STATE OF VERMONT RUTLAND COUNTY, SS	RUTLAND SUPERIOR COURT CIVIL ACTION DOCKET NO. S0562-97RCC
[redacted] PLAINTIFFS, V. DAVID C. CAMARA, JR. & SHAWN E. CAMARA, VERMONT UNFADING GREEN SLATE COMPANY, INC., U.S. QUARRIED SLATE PRODUCTS, INC., SCOTCH HILL LEASING CORPORATION, J & G HADEKA SLATE FLOORING, INC. DEFENDANTS.	

PLAINTIFFS' TRIAL MEMORANDUM

NOW COME the Plaintiffs, [redacted], by and through their attorneys. Langrock, Sperry & Wool, LLP, and submit the following Trial Memorandum in connection with the above captioned matter.

This action is brought by sixteen homeowners who reside in Castleton and Poultney, Vermont. Their third amended complaint, dated February 20, 1998, alleges that several slate quarry operators in the vicinity of their homes have operated their quarries in such a way as to interfere with Plaintiffs' use, enjoyment and value of their properties.[1] At the trial in this matter,

[1] Since the filing of the amended complaint, Plaintiffs [redacted], and Defendants Tatko Bros. Slate Quarry, Inc., and Sheldon Slate Products Co., Inc., were dismissed. In addition, in January 2000, Plaintiffs settled their claims against J & G Hadeka Slate Flooring, Inc., which operates a more geographically distant quarry than those of the remaining

Plaintiffs will be proceeding against the two remaining Defendant quarries, one owned and/or operated by David C. Camara, Jr., and Shawn E. Camara, Vermont Unfading Green Slate Company, Inc., and Stratified Stone & Slate Co., Inc.,[2] collectively referred to as the "Camaras Defendants," for their quarry operations located on the Rice Willis Road in Blissville, and one owned by U. S. Quarried Slate Products, Inc., and Scotch Hill Leasing Corporation, collectively referred to as "Defendant U.S. Slate," for its quarry operations located on Blissville Road.[3] Plaintiffs' complaint sound in private nuisance, with underlying claims of negligence and strict liability. See Argument, infra, pp. 10-21. In addition, [redacted] have claims of trespass against the Camara Defendants for depositing slate waste and slag, and building roads, on their property. [4]

I. STATEMENT OF FACTS

A. Plaintiffs' Complaints

The area in which Plaintiffs reside, and Defendants operate, has historically been dotted with slate quarries. Although many of the Plaintiffs grew up in the Poultney/Castleton area, and thus were familiar with slate quarrying, none of them had been bothered by blasting noise or vibrations from slate quarry operations in the past. Indeed, the Plaintiffs had been residing in

---

Defendants, upon their payment of damages and their agreement to modify their practices to minimize the off-site impacts of their blasting.

[2] On August ___, 2000, Plaintiffs filed their Fourth Amended Complaint, seeking to add a third Camara corporation, Stratified Stone & Slate Co., Inc., and to clarify the [redacted] trespass claim.

[3] A map of the area, identifying the location of the Plaintiffs' residences, and the location of the Defendants' quarries, is attached hereto as Exhibit 1.

[4] On October 29, 1999, in ruling upon Defendant U.S. Slate's first motion for summary judgment, this Court dismissed the trespass claims of all Plaintiffs, preserving only the [redacted] trespass claim against the Camara Defendants. The Court also dismissed the negligence and strict liability claims of the [redacted], on the grounds that they were the only Plaintiffs who had not yet suffered damage to their water supplies.

their current homes, some for more than a decade, and had been happily coexisting with the slate quarry industry for years before they experienced any nuisance impacts from Defendants' slate quarrying operations.

However, in 1996 the noise and vibrations from blasting and heavy equipment at Defendants' quarries increased dramatically, reaching levels which interfered unreasonably with the Plaintiffs' use and enjoyment of their properties. The Plaintiffs began experiencing loud and violent blasts at their properties, including early in the mornings, into the evenings, and on weekends, on a regular basis; their houses would shake and pictures would shift on the walls, knickknacks would move or fall from shelves, and the floors would vibrate. They became aware of heavy equipment noise on an ongoing basis, early in the mornings and into the evenings and on weekends. Some Plaintiffs noticed a dramatic increase in the number, location and size of slate rubbish and debris in the landscape surrounding their properties, which adversely affected their views. And several Plaintiffs experienced adverse changes in their water supplies, including problems with sediment, and water quantity.

In summary, Plaintiffs found themselves living in a changed neighborhood, and were no longer able peacefully to co-exist with their quarry neighbors. At the same time that Plaintiffs were experiencing such dramatic changes at their properties, significant changes were occurring in the operations of the U.S. Slate and Camara quarries.

B. Defendants' Conduct

In 1992, U. S. Slate purchased 136 acres of land in Poultney, Vermont, known as the Eagle Quarry property, and has operated quarries there since that time. When U. S. Slate's operations began causing off-site impacts in 1992, adjoining property owners challenged U.S. Slate's right to operate without a valid Act 250 permit. U.S. Slate spent the next two years

fighting the jurisdiction of Act 250 to govern or limit its operations, arguing that since the quarry had operated decades earlier under prior ownership, its reopening under new ownership, utilizing significantly different blasting and mining technology, should not trigger the oversight of the Act.

Nevertheless, in July of 1993 the Environmental Board ruled that U. S. Slate was subject to Act 250 and could not continue to operate without a permit. In August of 1993, U. S. Slate sought permission to continue operations at the Eagle Quarry property pending issuance of an Act 250 permit. U. S. Slate actively quarried the Eagle Quarry property during 1992 and 1993, and represented to the Environmental Board that it intended to continue active work there as an economic necessity.

