

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

ROBERT D. FORTNER, II,

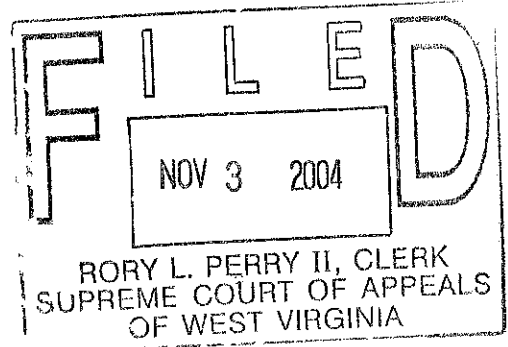
Plaintiff/Respondent,

v.

Supreme Court Docket No. 31940

KANAWHA STONE COMPANY, INC.,
a corporation,

Defendant/Petitioner.



PETITIONER'S OPENING BRIEF

Respectfully Submitted:

A handwritten signature in cursive script, appearing to read "Mary Sanders".

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I. NATURE OF PROCEEDING

On April 27, 2004, the Circuit Court of Logan County, West Virginia, when presented with unique questions of law regarding damages available in a trespass action, entered a Certification Order requesting guidance from this Court. See Certification Order.¹ The three questions presented to this Court are as follows:

1. In an action for trespass over a corner of an unmarked parking lot by trucks hauling coal and other material for a highway construction contractor for the State of West Virginia, is the owner of real estate entitled to damages in the form of wheelage?
2. In an action for trespass over a corner of an unmarked parking lot by trucks hauling coal and other material for a highway construction contractor for the State of West Virginia, is the owner of an unmarked parking lot entitled to damages for unjust enrichment or mesne profits?
3. Under West Virginia law, does the intermittent, non-exclusive crossing of an unmarked parking lot by trucks for a highway construction project fall within the purview of a continuing trespass?

Before certifying these questions, the circuit court answered each in the negative. The Petitioner, Kanawha Stone Company, Inc. ("Kanawha Stone"), respectfully requests that this Court affirm the circuit court's ruling and conclude that wheelage is unavailable in an action for trespass, that unjust enrichment does not apply in these circumstances, that mesne profits are unavailable in an action for trespass, and that intermittent, non-exclusive crossing of an unmarked parking lot does not constitute a continuing trespass.

¹ The Certification Order designates the following as the record for these certified questions: (1) the Complaint, (2) the Amended Complaint, (3) the Answer, (4) the Answer to Amended Complaint, (5) the Defendant's Motion for Partial Summary Judgment Regarding Wheelage and Memorandum in support thereof, (6) the Plaintiff's Response to the Motion and Memorandum in support thereof, (7) the Defendant's Reply to the Response, (8) the Defendant's Motion for Partial Summary Judgment Regarding Amended Complaint and Memorandum in support thereof, and (9) the Certification Order.

II. STATEMENT OF FACTS

In addition to the parties' stipulated facts outlined in the Certification Order, Kanawha Stone states as follows:

On September 1, 1999, Kanawha Stone entered into a contract with the West Virginia Department of Transportation's Division of Highways for the construction of the Stollings - Logan Road. Fortner alleges that Kanawha Stone's actions in fulfillment of its contractual obligations damaged a corner of his parking lot, which as Kanawha Stone's trucks and trucks owned by private trucking companies allegedly traveled over a corner of the unmarked lot.² Fortner alleges that Kanawha Stone trespassed and transported coal and other materials over his property while constructing the public road. It is this transportation that forms the underlying basis of Fortner's unprecedented request for wheelage and other inapplicable damages.

III. LAW AND ARGUMENT

In 1977, this Court abolished the distinction between permanent and temporary damages to real property. Jarrett v. E.L. Harper & Son, Inc., 235 S.E.2d 362, 365 (W. Va. 1977). In so ruling, the Court articulated the damages recoverable in a trespass to realty action:

When realty is injured the owner may recover the cost of repairing it plus his expenses stemming from the injury including loss of use during the repair period. If the injury cannot be repaired or the cost of repair would exceed the property's market *value*, then the owner may recover the money equivalent of its lost value plus his expenses resulting from the injury including loss of use during the time he has been deprived of his property.³

² Mr. Fortner's parking lot measures roughly 40 feet by 80 feet and is located at McConnell, Logan County, West Virginia. Additionally, the lot does not contain a structure and is located at the intersection of two roads. Significantly, Fortner incurred no out of pocket expense to repair the damage done to his lot. Fortner Deposition at 14.

