

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

ROBERT D. FORTNER, II

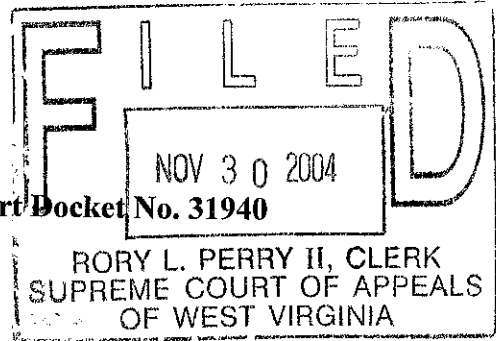
Plaintiff/Respondent,

v.

KANAWHA STONE COMPANY, INC.,
a corporation,

Defendant/Petitioner.

Supreme Court Docket No. 31940



RESPONDENT'S REPLY BRIEF

Respectfully Submitted:

A handwritten signature in black ink, appearing to read "B. Spaulding", written over a horizontal line.

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I. NATURE OF PROCEEDING

The Respondent agrees with the statement regarding the nature of the proceeding as indicated in the Petitioner's Opening Brief with the obvious exception that the Respondent requests that the Court reverse the Circuit Court's ruling and conclude that wheelage is available in an action for trespass, that unjust enrichment does apply in these circumstances, that mesne profits are available in an action for trespass, and that the actions of the Petitioner in this matter did constitute a continuing trespass.

II. STATEMENT OF FACTS

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

On September 1, 1999, Kanawha Stone entered into a contract with the West Virginia Department of Transportation Division of Highways for the construction of the Stollings-Logan road. At the time of the entry into the contract, Kanawha Stone's only access to the area in question and its only ability to transport coal from the area of the road to be constructed, would have required it to travel approximately three (3) miles over a dirt road to the first bridge across the Guyandotte River.

After entering into the contract, Kanawha Stone constructed a low water bridge across the Guyandotte River and entered into a right-of-way agreement with an adjoining owner of the Respondent's property.

Kanawha Stone then began to transport coal over the low water river bridge and across the property of the party that they had entered into the agreement with, but also over property of the Respondent's without his permission.

The Respondent, who was in Pocahontas County at that time, had his father block the road. Kanawha Stone then had officers from the State Police approach the Respondent's father to make him open the road up and employees of Kanawha Stone entered into a discussion with the father of the Respondent to the effect that they would make it right with the Respondent. Only after this assurance, did the father of the Respondent move his vehicle so that the Petitioner's trucks could continue hauling coal over the Respondent's property.

Attempts by the Respondent to discover information regarding the amount of coal hauled, the value of the coal, the location where the coal was sold, and copies of the original plans were denied by the Court in its rulings.

III. LAW AND ARGUMENT

The Respondent, Robert D. Fortner, II, emphatically denies that he has opportunistically requested recovery well in excess of his damages in this case and states that recovery would only be equitable if he were to be paid what the Petitioner would had to have paid any one else in negotiating a contract to haul coal over their property. As pointed out by the Petitioner, in the Opening Brief, the certified questions in this case appear to present rather unique questions of law with little applicable precedent. The previously established measures of damages would clearly not adequately and equitably compensate the Respondent for the use of his property by Kanawha Stone.

- 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 entitled to damages in the form of wheelage.**

As far as counsel for the Respondent has been able to determine, the Supreme Court of Appeals of West Virginia has never ruled on the issue regarding wheelage as

damages. This is a very unique case and as seen from Respondent's facts, it is clear that the Respondent intended to keep the Petitioner from crossing his property until an agreement was made for him to be compensated for the use of his property. Wheelage as defined in Petitioner's Opening Brief, would clearly have been the method of compensating the Respondent.

Defendant's Motion correctly states the law in the State of Kentucky. However, it should be pointed out that the same was not always the law in the State of Kentucky. In fact, the case of Kentucky Mountain Coal Co. v. Hacker, 412 S.W. 2d 581 (Ky. 1967), cited by the Plaintiff, specifically overruled prior cases in the State of Kentucky. In the case of Cary - Glendon Coal Co. v. Carmichael, 80 S.W.2d 29 (Ky. 1935), the Court in the State of Kentucky specifically affirmed an award of one and one-half cents per ton for wheelage. The same was done in the case of Carmichael v. Old Straight Creek Coal Corporation, 22 S.W. 2d 573 (Ky. 1929), which also allowed a wheelage. These cases were decided stating the same or practically the same rule regarding damages for trespass as is the case in West Virginia. Therefore, it does not appear that this Court should be in any way bound by the later decisions in the State of Kentucky since the earlier decisions made as much or more legal sense than the ones denying wheelage.

It should be noted that the case of Kincaid v. Morgan, 188 W.VA. 452, 458, 425 S.E. 2d 128, 134 (1992), cited by the Defendant in its motion dealt with an issue of simple trespass between two adjoining land owners where one had trespassed across the boundary when the boundary line was disputed. Certainly, it was not intended to restrict an award for damages in cases not similar to that one.