In October of 1993, the Environmental Board ruled that U. S. Slate could continue operations on its site pending issuance of an Act 250 permit, so long as it met certain limits on its quarrying activities during this period. U. S. Slate received a permit on December 28, 1993, although it was subsequently amended and issued in final form on February 7, 1994.

The permit contained significant limitations on the quarry's operations, all designed to protect the environment and to minimize the impacts of its blasting and mining activities on the neighboring residences. These included, *inter alia*, limitations on the numbers of blasts it could detonate and the total blast weight of explosives, and blast weight per delay to be used;[5] the requirement that it maintain detailed logs of all its blasting activities, notify certain neighbors in

[5] When a group of holes are drilled and loaded with explosives, the holes are often connected to "delays" in order to control the blast and move the rock in the desired way. Delays are measured in milliseconds, and are frequently sold in increments of 25 milliseconds. For example, on a blast where one subset of holes is connected to a 25 ms. delay and the other subset of holes is connected to a 50 ms. delay, the holes connected to the 25 ms. delay detonate 25 milliseconds after the detonation impulse is received, while the second group of holes will detonate 50 milliseconds after the detonation impulse is received, or 25 milliseconds after the first set of holes explodes.

advance of all blasts, and preserve wetlands and historic archeological ruins on site, and limitations on its hours of operation and the number and routes of trucks entering and leaving its property.

After losing its Act 250 battle, U. S. Slate and other slate quarry operators commenced a lobbying effort with the Vermont Legislature, which resulted first in the passage of Act 232, in June of 1994, and ultimately of Act 30, in April of 1995. Act 30 significantly amended Act 250, and effectively exempted slate quarries from Act 250 jurisdiction.[6] Among other things, Act 30 established a "slate quarry registration program," whereby quarries which properly registered were deemed to be "active" (and not "abandoned"), and were therefore exempt from Act 250 for enumerated "ancillary activities" of slate quarrying. The Act further provided that the amendments were retroactive to June 1, 1970, and that, upon proper registration, any preexisting Act 250 permits were subject to a finding of lack of jurisdiction under the Act. Act 30, ' 4. On this basis, on April 17, 1996, U. S. Slate received a jurisdictional opinion from the District Environmental Commission #1, confirming that five quarry holes located on the Eagle Quarry property were properly registered, and therefore exempt from Act 250.

The Camara family, in turn, had been quarrying slate on its Blissville property since 1986. At that time the quarrying activities were conducted primarily by David Camara, Sr., and his brother-in-law Victor Genier, Shawn and David, Jr.'s father and uncle. Their quarrying operations were limited to the northern quarry (the so-called "Vermont Unfading Green Slate" quarry), and involved relatively small blasts. Although these operations generated some neighbor complaints early on, David Camara, Sr. and Vic Genier modified their blasting and mining practices somewhat and thereby reduced off-site impacts.

---

[6] Act 30 added subsections (j) through (l) to 10 V.S.A. ' 6081("Permits required; exemptions").

By the early 1990's, however, Shawn Camara and David Camara, Jr., were actively participating in the quarrying operations. In 1993, Shawn and David, Jr., purchased the adjacent quarry property to the south of the Vermont Unfading Green Slate pit (known as the "Blue Slate" quarry), and gradually took over the operations in the northern quarry, as well. However, it was not until late 1995 or 1996 that they began actively to quarry in the southern Blue Slate pit, starting first by building roads into and around the southern quarry.[7] In October 1996, the Camaras registered their _____ pits in the Vermont Unfading Green Slate pit and the Blue Slate pit, for the purposes of Act 250 exemption. Since then, the Blue Slate quarry has been the site of the Camaras' primary quarrying activities, and over time the size of their blasts has increased. It is from this southern quarry site, with its relatively deep southern and western working faces, that the Plaintiffs' complaints of noise and vibration have been generated.

As the foregoing makes clear, by 1996 U.S. Slate and the Camara Defendants, and all other quarries who properly registered under Act 30, were free to operate outside the confines of Act 250, without any of the regulatory limitations previously imposed by that Act (regulatory limitations which are, in fact, imposed upon all other quarrying operations in the State of Vermont). It was at this time that the Plaintiffs began to see dramatic changes in the nature and extent of the blasting activities at the Eagle Quarry property and the Camara quarries. They soon found themselves unable to use and enjoy their properties in an undisturbed manner. When the situation did not improve, despite complaints to various governmental entities, and to the quarries themselves, in October of 1997 the Plaintiffs filed the instant lawsuit.

Plaintiffs' experts have testified, during discovery, to the many ways in which Defendants' failure to use reasonable and prudent mining practices has caused unreasonable

---

[7] It was at this time that they began actively trespassing upon the [redacted] property.

offsite impacts upon the Plaintiffs' properties. These unreasonable practices, which include, inter alia, use of uncovered detonation cord, excessive blast weight of explosives per delay, poor blast design, uneven spacing between boreholes, inadequate or excessive overburden, and insufficient attention to geological features of the slate, all result in "unconfined" blasts which, in turn, result in excessive noise and vibrations on Plaintiffs' properties. Moreover, Defendants have failed to take even the most rudimentary steps to establish good relations with their residential neighbors, such as employing preblast surveys, notifying neighbors prior to blasting, blasting only during reasonable working hours, and enacting an effective complaint process for reporting offsite impacts when they do occur.