³ In addition to providing that the cost of repair is properly recoverable, the Court also explained that "annoyance and inconvenience are properly considered as elements in the measure of damages . . . provided that these considerations are measured by an objective standard of ordinary persons acting reasonably under the given conditions." Jarrett, 235 S.E.2d at 365. The Court also denied recovery for

Id. (emphasis in original). Thus, in attempting to recover wheelage, mesne profits, damages for unjust enrichment, and damages for continuing trespass, the Respondent, Robert D. Fortner, II, opportunistically requests recovery well in excess of the damages he has actually sustained, and such recovery would be grossly inequitable. As is illustrated more fully below, the law as to each of these principles indisputably indicates that each was intended to apply in far different circumstances. Therefore, although the certified questions appear to present rather unique questions of law with little applicable precedent, Kanawha Stone requests that the Court hold true to the well-established measure of damages previously expounded.

1. **In an action for trespass over a corner of an unmarked parking lot by trucks hauling coal and other material for a highway construction contractor for the State of West Virginia, the owner of real estate is not entitled to damages in the form of wheelage.**

Respondent contends that he is entitled to damages in the form of wheelage for Petitioner's alleged trespass. Wheelage is the duty or toll paid for vehicles passing over certain ground. Black's Law Dictionary 1595 (6th ed. 1990). This Court, however, has not held that wheelage is an appropriate measure of damages in actions for trespass. Indeed, "it has been a longstanding rule in this jurisdiction that in an action for trespass, actual damages should be calculated by taking the value of the property before the trespass and subtracting the value of the property after the trespass." Kincaid v. Morgan, 425 S.E.2d 128, 134 (W. Va. 1992). In Kincaid, this Court was presented with defendants who had willfully and knowingly trespassed on the plaintiff's property, as the defendants had intentionally constructed a restaurant that encroached on the

mental pain and suffering, id., though subsequent opinions reveal that the possibility of such recovery has not been completely foreclosed. See Evans v. Mutual Mining, 485 S.E.2d 695, 701 n.3 (W. Va. 1997). Here, however, Fortner has not alleged annoyance, inconvenience, or mental pain and suffering; thus, such recovery is inappropriate.

plaintiff's land. Id. at 133. Although the trespass was permanent and was designed to profit the defendants, the Court remained steadfast in its approach to calculating damages in a trespass action and reiterated that

In ... a [trespass] suit it is proper for the court to instruct the jury that they will find, in assessing damages, if they believe from the evidence any were inflicted upon the property in question by the defendant, only such difference in the value of the said property at the time said damages were inflicted and the value of the said property before the said damage was so done.

Id. at 134 (quoting Syl. Pt. 2, Rowe v. Shenandoah Pulp Co., 26 S.E. 320 (W. Va. 1896)).

Because this Court refused to vacillate from its calculation of damages where the trespass was much more egregious, it should likewise conclude here that wheelage damages are not recoverable.

Though Kincaid specifically addressed the proper measure of damages in a trespass action, this Court has not had occasion to definitively decree that wheelage is not available as a remedy for trespass. The Kentucky courts, however, have specifically dealt with this topic and concluded that wheelage damages are unavailable. In Kentucky Mountain Coal Co. v. Hacker, 412 S.W.2d 581 (Ky. 1967), the Supreme Court of Kentucky, then known as the Court of Appeals of Kentucky, discussed the proper measure of damages in a real estate trespass action and reversed an award of wheelage based on the amount of coal that was hauled over the plaintiff's land. In Hacker, the defendant coal company hauled coal across the plaintiff's land, even though it had no legal right to do so. Id. at 582. Nevertheless, the court rejected wheelage damages, noting that while two cents per ton hauled over the land may have been customary by private contract, the proper measure of damages for trespass was the depreciation in the rental value of the land during the period of occupancy. Id. In so holding, the court expressly overruled prior decisions to the contrary. Id. at 583 (overruling Cary-Glendon Coal Co. v. Carmichael, 80 S.W.2d 29 (Ky.

1935)). Likewise, Triple Elkhorn Mining Co. v. Anderson held that profits, wheelage, and tonnage are irrelevant to the issue of damages in an action for trespass; rather, the proper measure of damages is the diminution of the rental value or market value of the property. 646 S.W.2d 725, 726 (Ky. 1983). Thus, Kentucky, perhaps the only jurisdiction to address this issue specifically, has made clear that wheelage is inapplicable to these circumstances.

