

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON

VERNON ELLIS, et al., : Docket No. CV 99-242
:
Plaintiffs, :
:
versus :
:
GALLATI N STEEL COMPANY, :
:
Defendant. :

LAVERNE BRASHEAR, : Docket No. CV 00-263
:
Plaintiffs, :
:
versus :
:
HARSCO CORPORATION, :
:
Defendant. :

TRANSCRIPT OF COURT'S RULING
BEFORE JUDGE WILLIAM O. BERTELSMAN

APPEARANCES:

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25 Proceedings recorded by mechanical stenography, transcribed via
computer-aided transcription.

1 (Proceedings commenced at 3:00 p.m.)

2 THE CLERK: Covington Civil 99-242, Vernon Ellis, et
3 al., versus Gallatin Steel; and Covington Civil 00-263, Laverne
4 Brashear versus Harsco.

5 THE COURT: Good afternoon, ladies and gentlemen. As
6 advertised, we're here for me to render an oral decision in this
7 case. This is an unusually complicated case, so what I'm going
8 to do is deliver a decision in about the degree of specificity
9 of a jury special verdict. And we will, drawing on your very
10 thorough proposed findings of fact and conclusions of law from
11 each side, we'll plug in -- we'll come out with some written
12 findings to satisfy Civil Rule 52, which requires the Court to
13 make written findings of fact and conclusions of law. So this
14 opinion's going to be in a highly summary manner, but you will
15 see what the bottom line is going to be.

16 All right. I'll take the issues up one at a
17 time. There's a standing issue that's been raised that some of
18 the plaintiffs, at least during most of the time in evidence,
19 did not have an ownership interest. I don't think that's
20 sufficient. I think all of the plaintiffs had --

21 Is this on? Can you hear me?

22 (Parties acknowledged affirmatively).

23 THE COURT: I think all of the plaintiffs had a
24 sufficient possessory interest and standing to sue, and that's
25 all that's required.

1 Turning to the other various issues on the
 2 merits, the nuisance issues, speaking of common law nuisance on
 3 the dust, I won't try to summarize all the evidence or anything.
 4 You all know what the evidence is.

5 I think the evidence is uncontrovertible that
 6 there was an extreme nuisance by reason of dust as described
 7 from the evidence existing from I think about 1995. Once there
 8 was the implementation of the containment facilities that have
 9 been described, this was greatly ameliorated, but it still
 10 exists to some extent today, as has been described in the
 11 evidence. Still experiencing problems with dust in that area,
 12 although greatly reduced, but I still think this thing is about
 13 to constitute a common law nuisance and also a violation of the
 14 Clean Air Act.

15 And we had some evidence about explosions, not
 16 explosions from blasting or anything like that, but the type of
 17 explosion that occurs when the molten slag encounters standing
 18 water or even sometimes moist earth, I gather. These are caused
 19 in various amounts at various times. And, again, they were much
 20 worse back before the corrective measures were implemented, but
 21 they're still going on. Indeed, it was said that they were
 22 unavoidable was the testimony of the defendants' own supervisor,
 23 or foreman, or superintendent, whatever he was. And he says
 24 their position is, it's unavoidable, and the plaintiffs pretty
 25 much ought to put up with it, which presents a problem how to

1 deal with that.

2 CERCLA issue's an intriguing theory, but I don't
3 think this is an appropriate CERCLA case. The only claim made
4 was for monitoring, and I think this was -- the Court finds this
5 was primarily for litigation purposes. There's no clean-up
6 costs on the plaintiffs' own property that's contemplated. I
7 don't think it is a proper CERCLA case. It's a pollution case
8 and so the CERCLA count will be dismissed.

9 Turning, then, to damages, and other relief... I
10 got my pages out of order.

11 Okay. Turning to the relief, injunctive relief.
12 The Court is aware of the Consent Decrees that have been entered
13 herein, but the Court finds that enforcement by the EPA due to
14 budgetary constraints and limitations of time and personnel must
15 of necessity be inadequate.

16 The Court concludes that there are continuing
17 violations following the entry of the consent decree and that
18 private injunctive relief is appropriate due to the following
19 cases cited in the plaintiffs' post or earlier brief.

20 The Court has broad discretion concerning the
21 form this relief will take. Indeed, it is ancient legal lore
22 that the hallmark of equity is the flexibility of the decree in
23 order to assure adequate relief; therefore, the Court will enter
24 the injunction as requested by the plaintiffs, with one
25 exception:

1 The plaintiffs have requested that video
2 monitoring be set up by the defendants. The Court declines to
3 grant this relief because of the difficulties of enforcement. I
4 could anticipate if I ordered them to set up video monitoring,
5 there would be disputes whether they should have a camera from
6 RadioShack or a better camera somewhere else, and where it's
7 going to be and all that. That doesn't mean we're not going to
8 monitor it, though.