Moreover, U.S. Slate has *never* kept any records of its blasting and mining operations, even during the approximately two year period it was expressly required to do so under the terms of its Act 250 permit. Notwithstanding the commencement of this lawsuit, U.S. Slate has steadfastly refused to keep any records of the date, size, or location of its blasts, nor of the types or amounts of explosives used in such blasts. Indeed, U. S. Slate has identified only four specific blasts as having taken place at U.S. Slate's quarries since 1996, on May 12, 1998, November 30, 1998, December 4, 1998, and December 17, 1999, although they acknowledge that many other blasts have occurred. Not surprisingly, U.S. Slate's principals and employees have been unable to recall the specifics of any other blasts, asserting simply that their blasts have never exceeded reasonable bounds and cause no off-site impacts. Importantly, Defendant U.S. Slate has refused to provide Plaintiffs with *any* information regarding the levels of slate production undertaken at their quarry during the relevant time period.

Although the Camara Defendants claim there has been no change in the level of their operations coincident with the time the Plaintiffs began complaining, they have been unable to

produce *any* documentation in support of this contention. Indeed, they did not maintain *any* records of the size, date or location of their blasts, nor of the types or amounts of explosives used in such blasts, prior to the filing of this lawsuit. And the Camara Defendants, as well, have repeatedly refused to provide Plaintiffs with *any* information regarding the levels of slate production undertaken at their quarries.

The testimony of the Plaintiffs, however, as well as the calendar entries kept by some of them, clearly establish that they have experienced unreasonable blast noise and vibrations, as well as other off-site impacts of Defendants' blasting and mining practices, since at least the Summer of 1996, at levels that should not have to be tolerated. Moreover, to the extent the Defendants have kept any records of their blasts, there is a remarkable coincidence between the dates and times of blasts noted on Plaintiffs' calendars, and those blasts to which Defendants have admitted.

Nevertheless, for the most part the Plaintiffs are unable to distinguish the source of the vast majority of the blasts they experience on their properties as between the Camara Defendants or Defendant U.S. Slate's quarries. Neither Plaintiffs, nor their experts, can reasonably allocate the injuries to Plaintiffs as between the conduct of the Camara Defendants and Defendant U.S. Slate, in terms of blast noise and vibrations, or damage to their wells. These injuries, therefore, are legally indivisible, and each Defendant is jointly and severally liable for all resulting harm to Plaintiffs.

Plaintiffs further claim that they have suffered anxiety, annoyance, and discomfort in their use of their homes since the onset of the nuisance. They have also suffered lost use and enjoyment of their properties, and a diminution in their property values.[8] Finally, Plaintiffs are

[8] Several Plaintiffs have successfully grieved their property tax assessments, on the basis

claiming punitive damages as a result of the Defendants' knowing, reckless, and continued disregard for the off-site impacts of their blasting and mining practices.

II. ARGUMENT

A. Private Nuisance

Plaintiffs' complaint sounds in private nuisance, a tort long recognized by the Vermont courts. See e.g., Gifford v. Hulett, 62 Vt. 342, 346-47 (1890)(improperly maintained horsebarn held to be a nuisance). "The essence of a private nuisance is an interference with the use and enjoyment of land. The ownership or rightful possession of land necessarily involves the right not only to the unimpaired condition of the property itself, but also to some reasonable comfort and convenience in its occupation." W. Prosser, Law of Torts ' 87, at 619 (5th ed. 1984) ("Prosser").

As set forth in the Restatement (Second) of Torts, a private nuisance is a "nontrespassory invasion of another's interest in the private use and enjoyment of land." Id. ' 821D. Comment b to ' 821D explores the nature of this invaded interest:

> The phrase "interest in the use and enjoyment of land" is used in this Restatement in a broad sense. It comprehends not only the interests that a person may have in the actual present use of land for residential, agricultural, commercial, industrial and other purposes, but also his interests in having the present use value of the land unimpaired by changes in its physical condition . . .. "Interest and enjoyment" also comprehends the pleasure, comfort and enjoyment that a person normally derives from the occupancy of land. Freedom from discomfort and annoyance while using land is often as important to a person as freedom from physical interruption with his use or from a detrimental change in the physical condition of the land itself.

Id. at 101.

In order to succeed in their claim of private nuisance, Plaintiffs must establish that Defendants' "interference with the use and enjoyment of [Plaintiffs'] property . . . [is] both unreasonable and substantial." Coty v. Ramsey Assoc., Inc., 149 Vt. 451, 457 (1988)(citing

---

that the quarrying activities of Defendants have diminished their property values.

Dunlop v. Daigle, 122 N.H. 295, 298, 444 A.2d 519, 520 (1982)); see also Prosser, supra ' 87, at 619. As Dean Prosser points out, "[t]he interference must be substantial and unreasonable. Substantial simply means a significant harm to the plaintiff and unreasonably means that it would not be reasonable to permit the defendant to cause such an amount of harm intentionally without compensating for it." Posser, supra ' 88, at 626.

Moreover, as Dean Prosser has made clear, a jury can find a nuisance created by any unreasonable and substantial interference with another's interest in land:

> The different ways and combinations of ways in which the interest in the use or enjoyment of land may be invaded are infinitely variable. A private nuisance may consist of an interference with the physical condition of the land itself, as by vibrations or blasting which damages a house, the destruction of crops, flooding, raising the water table, or the pollution of a stream or of an underground water supply. It may consist of a disturbance of the comfort or convenience of the occupant, as by unpleasant odors, smoke or dust or gas, loud noises, excessive light or high temperatures, or even repeated telephone calls; or of his health, as by a pond full of malarial mosquitoes. Likewise, it may disturb merely his peace of mind, as in the case of a bawdy house, the depressing effect of an undertaking establishment, or the unfounded fear of contagion from a tuberculosis hospital. A threat of future injury may be a present menace and interference with enjoyment, as in the case of stored explosives, inflammable buildings or materials, or a vicious dog; and even though no use is being made of the plaintiff's land at the time, the depreciation in the use value of the property because of such conditions or activities is sufficient present damage upon which an action may be based. Many nuisances involve an assortment of interferences: a factory may cause vibration, smoke and dust, loud noises, pollution of a stream, and a fire hazard. So long as the interference is substantial and unreasonable, and such as would be offensive or inconvenient to the normal person, virtually any disturbance of the enjoyment of the property may amount to a nuisance.