In asserting that he is entitled to wheelage damages, Fortner has only offered two subsequently overruled Kentucky decisions for support. Kanawha Stone contends that the silence of the courts on this issue speaks volumes – wheelage is completely inappropriate under these circumstances. Therefore, because an action for trespass does not give rise to recovery of wheelage damages, Kanawha Stone respectfully requests that this Court answer the first certified question in the negative.

2. **In an action for trespass over a corner of an unmarked parking lot by trucks hauling coal and other material for a highway construction contractor for the State of West Virginia, the owner of the unmarked parking lot is not entitled to damages for unjust enrichment or mesne profits.**

A. Unjust Enrichment

This Court has explained that an action for unjust enrichment may lie where “benefits have been received and retained under such circumstance that it would be inequitable and unconscionable to permit the party receiving them to avoid payment therefore.” Realmark Developments, Inc. v. Ranson (“Realmark I”), 542 S.E.2d 880, 884-45 (W. Va. 2000). Here, an action for unjust enrichment is not legally cognizable, as it is questionable whether Kanawha Stone’s trespass over a corner of an unmarked parking lot conferred any benefit on it whatsoever. Furthermore, as this Court announced only a year ago, “the measure of damages in an unjust enrichment claim is the greater of the enhanced market value of the property or the cost of the

improvements to the property.” Syl. Pt. 2, Realmark Developments, Inc. v. Ranson (“Realmark II”), 588 S.E.2d 150 (W. Va. 2003). Simple analysis of the proper measure of damages in an unjust enrichment action illustrates the inapplicability of such a cause of action to these circumstances. However, even if an action for unjust enrichment can be maintained, Fortner’s recovery must be limited to the cost of repairs to his property. Indeed, any additional recovery by Fortner would constitute unjust enrichment of an opportunistic plaintiff.

In the proceedings leading to the presentation of this appeal, Fortner has relied on Edwards v. Lee's Adm'r, 96 S.W.2d 1028 (Ky. 1936), for support of his contention that an action for unjust enrichment may be properly maintained. In Edwards, however, the court emphasized that the case was being decided on its peculiar facts and explained that circumstances in which a defendant derived profit from the use of a cave under the plaintiff’s land is “sui generis.” Id. at 1030; see also Alaska v. 13.90 Acres of Land, 625 F.Supp. 1315, 1321 (D. Alaska 1985) (explaining, in an action for trespass, that Edwards is a “resource conversion case”). Here, however, there is no evidence that Kanawha Stone beneficially converted Fortner’s resources – Kanawha Stone inadvertently traversed a minute area of Fortner’s lot and would have accomplished its objectives absent this minor trespass.⁴ Furthermore, Edwards has been subsequently cited for the proposition that damages for temporary trespass are “the depreciation in the rental value of the land during the period of occupancy if it is rented out, but if occupied by the owner it is the diminution in the value of the use of the property.” Hacker, 412 S.W.2d at 582-83.

⁴ As the language circuit court’s certification order reveals, Kanawha Stone did not substantially interfere with Fortner’s possession of his parking lot, as the alleged trespass was limited to a corner of the unmarked lot.

Unjust enrichment is inapplicable to the case at hand. Kanawha Stone has not benefited inequitably; however, even assuming that some nominal benefit was realized by Kanawha Stone, Fortner's recovery must be limited to the cost of repairing the damages to his property. Any contrary ruling would permit Fortner to be unjustly enriched, as such recovery would be distinctly inequitable. Therefore, given the lack of support for unjust enrichment damages in this case, both legally and equitably, Kanawha Stone requests that this Court deny Fortner's recovery on the basis of unjust enrichment.

B. Mesne Profits

Mesne profits are "intermediate profits: that is profits which have been accruing between two given periods," and they most often constitute the "value of the use or occupation of the land during the time it was held by one in wrongful possession." Dumas v. Ropp, 558 P.2d 632 (Idaho 1977) (citing Black's Law Dictionary). Here, however, no such damages are recoverable, as there has been no wrongful possession by Kanawha Stone. Although the Amended Complaint contains a bare allegation of occupancy, Fortner can offer no facts that would support this contention. Unless this Court concludes that trespassing "over a corner of an unmarked parking lot by trucks hauling coal and other material for a highway construction contractor for the State of West Virginia" constitutes "occupancy," there can be no recovery of mesne profits.