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 entitled to damages for unjust enrichment or mesne profits.**

A. Unjust Enrichment

The Respondent must strongly object to Petitioner's portion of the Brief, which indicates that it is questionable whether Kanawha Stone's trespass over a corner of an unmarked parking lot conferred any benefit on it whatsoever. As previously noted, efforts by the Respondent to discover evidence as to how much Kanawha Stone made by hauling the coal over the low water bridge and trespassing on the Respondent's property were thwarted by the Petitioner's refusal to furnish this discovery information. However, it does not take a genius to know that had Kanawha Stone had to transport the coal three (3) miles to the next available bridge rather than crossing at a location immediately adjacent to the construction site, then their costs for transporting the coal would have been substantially more. The enhanced market value of the property discussed in Realmark Developments, Inc. v. Ranson ("Realmark II"), 588 S. E. 2d 150 (W.Va. 2003), clearly means that the enhanced market value of the use of the Respondent's property. Again, the only thing opportunistic of the Plaintiff in this matter, was that he realized that Kanawha Stone wanted to cross his property and he did not want to let them do so until they agreed to compensate him for the use of it. It is totally unfair to define him as opportunistic. The equity of the situation clearly shows that the Petitioner in this matter was the one that simply forced its way over the Respondent's property despite his efforts to prevent them from doing so.

In this case, the Petitioner was clearly unjustly enriched by using the property of the Respondent. It allowed the Petitioner to avoid a long coal haul with the costs associated therewith. This naturally increased its profits at the expense of the Respondent. While the rule previously was that one could not sue for contract violation under the theory of trespass, this has been made subject to numerous exceptions. As stated in the case of Edwards v. Lee's Adm'r., 96 S.W. 2d 1028 (Ky. 1936), unjust enrichment of a wrong doer is the gist of the right to bring an action "ex contracta". That case involved a cave, which was visited by tourists. The opening to the cave was on the Petitioner's property while part of the cave went under the property of the Respondent. The Court determined that the Petitioner had been unjustly enriched by allowing the tourists not only to view his portion of the cave but also the portion of the cave under the Respondent's property.

While those facts are somewhat dissimilar to the case before the bar, the issues are similar. In this case, the Petitioner has been unjustly enriched by using the property of the Respondent. In doing so, an implied contract should be placed upon the Petitioner whereby it would have to pay what it would otherwise have been required to contract to pay. Certainly, had it approached the Respondent to haul coal over the Respondent's property the normal discussion, negotiation, and agreement would have envisioned a reasonable wheelage payment.

B. Mesne Profits

As stated in the case of Dumas v. Ropp, 558 P.2d 632 (Idaho 1977), "Mesne Profits is most often defined as the value of the use or occupation of the land during the time it was held by one in wrongful possession and is commonly measured in terms of

rents and profits.” As to the damages recoverable, “Mesne Profits are ‘ a sum recovered for the value or benefit which a person in wrongful possession has derived from his wrongful occupation of land between the time when he acquired wrongful possession and the time when possession was taken from him’”, Martin v. Smith, 7 N.W.2d 481 (Minn. 1942).

Further, “the worth of the use of the property while a trespass is continuing is the measure of Mesne Profits recoverable as damages which may be shown by the reasonable rental value, “87 C.J.S., Trespass § 153. Clearly the sum which should be recovered from the Petitioner while it took wrongful possession of the Respondent’s property would be the amount that it would have derived from the wrongful occupation. The amount that it would have derived would have been the amount of wheelage that it would have otherwise had to have paid had it bargained in good faith with the Respondent or with some other adjoining landowner. In this case, the facts are such that the Petitioner had a choice of transporting the coal over property that it had a right-of-way to do so but would have required it to drive from the Stollings area up the river several miles to the bridge on Three-Mile Curve and then back down the river or to simply use a shortcut and come across the property owned by the Respondent without his permission. It chose to violate the ownership of the property of the Respondent in order to save this additional trucking costs. Therefore it certainly derived the value of what it would have had to paid in a fair wheelage. In addition, the wheelage is in a sense a form of a rental value and a reasonable rental value would have been a reasonable wheelage to be paid.

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 fall within the purview of a continuing trespass.**

It is interesting that Petitioner states under 87C. J. S. Trespass § 152, that the measure of damages for an appropriation of the use of the land by continuing trespass as a cost of repair but neglects to include the rest of that sections which states, "for the worth of the use of the property not the difference between the value of the land with and without the structure". That is the key to this issue, the measure of damages should be the worth of the use of the property. Clearly, the worth of the use of the property in this case would be what a coal company or other company transporting coal would normally have to pay for wheelage over an adjoining land owner.

Petitioner fails to understand that the term *continued trespass* does not mean a trespass which has not ended. Obviously, the Court at some point in time could have stopped this trespass or as in the facts of this case, the continuing trespass could have ended because the Petitioner no longer needed to use the property of the Respondent. What is clear, is that 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 for its use to the use of the trespasser." That is exactly what has happened in this case, the Petitioner appropriated or attempted to appropriate the land of the Respondent for the use by the Petitioner, which was clearly a trespass. It was also a continuous trespass or series of trespasses.

IV. CONCLUSION

WHEREFORE, the Respondent, Robert D. Fortner, II, by counsel, respectfully

prays that this Court reverse the decision reached by the Circuit Court of Logan County.



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CERTIFICATE OF SERVICE

I, Bernard L. Spaulding, Counsel for Plaintiff/Respondent, do hereby certify that I served the foregoing **Respondent' Reply Brief** upon Mary H. Sanders, counsel for Defendant/Petitioner this the 29 day of November, 2004, by mailing a true and exact copy thereof via United State mail, postage prepaid, as addressed below:

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