Prosser, supra, ' 87, at 619-620 (citations & footnotes omitted). As to whether an interference is substantial:

> The standard for determining whether a particular type of interference is substantial is that of "definite offensiveness, inconvenience or annoyance to the normal person in the community . . .." "Substantial harm is that in excess of the customary interferences a land user suffers in organized society."

Coty v. Ramsey Assoc., Inc., supra, 149 Vt. at 457 (quoting Prosser, supra; and 6-A American Law of Property ' 28.25, at 73 (A.J. Casner ed. 1954)).

Section 822 of the Restatement goes on to outline the elements necessary to prove private nuisance:

> One is subject to liability for a private nuisance if, but only if, his conduct is a legal cause of an invasion of another's interest in the private use and enjoyment of land, and the invasion is either
>
> (a) intentional and unreasonable, or
>
> (b) unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities.

Id. at 108. Thus, Defendants may be liable to Plaintiffs for causing a private nuisance under two distinct nuisance theories: first, that Defendants' conduct was "intentional and unreasonable;" or second, that Defendants' conduct was "unintentional and otherwise actionable," either because it was negligent or abnormally dangerous. Id.

1. Intentional and Unreasonable Conduct

Under the first prong of the nuisance analysis, Plaintiffs must establish that Defendants' conduct was intentional and unreasonable. In order to determine whether Defendants' conduct was intentional, it is important to bear in mind that "intent," as defined in private nuisance actions, has a "broad sweep and expansive meaning." Atlantic Cement Co. v. Fidelity & Cas. Co. of New York, 91 A.D.2d 412, 459 N.Y.S.2d 415, 428 (A.D. 1 Dept. 1983). This point is clarified in ' 825 of the Restatement:

> An invasion of another's interest in the use and enjoyment of land is intentional when the actor (a) acts for the purpose of causing it; or (b) knows that it is resulting or is substantially certain to result from his conduct.

Restatement (Second) of Torts, supra ' 825 (quoted in Copart Industries, Inc. v. Consol, Ed. Co. of New York, Inc., 41 N.Y.2d 564, 571, 394 N.Y.S.2d 169, 174, 362 N.E.2d 968 (1977)). See also 1 Rodgers, Environmental Law: Air and Water ' 2.4, at 45 and n. 23 (1986)("Virtually all other continuously or intermittently polluting activities . . . can be described — and fairly so —

as intentionally tortious conduct, not in the sense of having a design to bring about the forbidden result but in the sense of having knowledge that the effects are substantially certain to follow.").

As Dean Prosser has pointed out, the intent element in nuisance is most often met "where the invasion is intentional merely in the sense that the defendant has created or continued the condition causing the interference with full knowledge that the harm to the plaintiff's interests are occurring or are substantially certain to occur." Prosser, supra ' 87, at 624-25. He goes on:

> It is apparent from what has been said hereafter that the conduct may often result in substantial interference, as when a cement factory locates next to a small farmer, without such conduct being unreasonable, and even when defendant is exercising utmost care while utilizing all the technical know-how available. It has often been observed that liability, if imposed in such a case, is liability without fault. But this is a mistake. The harm is intentional. Private property cannot be physically harmed or its value impaired in this way, however socially desirable the conduct, without payment being made for the harm done, if the interference that is the consequence of the activity is substantial and considered to be unreasonable. This, of course, does not mean that the activity will be enjoined. When the defendant engages in an activity with knowledge that this activity is interfering with the plaintiff in the use and enjoyment of his property, and the interference is substantial and unreasonable in extent, the defendant is liable, and the monetary recovery is simply a cost of engaging in the kind of activity in which the defendant is engaged.

Id. at 625 (citations and footnotes omitted).

The Restatement defines the unreasonableness of a defendant's intentional invasion as follows:

> An intentional invasion of another's interest in the use and enjoyment of land is unreasonable if
>
> (a) the gravity of the harm outweighs the utility of the actor's conduct, or
>
> (b) the harm caused by the conduct is serious and the financial burden of compensating for this and similar harm to others would not make the continuation of the conduct not feasible.

Restatement (Second) of Torts, supra ' 826. "Fundamentally, the unreasonableness of intentional conduct is to be determined by the trier of fact in each case in the light of all the circumstances of that case." Id. ' 826, comment b, at 120.

The factors to be considered and balanced by the fact finder in undertaking such analysis are also set forth in the Restatement:

> In determining the gravity of the harm from an intentional invasion of another's interest in the use and enjoyment of land, the following factors are important:
>
> (a) the extent of the harm involved;
> (b) the character of the harm involved;
> (c) the social value that the law attaches to the type of use or enjoyment invaded;
> (d) the suitability of the particular use or enjoyment invaded to the character of the locality; and
> (e) the burden on the person harmed of avoiding the harm.

Id. ' 827.

Defendants may argue that their conduct is socially useful. However, while our commercial society may well need products such as quarried slate, Defendants' quarrying operations must be carried out in a manner that allows them to co-exist peacefully with their residential neighbors.