To constitute occupancy, there must be a taking with an intention to become the owner of the object possessed. Black's Law Dictionary 1078 (6th ed.1990). Even assuming that Kanawha Stone passed over portions of Fortner's parking lot to construct the public road, this temporary and non-exclusive use cannot rise to the level of occupation required to justify recovery of mesne profits. This Court has not been presented a case necessitating an expanded analysis of the availability of mesne profits in a trespass action. The Supreme Court of Idaho, however, in

Dumas v. Ropp, 558 P.2d 632 (Idaho 1977), had such an opportunity. Although Dumas is indicative of the factual scenario required for mesne profits to be appropriately recovered and unambiguously indicates that such recovery is wholly inappropriate here, Fortner has curiously relied on this opinion for support. In Dumas, the court was presented with allegations that the defendants trespassed onto the property of the plaintiffs and “did cut, girdle, or otherwise injure, destroy and take trees and timber on the land of the plaintiffs.” Id. at 633. The plaintiffs sought to recover the profits realized by the defendants when selling the stolen timber and alleged that these damages constituted mesne profits. Id. The court analyzed the plaintiffs’ allegations and a state statute applicable to recovery for removal of timber and ultimately concluded that “the value of the timber may be recoverable as damages in an action for mesne profits.” Id. at 634. The court further explained that “an action for mesne profits is closely tied to an action in ejectment” and that mesne profits “must necessarily be available as a remedy only where there has been an ouster or dispossession of the Plaintiff.” Id.; see also 87 C.J.S. Trespass § 153 (providing that an action for mesne profits is an emanation from the action of ejectment and can be brought after judgment in ejectment). In this case, there has been no ouster or dispossession of Fortner. Kanawha Stone did not physically remove the Fortner’s property and did not subsequently profit from a sale of the dispossessed property.

As Dumas illustrates, Fortner’s requested recovery of mesne profits is completely baseless. Additionally, no West Virginia statute or court decision supports Fortner’s contention that he is entitled to mesne profits. The West Virginia Code references mesne profits merely in connection with unlawful entry and detainer and ejectment actions, and none of these sections are applicable here. See West Virginia Code § 55-3-2, § 55-4-21, and § 55-4-28. Thus, because Fortner can offer this Court no legal authority supporting such an award and because recovery of mesne

profits in this case would be inequitable, Kanawha Stone requests that this Court conclude, as a matter of law, that Fortner is not entitled to mesne profits.

3. Under West Virginia law, the intermittent, non-exclusive crossing of a corner of an unmarked parking lot by trucks for a highway construction project does not fall within the purview of a continuing trespass.

A continuing trespass is "[o]ne which is in its nature a permanent invasion of the rights of another; as, where a person builds on his own land so that a part of the building overhangs his neighbor's land." Black's Law Dictionary 1503 (6th ed.1990). Because Kanawha Stone's actions did not permanently invade on Fortner's rights, Fortner must be denied recovery for continuing trespass. It is ludicrous to suggest that intermittent and non-exclusive crossing for construction purposes constitutes a continuing trespass: Petitioner's construction activities are fundamentally of a temporary nature. Thus, any trespass must end at the conclusion of the road's construction.

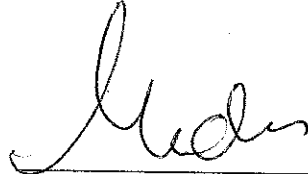
Fortner has directed this Court to 87 C.J.S. Trespass § 152, which specifically addresses continuing trespasses. Id. Although this Court has not adopted this section, Kanawha Stone agrees that the language is instructive:

Where the act is not a single act of trespass but a continuous trespass or series of trespasses *which amounts to an appropriation or an attempt to appropriate the land itself or its use to the use of the trespasser*, the damages are to be assessed for the trespass only, not for the permanent appropriation of the land.

Id. (emphasis added). Furthermore, "the measure of damages for an appropriation of the use of the land by a continuing trespass is the cost of repair." Id. As these passages illustrate, Kanawha Stone's alleged intermittent, non-exclusive crossing of a corner of an unmarked parking lot by trucks for a highway construction project does not fall within the purview of a continuing trespass. Additionally, even if such actions do rise to the level of a continuing trespass, Fortner's proper remedy is to recover only the cost of repair.

IV. CONCLUSION

WHEREFORE, the Petitioner Kanawha Stone Company, Inc., by counsel, respectfully prays that this Court AFFIRM the decisions reached by the Circuit Court of Logan County.



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CERTIFICATE OF SERVICE

I, Mary H. Sanders, counsel for Defendant/Petitioner, hereby certifies that service of the foregoing *Petitioner's Opening Brief* was made upon counsel of record this the 1st day of November, 2004, by mailing a true and exact copy thereof via first class United States Mail, postage prepaid, in an envelope addressed as follows:

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