.g., *Kimzey v. Wal-Mart Stores, Inc.*, 107 F.3d 568 (8th Cir. 1997) (\$5 million punitive award reduced to \$350,000); *Continental Trend Resources, Inc. v. OXY USA Inc.*, 101 F.3d 634 (10th Cir. 1996) (\$30 million punitive award reduced to \$6 million), *cert. denied*, 65 U.S.L.W. 3781 (May 27, 1997); *Lee v. Edwards*, 101 F.3d 805 (2d Cir. 1996) (\$200,000 punitive award reduced to \$75,000); *Patterson v. P.H.P. Healthcare Corp.*, 90 F.3d 927 (5th Cir. 1996) (\$150,000 punitive award excessive under *BMW*; case remanded to district court for further consideration), *cert. denied*, 117 S. Ct. 767 (1997); *Leab v. Cincinnati Ins. Co.*, 1997 U.S. Dist. LEXIS 8868 (E.D. Pa. June 26, 1997) (ordering \$5.5 million punitive award reduced to \$35,000 in case alleging bad faith delay in paying UM claim); *Johansen, supra* (\$12 million in punitive damages reduced to \$4.35 million); *Creative Demos, Inc. v. Wal-Mart Stores, Inc.*, 955 F. Supp. 1032 (S.D. Ind. 1997) (\$6.5 million punitive award so grossly excessive as to justify a new trial); *Geuss v. Pfizer, Inc.*, 1996 U.S. Dist. LEXIS 18784 (E.D. Pa. Dec. 17, 1996) (\$150,000 punitive award reduced to \$17,500); *Iannone v. Harris*, 941 F. Supp. 403 (S.D.N.Y. 1996) (\$250,000 punitive award reduced to \$50,000); *Florez v. Delbovo*, 939 F. Supp. 1341 (N.D. Ill. 1996) (\$750,000 punitive award reduced to \$275,000); *Utah Foam Prods. Co. v. Upjohn Co.*, 930 F. Supp. 513 (D. Utah 1996) (\$5.5 million punitive award reduced to approximately \$600,000); *Rush v. Scott Specialty Gases, Inc.*, 930 F. Supp. 194 (E.D. Pa. 1996) (\$3 million punitive award reduced to \$300,000), *rev'd on other grounds*, 113 F.3d 476 (3d Cir. 1997); *Schimizzi v. Illinois Farmers Ins. Co.*, 928 F. Supp. 760 (N.D. Ind. 1996) (\$600,000 punitive award reduced to \$135,000 in case alleging bad faith failure to pay a UM claim); *BMW of North America, Inc. v. Gore*, 1997 Ala. LEXIS 126 (Ala. May 9, 1997) (reducing what was once a \$4 million punitive award to \$50,000); *Foremost Ins. Co. v. Parham*, 1997 Ala. LEXIS 56 (Ala. Mar. 14, 1997) (reducing two \$7.5 million punitive awards to \$175,000 and \$173,000); *Cates Constr., Inc. v. Talbot Partners*, 62 Cal. Rptr. 2d 548 (Cal. Ct. App. 1997) (\$28 million punitive award reduced to \$15 million); *Langmead v. Admiral Cruises, Inc.*, 1997 Fla. App. LEXIS 5111 (Fla. Dist. Ct. App. May 14, 1997) (holding that \$3.5 million punitive award was so excessive as to warrant a new trial); *Wilson v. IBP, Inc.*, 558 N.W.2d 132 (Iowa 1996) (\$15 million punitive award reduced to \$2 million); *Management Computer Servs., Inc. v. Hawkins, Ash, Baptie & Co.*, 557 N.W.2d 67 (Wis. 1996) (\$1.75 million punitive award reduced to \$650,000).

As in *BMW*, “none of the aggravating factors associated with particularly reprehensible conduct is present” in this case. *Id.* To begin with, here, as in *BMW*, the injury was “purely economic in nature.” *Id.* Apart from plaintiffs’ highly improper effort to insinuate that various ailments were caused by PCBs (*see* pages 32-34, *supra*), there is no claim of personal injury or any detrimental health consequences from the presence of minute quantities of PCBs on plaintiffs’ properties. Moreover, as in *BMW*, the injuries in this case were not inflicted “intentionally through affirmative acts of misconduct” on the part of the defendant. *Id.* To the contrary, during the five-year period before plaintiffs filed suit (which, as we have argued, is the only period for which the jury was entitled to punish Rockwell), the only “misconduct” that plaintiffs attribute to Rockwell was (1) its decision to go to trial on the scope of its remediation obligation, rather than spending hundreds of millions of dollars remediating areas that its consultants had concluded did not need remediation and (2) its failure, despite spending millions of dollars, to completely prevent minute quantities of PCBs from being carried off its property by storm water. Neither of these “acts” registers at all on the reprehensibility scale.