> Confusion has resulted from the fact that the intentional interference with the plaintiff's use of his property can be unreasonable even when the defendant's conduct is reasonable. This is simply because a reasonable person could conclude that the plaintiff's loss resulting from the intentional interference ought to be allocated to the defendant. The ultimate decision as to the unreasonableness of the interference is for the jury in a suit for damages, except when the circumstances are such as to indicate no basis for a reasonable difference of opinion. Courts have often found the existence of a nuisance on the basis of unreasonable use when what was meant was that the interference was unreasonable, i.e., it was unreasonable for the defendant to act as he did without paying for the harm that was knowingly inflicted on the plaintiff. Thus, an industrial enterpriser who properly locates a cement plant or a coal-burning electric generator, who exercises utmost care in the utilization of known scientific techniques for minimizing the harm from the emission of noxious smoke, dust and gas and who is serving society well by engaging in the activity may yet be required to pay for the inevitable harm caused to neighbors. This is simply a decision that the harm thus intentionally inflicted should be regarded as a cost of doing the kind of business in which the defendant is engaged.

Prosser, supra ' 88, at 629.

2. Unintentional and Otherwise Actionable Conduct.

Should the jury conclude that Defendants' conduct was unintentional, or was not unreasonable under all the circumstances, there is also sufficient evidence from which they could

find it to be otherwise actionable, either because such conduct was negligent or because Defendants are strictly liable for damages resulting from an abnormally dangerous activity. Restatement (Second) of Torts, supra ' 822(b).

According to Plaintiffs' experts, Defendants have failed to employ reasonably prudent blasting and mining practices, which has resulted in the off-site impacts complained of by Plaintiffs. Thus, Defendants' conduct has fallen "below the standard established by law for the protection of others against unreasonable risk of harm." Restatement (Second) of Torts, supra ' 282, at 9. Stated differently, Defendants are responsible for those injuries caused to others by the want of reasonable skill and care in the management of their property. Smyth v. Twin State Improve. Corp., 116 Vt. 569, 570-71 (1951); Sprecher v. Adamson Co., 636 P.2d 1121, 1123 (Cal. 1981).

Nor can Defendants argue that their conduct is reasonable simply because other slate quarry operators may conduct their operations in a similar manner. "It is basic that since an entire industry can adopt careless methods to save time, effort or money, it cannot therefore be permitted to set its own, possibly negligent, standard of care. This is true even though an entire industry follows particular standards or procedures." 57A Am.Jur. 2d, Negligence ' 179, at 233 (1989). As Judge Learned Hand stated:

> Indeed in most cases reasonable precedence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices. It never may set its own tests, however persuasive its usages. Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission.

The T.J. Hooper, 60 F.2d 737, ____ (2d Cir. 19__), cert. den. 287 U.S. 662, 77 L.Ed. 571, 53 S.Ct. 220 (19__). See also Tug Ocean Prince, Inc. v. U.S., 584 F.2d 1151 (2d Cir. 19__), cert den 440 U.S. 959, 59 L.Ed.2d 772, 99 S.Ct. 1499 (19__); Hogge v. SS. Yorkman, 434 F.Supp. 715 (D.C. Md. 19__); Edgewater Molds, Inc. v. Gatzke, 277 N.W.2d 11 (Minn. 19__).

Moreover, where, as here, Defendants have special expertise in the activities they conduct, or where they have access to information not available to the general public, they may be expected to exercise a higher degree of care in the management of their business than the ordinary person. Restatement (Second) of Torts, supra ' 289(b), at 41, and ' 299A, at 73.

> Professional persons in general, and those who undertake any work calling for special skill, are required not only to exercise reasonable care in what they do, but also to possess a standard minimum of special knowledge and ability.

W. Prosser, supra ' 32, at 185-86. See also Borel v. Fibreboard Paper Products Corp., 493 F.2d 1076, 1089-90 (5th Cir. 1973)(asbestos manufacturer).

Thus, should the jury determine that Defendants' conduct was unintentional, there is ample evidence from which they could find Defendants' conduct to be negligent, and on that basis determine that Defendants' interference constituted a private nuisance as to Plaintiffs. Alternatively, should it be determined that the harm which occurred here could not have been prevented despite the exercise of reasonable care, then Defendants' conduct constitutes a private nuisance under the doctrine of strict liability. Restatement (Second) of Torts, supra ' 822(b).

Imposing strict liability for ultrahazardous and abnormally dangerous activities grows out of the famous English case of Rylands v. Fletcher, LR 3 HL 338 (1868):

> The person who for his own purpose brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and if he does not do so is prima facie answerable for all the damage which is the natural consequence of its escape.

Id. See also Prosser, supra ' 78. Section 519 of the Restatement (Second) of Torts imposes strict liability if the harm that occurs is of the type that makes the activity abnormally dangerous, even though the defendant "has exercised the utmost care to prevent the harm." Id. Section 520 identifies the following factors to be considered in determining whether an activity is abnormally dangerous:

(a) existence of a high degree of risk of some harm to the person, land or chattels of others;
(b) likelihood that the harm that results from it will be great;
(c) inability to eliminate the risk by the exercise of reasonable care;
(d) extent to which the activity is not a matter of common usage;
(e) inappropriateness of the activity to the place where it is carried on; and
(f) extent to which its value to the community is outweighed by its dangerous attributes.

Id. The Restatement also makes clear that it is for the court to determine whether Defendants' activities on their sites are abnormally dangerous, such as to warrant the imposition of strict liability. Id. Comment 1, at 42-43.

One of the earliest cases in Vermont regarding strict liability involved explosives and blasting. Thompson v. Green Mountain Power, 120 Vt. 478, 144 A.2d 786 (1958). In Thompson, the Court affirmed a jury verdict in favor of a farmer whose chickens suffered damage from fright after the defendant exploded dynamite a short distance from the farmer's property. The Court noted that the "law preserves dynamite in the category of highly dangerous agencies and demands of its use the highest degree of care and caution." Id. at 478 (citing Tinney v. Crosby, 112 Vt. 95, 104, 22 A.2d 145 (1941)).