9 Rather, the Court will follow a technique I have
10 used in other cases and will appoint an expert, pursuant to
11 Federal Rules of Evidence 706, or a special master, whatever
12 seems appropriate, to monitor compliance with the injunction.

13 In Frankfort, years ago, we had a similar
14 situation where, in the prison systems, in state buildings,
15 there was asbestos which had been torn out improperly and there
16 was contamination that nobody knew much of, so we appointed a
17 monitor to monitor the prison. They went in there with air
18 collectors and devices of that sort and they reported to the
19 Court. They're appointed by the Court. They report to the
20 Court. Obviously, the Court hasn't got the resources to pay
21 them and the plaintiffs don't have the resources to pay them, so
22 Harsco will pay them. Should be able to deal expeditiously with
23 the issue of whether and to what extent any additional air
24 pollution is occurring. They can also monitor the explosions;
25 and we have to have a look at how those explosions could be

1 ameliorated and how we can do that.

2 All right. I'd like the parties to attempt to
3 agree on a firm to be appointed by the Court -- they'll be
4 appointed by the Court -- to report to the Court. Each party
5 will get a copy of the report. If they cannot agree, each party
6 shall make three nominations by October 20th, and the Court will
7 appoint someone from that list or seek a firm of its own choice
8 to do this monitoring. Again, the monitor will be appointed by
9 the Court and will report to the Court.

10 All of this will be put into a final, permanent
11 injunction which will be entered pursuant to both the common law
12 and Clean Air Act claims.

13 The explosions. They present a difficult
14 problem. Plaintiff argued at the last minute that they were a
15 permanent nuisance; and I think the defendant makes a good point
16 that it was too late for them to have an opportunity to respond
17 to it, at least as far as Mrs. Brashear's concerned; however, I
18 think the testimony of Mr. Schoepf did make clear that the
19 market value had not been diminished, or the Ellis property,
20 because its highest and best use is industrial. A few
21 explosions or a little less would not bother somebody to use it
22 for industrial purposes.

23 As far as the dust is concerned, all the parties
24 seem to agree that the dust constituted a temporary nuisance to
25 a greater extent before the facility was -- the protected

1 quality was introduced. The measure of damages for a temporary
2 nuisance is the diminution of the value of the use of the
3 property -- somebody's living on the property -- or the rental
4 value if it's not occupied by the owners.

5 Here, there was testimony as to the rental value
6 of people's interest in it, which I won't recite all the
7 figures, but the Court feels that this value was diminished, up
8 to the point that the remedial measures were introduced, by 50%
9 and 10% thereafter. And we'll go to the evidence and figure out
10 the exact figures.

11 This amount will be calculated and included in
12 the written findings and will be apportioned, as the statute
13 requires, 80% against Harsco and 20% against Gallatin.

14 Okay. Punitive damages. Although the defendants
15 now come before the Court and say that they've acted in the
16 utmost good faith to abate the nuisance, once they were aware of
17 it, the record does not bear them out.

18 Reviewing the record, it reflects that the
19 defendants followed a scorched-earth defense policy, contested
20 every procedural and substantive point. Although the evidence
21 here shows they well knew that they had a nuisance on their
22 hands, they caused the plaintiffs and taxpayers needless expense
23 by raising all sorts of legal obfuscation, made denials that any
24 nuisance existed or that the plaintiffs were affected by the
25 nuisance, raised procedural objections that caused the plaintiff

1 to have to file three or four different lawsuits; and,
 2 basically, the defendant defended every inch of turf to the
 3 death. And the Court finds that they did not act in good faith.
 4 Until forced to do so, they didn't make any effort to deal with
 5 this nuisance. They're still doing as little as they think they
 6 can get away with, and the Court finds that this applies only up
 7 to the implementation of the remedial measures. They have taken
 8 some effort since then but they're still doing as little as they
 9 think they can, but they are doing something. So at least up to
 10 that time, they have acted willfully, wantonly and oppressively
 11 under the Kentucky statute.

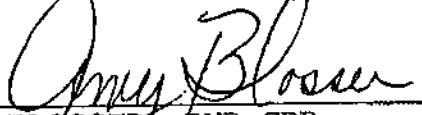
12 By reason of the same, the plaintiffs are
 13 entitled to punitive damages in the sum of \$750,000. This shall
 14 be awarded 80% against Harsco, 20% against Gallatin.

15 That's it. You'll be getting our written
 16 findings as soon as we can get them out. Get those nominations
 17 in. We'll be in recess.

18 (Proceedings adjourned at 3:10 p.m.)

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 21 C E R T I F I C A T E

22 I, AMY J. BLOSSER, RMR-CRR, certify that the
 23 foregoing is a correct transcript from the record of proceedings
 in the above-entitled case.

24 
 25 AMY J. BLOSSER, RMR-CRR
 Official Court Reporter


Date of Certification