Moreover, even if, contrary to our arguments, the Court deems it appropriate to consider conduct occurring outside the limitations period, there is no basis for concluding that the conduct was so egregious as to warrant one of the highest punishments in the history of American law. The most the evidence suggests is that, during the period that it was using Pydraul, Rockwell could have done more to ensure that none of the product escaped into Town Branch. But throughout that period Rockwell had no reason to suppose that Pydraul was any more dangerous than ordinary lubricating oil. To the contrary, Monsanto was informing its customers as late as 1970 that PCBs with a chlorine content of less than 54%, like the product used by Rockwell, “appear to present no potential problem

to the environment.” D. Exh. 10, Appendix 8. While it might have been regarded as negligent to allow any kind of oil to escape into Town Branch in the 1950s, 1960s, and early 1970s, in the absence of evidence that Rockwell knew the oil to be unusually dangerous, there is no basis for a finding that Rockwell was even reckless, let alone that its conduct was so egregious as to warrant a \$210 million punishment.^{20/} In this regard, the observations of one influential commentator on punitive damages in the product liability context are equally apt here:

The problem [with punishing for conduct that occurred many years earlier] is that society's values concerning safety and corporate responsibility have been evolving rapidly in recent years. It is one thing to judge according to today's higher standards the “safety” or “defectiveness” of a product that was made when concern for safety was much less, and to compensate a victim accordingly for losses actually suffered. It is quite another to exact enormous “punishment” from an enterprise, acting on our greater social consciousness of today, for decisions that were made pursuant to business ethics of times past by men and women who have since left the company and perhaps this life. In our zeal to punish abuses discovered today, we must be cautious not to overlook the prevailing moral and business standards of the time involved.

Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1, 13-14 (1982) (emphasis added) (footnotes omitted).

Plaintiffs sought and received punitive damages for conduct (or, to be accurate, alleged non-conduct) that occurred in a different era — before Rockwell knew that Pydraul contained PCBs, before it knew that PCBs were potentially dangerous, and before either Kentucky or the federal government even began regulating PCBs. While it may be appropriate to require Rockwell to compensate for present harms caused by its conduct 20, 30, and 40 years ago, it is unfair — and violates the notice requirement articulated in *BMW* — to treat Rockwell as an egregious, willful

^{20/} It is a matter of common knowledge that at that time (and subsequently), oil was commonly used to keep down dust on roads and to film waterways for mosquito control. Needless to say, these practices resulted in substantial quantities of oil finding their way into Kentucky’s waters.

wrongdoer and impose an “enormous” punishment against it based on “our greater social consciousness of today.”

Thus, what the Supreme Court said in *BMW* applies fully here: the mere fact that “conduct is sufficiently reprehensible to give rise to tort liability, and even a modest award of exemplary damages, does not establish the high degree of culpability that warrants a substantial punitive damages award.”

116 S. Ct. at 1601 (emphasis added). This \$210 million penalty bears no relationship to the degree of reprehensibility of the alleged misconduct and must, for that reason, be set aside.

b. The relationship between the punitive damages and plaintiffs’ injury. In addition to bearing no reasonable relationship to the degree of reprehensibility of Rockwell’s conduct, the \$210 million punishment in this case is grossly disproportionate to the actual harm to plaintiffs. As we demonstrated above, the actual harm in this case is small (if it exists at all). The punitive damages must be thousands of times any fair measure of plaintiffs’ actual injury. But even if the compensatory damages awarded by the jury are used as a fair measure of actual harm, the punitive damages are over **27** times the aggregate amount of those awards.^{21/}

Since *BMW* was decided, numerous courts have concluded that ratios of the magnitude involved in this case (and smaller) violate the Due Process Clause.^{22/} Moreover, in the post-*BMW*

^{21/} Of course, if the compensatory damages are set aside, the punitive damages must meet the same fate because of the impossibility of determining whether the punishment is disproportionate to the injury.