The Court went on to state that "those who deal with a deadly agency should be held accountable to all whose likelihood of injury could reasonably be foreseen, even unto trespassers." Id. at 482-83 (citing Humphrey v. Twin State Gas & Electric Co., 100 Vt. 414, 422, 139 A. 440 (1927)). The Court then acknowledged that "[f]oresight of harm lies at the foundation of negligence. Knowledge of danger on the part of the actor is vital to the creation of the duty to exercise care in any given situation where injury to the person or property of others is at state." Id. at 483. However, the Court noted, "[k]nowledge essential to the invocation of legal duty need not be actual; it may be implied, imputed and constructed from the circumstances." Id. (citing Humphrey, supra, among others).

The Thompson Court continued:

Blasting is ultrahazardous because it requires the use of high explosives. It is impossible to predict with certainty the effect of its consequences. Restatement, Torts, '502, Comment c. The defendant, about to release an explosive force, whose pattern of destruction could not be accurately foretold, was under the duty to investigate adjacent property where the force might be spent. A survey of the area within range of the blast presented the dwelling and outbuildings at a distance of less than a hundred paces from the excavation site. There was ample time for inquiry and investigation, for the timing was under the control of the defendant. The explosion itself was not accidental; only the final result was unforeseen. In this situation the range of vision and apprehension to the prudent eye is substantially enlarged from the predicament where an instrument, outwardly innocent and harmless, exploded without warning.

Id. at 483-84 (citing Palsgraf v. Long Island Railroad Co., 248 N.Y. 339, 162 N. E. 99 (1928)).

And in the case of Malloy v. Lane Const. Corp, 123 Vt. 500, 501-03 (1963), the Vermont Supreme Court recognized that harm resulting from blasting is compensable even in the absence of negligence.

[I]n cases involving the use of explosives, there has been applied an approach referred to as strict or absolute liability. Negligence need not be demonstrated, but only the use of explosives and resulting damage. The foreseeability of the resulting harm does not condemn the activity as negligence in spite of careful conduct, in those cases where the possibility of harm cannot be avoided short of discontinuing the socially necessary and desirable activity. But if damage occurs, even in the presence of careful conduct, within the range of foreseeable harm, and of a kind within the class of risk which makes the operation extra hazardous, liability attaches.

Id. at 503.

Plaintiffs maintain that Defendants' conduct constitutes a private nuisance, resulting from Defendants' intentional and unreasonable invasion of their property rights. Alternatively, Plaintiffs' injuries resulted from Defendants' unintentional invasion of their property rights, arising out of Defendants' conduct which was negligent, or which necessarily involved risks which could not have been eliminated by the exercise of reasonable care. Any of the foregoing alternatives provides Plaintiffs with a right to recover in private nuisance.

B. Proximate Cause and Apportionment of Harm

Plaintiffs' contend with respect to both their nuisance and damage to water supply claims that the wrongful conduct of both the Camara and U.S. Slate Defendants was and is a substantial contributing factor to the harms they have suffered; therefore, both the Camara and U.S. Slate Defendants have proximately caused Plaintiffs' harms. It is well settled that where two or more independent causal forces combine to visit an injury on a claimant, the claimant is not required to prove the amount of damage that each actor has caused, regardless of whether each actor is a party to the suit. Rather, the plaintiff satisfies the burden of proof by a showing that each tortfeasor before the court played a substantial role in causing the harm. See Restatement (Second) of Torts " 431 and 433B(1). In Phillips Petroleum Co. v. Vandergriff, 122 P.2d 1020 (Okla. 1942), a case involving noise and vibration allegedly caused by defendant's gas boosting station, defendant was held jointly and severally liable for vibrations to plaintiff's home, despite contribution from other non-party sources not acting in concert with defendant. The Court stated:

> Where, although concert is lacking, the separate and independent acts or negligence of several combine to produce directly a single injury, each is responsible for the entire result, even though his act or neglect alone might not have caused it.

Id. at 1023.

The inquiry necessarily then turns to whether or not the harm suffered by Defendants is capable of apportionment. The determination of whether apportionment is appropriate is the Court's responsibility; it is not an issue left for the jury. See Restatement (Second) of Torts ' 434(1)(b). Again, it is well settled that there exist two classifications of claims for which the harm is subject to apportionment, harms which are distinct and harms for which there is some other reasonable basis for determining the contribution of each tortfeasor. See Restatement (Second) of Torts ' 433(1)(a) and (b). In either case, the burden of proof is on the Defendant to

limit its liability by apportioning damage among the itself and the other tortfeasor(s). Thus, section 433B(2), provides:

Where the tortious conduct of two or more actors has combined to bring about harm to the plaintiff, and one or more of the actors seeks to limit his liability on the ground that the harm is capable of apportionment among them, the burden of proof as to the apportionment is upon each such actor.

See Restatement (Second) of Torts ' 433B(2) (emphasis added).

If, however, the Court determines that the harm to the plaintiff is not capable of apportionment, and is therefore indivible, each tortfeasor is subject to liability for the entire harm. See Restatement (Second) of Torts ' 433A(1) and (2) (only harms for which damages can be apportioned are harms which are distinct and those harms for which there is some reasonable basis for determining each defendant's contribution) and '875 (“Each of two or more persons whose tortious conduct is a legal cause of a single and indivisible harm to the injured party is subject to liability to the injured party for the entire harm').

As the Restatement comments concerning this issue explain, the burden of proving that the harm is capable of apportionment is fairly to be placed on the tortfeasor because of:

the injustice of allowing a proved wrongdoer who has in fact caused harm to the plaintiff to escape liability merely because the harm which he has inflicted has combined with similar harm inflicted by other wrongdoers, and the nature of the harm itself has made it necessary that evidence be produced before it can be apportioned. In such a case the defendant may justly be required to assume the burden of producing that evidence, or if he is not able to do so, of bearing full responsibility. As between the proved tortfeasor who has clearly caused some harm, and the entirely innocent plaintiff, any hardship due to lack of evidence as to the extent of the harm should fall upon the former.

Comment (d) on Section 433B, subsection (2); United States v. Alcan Aluminum Corp., 964 F.2d 252, 269 (3d Cir. 1992)(involving application of Section 443 joint and several liability in CERCLA context).

Here, the Plaintiffs for years have been, and continued to be, buffeted on an on-going basis on two sides by of the same kind nuisance activity generated by Defendants' quarrying

operations. The result is an on-going and cumulative damage to their ability to use and enjoy their homes. In the same vein, they have suffered a single injury to their water supplies due to increased sedimentation from blasting by both the Camara and U.S. Slate Defendants' quarries. Plaintiffs' expert Phil Wagner opines that the conduct of both the Camara and U.S. Slate Defendants is a substantial contributing factor to Plaintiffs' nuisance harms and the damage to their water supplies.

It is therefore for the Court to determine after reviewing the evidence produced by Defendants at trial whether Plaintiffs' harms are indivisible or capable of apportionment. If, the harms are indivisible, then liability is joint and several for each Defendant found liable. See, e.g., Velsicol Chemical Corp. v. Rowe, 543 S.W.2d 337, 343 (Tenn. 1976) (applying joint and several liability in nuisance action against chemical company for air and water pollution, "when an indivisible injury has been caused by the concurrent, but independent, wrongful acts or omissions of two or more wrongdoers"). If the Court rules that the harms are subject to apportionment, then the jury will ascertain the relative harm for each Defendant found liable.

Thus, in Thorson v. City of Minot, 153 N.W.2d 764, 772 (N. Dak. 1967), where multiple parties created a dam, by independently discarding debris which cumulatively impacted water flow and caused flooding on plaintiffs' property, the North Dakota Supreme Court applied joint and several liability, as it could "find no logical or reasonable basis for apportioning the plaintiffs' total loss."

Recently, the common law of joint and several liability in the context of indivisible injuries has been applied to cases under the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. ' 9607 ("CERCLA"). These cases have made clear that when the harm alleged to have occurred by the independent acts of two or more tortfeasors

is either theoretically or practically indivisible, joint and several liability applies unless the tortfeasor carries its burden of establishing a reasonable basis for apportionment. See e.g., Alcan, supra, 964 F. 2d at 269; O'Neil v. Picillo, 883 F.2d 176, 178 (1st Cir. 1989); Stringfellow, supra, 661 F. Supp. at 1060; Idaho v. The Bunker Hill Company, 635 F.Supp. 665, 676 (D. Idaho 1986); United States v. Ottati & Goss, Inc., 630 F.Supp. 1361, 1396 (D.N.H. 1985); United States v. Chem-Dyne Corp., 572 F.Supp. 802, 811 (S.D. Ohio, W.D. 1983).

Plaintiffs' harm arising from Defendants' blasting is indivisible "in a practical sense in that [they are] not able to apportion it among the wrongdoers with reasonable certainty." Velsicol Chemical Corp., supra, 543 S.W.2d at 342. Moreover, it is Defendants' burden to prove both that the Plaintiffs' injuries are divisible, and that a reasonably certain method exists for apportionment as between Camara and U.S. Slate. Having failed to do, both Defendants should be held jointly and severally liable for all of Plaintiffs' damages.

C. Remedies.

In this private nuisance action, Plaintiffs may recover "both compensation for the lost use of property . . . , and compensation for personal injuries such as annoyance, discomfort and inconvenience." Coty v. Ramsey Assoc., Inc., supra, 149 Vt. at 464 (citing Wilson v. Kay Tronic Corp., 40 Wash.App. 802 811, 701 P.2d 518, 525 (1985); Rust v. Guinn, 429 N.E.2d 299, 302-04 (Ind.App. 1981); Prosser, supra ' 89, at 637-40. See also, Pierce v. Riggs, 149 Vt. 136, 140 (1987).

Here, Plaintiffs have been damaged significantly and permanently by Defendants' nuisance. Vermont law is well established that a property owner is required to disclose to a prospective purchaser material defects about the property of which she or he is aware at the time of sale. Cushman v. Kirby, 148 Vt. 571, 575-76 (1987). See also, State v. Brooks, 163 Vt. 245,

252 (1995); Silva v. Stevens, 156 Vt. 94, 103-04 (1991); Sugarline Assocs. v. Alpen Assocs., 155 Vt. 437, 446-47 (1990); Suffin v. Southworth, 149 Vt. 67, 69-71 (1987). Thus, it is clear that in any sale of their properties the Plaintiffs would be required to disclose the noise and vibrations their properties are subjected to from Defendants' quarries, the aesthetic nuisance of unsightly slag piles, the unreasonable truck traffic and machinery noise, and the damage to certain of their wells. Plaintiffs will testify that, in their opinions, the presence of these nuisance impacts and other damages have diminished the value of their properties. As such, Plaintiffs are entitled to recover their diminution in property value.

In addition, Plaintiffs may recover special damages for discomfort and inconvenience as a result of Defendants' nuisance. Coty v. Ramsey Assoc., Inc., supra; Prosser, supra ' 89, at 637-39. See also, Sundell v. Town of New London, 409 A.2d 1315, 1321 (N.H. 1979). Such damages include the upset and annoyance of living with the nuisance on a daily basis, as well as their fears and anxieties about the potential additional damages the blasting may cause them. Clearly, the destruction of their quiet and peaceful enjoyment of their homes is a compensable injury.