^{22/} See, e.g., *Kimzey, supra* (140:1 ratio reduced to 10:1 where compensatory damages were \$35,000); *Continental Trend, supra* (reducing punitive award that was between 15 and 30 times the actual and potential harm of \$1 million to \$2 million to an amount that is between three and six times that aggregate harm); *Patterson, supra* (holding a punitive award that was approximately 6.5 times the roughly \$20,000 compensatory damages to be excessive and observing that a 4:1 ratio is “close to the line”); *Geuss, supra* (punitive damages award that was roughly equal to the compensatory
(continued...))

period, no court has permitted a ratio of anywhere near 27:1 when, as here, the compensatory damages exceeded \$1 million.^{23/}

The 27:1 ratio in this case is thus a gross outlier. As in *BMW*, it is a powerful indicium of the excessiveness of the punishment.

c. Fines for comparable misconduct. The comparative fines guidepost is animated by the constitutional requirement that defendants have fair notice of the amount of punishment to which their conduct can subject them. *BMW*, 116 S. Ct. at 1603. Here, there is not the slightest basis for concluding that Kentucky law gave Rockwell fair notice that even deliberate discharging of Pydraul, much less reticence in agreeing to a massively expensive cleanup program not required by any existing statute or regulation, could subject it to a civil fine in the millions (let alone hundreds of millions) of dollars. To the contrary, in 1978, after detecting the escape of undetermined oily substances from Rockwell's facility, the Cabinet fined Rockwell only \$1,000. This fine is the best indication of the level of punishment of which Rockwell could fairly be said to have had notice. See *Johansen*, 1997 U.S.

22/(...continued)

damages reduced to one-tenth of \$165,000 compensatory award); *Iannone, supra* (10:1 ratio reduced to 2:1 where compensatory damages were \$25,000); *Florez, supra* (15:1 ratio reduced to 5:1 where compensatory damages were \$55,000); *Utah Foam, supra* (18:1 ratio reduced to 2:1 where compensatory damages were approximately \$315,000); *Rush, supra* (3:1 ratio reduced to 1:1 where compensatory damages were approximately \$300,000); *Schimizzi, supra* (13:1 ratio reduced to 3:1 where compensatory damages were approximately \$45,000); *In re Arnold*, 206 B.R. 560, 569 (Bankr. N.D. Ala. 1997) (observing that ratios of 4:1 to 10:1 may be appropriate depending on the circumstances, but imposing \$15,000 punitive award that was between two and three times the debtor's actual damages); *Cates*, 62 Cal. Rptr. 2d at 571-572 (holding that a 9:1 ratio "can be said to be 'close to the line of constitutional impropriety'" and reducing punitive damages to approximately five times the \$3.1 million compensatory award); *Maiorino, supra* (holding a punitive award that was 18 times the \$435,000 compensatory award to be so excessive as to require a new trial); *Management Computer Servs., supra* (27:1 ratio reduced to 10:1 where compensatory damages were \$65,000).

23/ Indeed, only one court has permitted a ratio equivalent to this one when the compensatory damages have exceeded \$100,000. See *Walston v. Monumental Life Ins. Co.*, 923 P.2d 456 (Idaho 1996) (upholding punitive award that was 26 times the \$120,000 compensatory award).

Dist. LEXIS 10781, at *13, *14. Not only are the punitive damages 21,000 times the fine that Rockwell actually received, they are over 260 times the highest fine ever imposed by the Cabinet — \$800,000. *See Kentucky Natural Resources and Environmental Protection Cabinet, Penalties, Land, Air & Water 21* (Summer 1993). The fact that the punitive damages are orders of magnitude greater than the highest fine ever imposed by the Cabinet is further confirmation that Rockwell lacked fair notice that it could be mulcted to the tune of \$210 million. *See Johansen, 1997 U.S. Dist. LEXIS 10781, at *16 n.8.*

CONCLUSION

The Court should order the entry of judgment in favor of Rockwell. At a minimum, it should require a new trial.

Respectfully submitted.

Andrew L. Frey
Evan M. Tager
Charles A. Rothfeld
MAYER, BROWN & PLATT
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 463-2000

Co-Counsel for Appellant

M. Stephen Pitt
Virginia H. Snell
J. Anthony Goebel
Donald J. Kelly
WYATT, TARRANT & COMBS
Citizens Plaza
Louisville, KY 40402-2898
(502) 589-5235

Co-Counsel for Appellant