Moreover since Defendants' actions in creating and continuing the nuisance were undertaken as a result of what Plaintiffs maintain was reckless and wanton conduct in disregard of Plaintiffs' rights, Plaintiffs are also seeking to recover punitive damages. Bruecher v. Norwich University, 10 Vt.L.Week 33, 36 (Feb. 5, 1999). Coty v. Ramsey, supra. Under Vermont law, the plaintiff is entitled to punitive damages if there is proof that the defendant's conduct manifests “bad spirit and wrongful intention.” Hilder v. St. Peter, 144 Vt. 150, 165, 478 A.2d (1984). A plaintiff produces such evidence by showing that the defendant's conduct manifested “personal ill will, or [was] carried out under circumstances of insult or oppression, or even [that

the defendant's] conduct manifest[ed] nothing worse that a reckless and wanton disregard of the plaintiff's rights . . .." Sparrow v. Vermont Savings Bank, 95 Vt. 29, 33 (1921)(emphasis added); accord, Hilder v. St. Peter, supra; Greenmoss Builders, Inc. v. Dun & Bradstreet, Inc., 143 Vt. 66, 79 (1983), aff'd, 472 U.S. 749 (1985); Pezzano v. Bonneau, 133 Vt. 88, 90 (1974). "[N]o direct evidence of the actor's mental status is required, instead the nature of [the] conduct in the surrounding circumstances can establish [the requisite] motive and . . . state of mind." Cody v. Ramsey Assoc., Inc., supra, 149 Vt. at 464.

A corporate defendant is liable for punitive damages resulting from its employees' reckless conduct if it "either directed . . ., participated in . . ., or subsequently ratified" the employees' acts. Shortle v. Central Vermont Public Service Corp., 137 Vt. 32, 33 (1979). Punitive damages are awarded under Vermont law to "stamp the condemnation of the jury upon the acts of defendant." Pezzano, supra (quoting Goldsmith's Administration v. Joy, 61 Vt. 488, 500 (1889)):

> The purpose of punitive damages . . . is to punish conduct which is morally culpable . . . Such an award serves to deter a wrongdoer . . . from repetitions of the same or similar actions. And it tends to encourage prosecution of a claim of a victim who might not otherwise incur the expense or inconvenience of private action . . . The public benefit and a display of ethical indignation are among the ends of the policy to grant punitive damages.

Hilder, supra, 144 Vt. at 164 (quoting David v. Williams, 92 Misc.2d 1051, 402 N.Y.S.2d 92, 94 (N.Y.Civ. Ct. 1977)).

In this case, U.S. Slate first fought the jurisdiction of Vermont Act 250 for two years, and once jurisdiction was established, U.S. Slate, the Camara defendants, and the other quarries, prevailed upon the legislature wholly to exempt slate quarrying from Act 250 jurisdiction. Once having freed itself from all State regulatory oversight, U.S. Slate then commenced a blasting and mining operation which failed to comply with any reasonable standards of good mining: it conducted no preblast surveys to document the status of surrounding residences; it steadfastly

has kept no records of its blasting; it has used uncovered detonation cord on the surface in all blasts; it has knowingly continued to design blasts which are unconfined and likely to have, and are having, significant off-site impacts; and it has ignored neighbor complaints and threatened to "see in court" anyone who has complained about the adverse impacts of its blasting and mining practices.

The Camara Defendants, in turn, performed no preblast surveys when they greatly expanded the nature and scope of their blasting and mining operations; they kept no records of their blasting until after this lawsuit was commenced, and then kept only minimal records; it, too, has knowingly continued to design blasts which are unconfined and which are having significant adverse impacts upon its neighbors. With respect to the [redacted]' trespass claims, the Camara Defendants have intentionally cut a road through the [redacted] property and dumped massive amounts of quarry debris, rock and rubble on the [redacted] land. Although the [redacted] complained, the trespass continued.

As such, Defendants are liable for punitive damages. Awards of punitive damages have been affirmed by the Vermont Supreme Court in cases in which the defendant's conduct was reckless and wanton in causing a private nuisance. Coty v. Ramsey Assoc., Inc., supra. Punitive damages have also been awarded and affirmed in cases in which the plaintiff suffered purely economic harm. Greenmoss, supra; Pezzano, supra.

Once Plaintiffs have presented the requisite evidence of Defendant's reckless conduct, they will then be permitted to introduce evidence of Defendant's financial condition: "Where exemplary damages are awardable . . . the defendant's pecuniary ability may be considered in order to determine what would be a just punishment . . ." Lent v. Huntoon, 143 Vt. 539, 550 (1983)(quoting Kidder v. Bacon, 74 Vt. 263, 274 (1902)).

CONCLUSION

Plaintiffs are entitled to proceed to the jury on their claim of private nuisance, in that their property rights have been substantially and unreasonably harmed by the conduct of Defendants. Defendants' interference with Plaintiffs' properties was either intentional and unreasonable, or unintentional and otherwise actionable under theories of negligence or strict liability. As the nuisance in this case is permanent and unabatable, Plaintiffs may seek compensation both for diminution in property value, and for their discomfort, anxiety and inconvenience resulting from Defendants' interference. Finally, they are entitled to punitive damages, in light of the reckless and wanton character of Defendants' conduct.

DATED at Middlebury, in the County of Addison, this _____ day of September, 2000.

LANGROCK SPERRY & WOOL, LLP

_____

Emily J. Joselson, Esq.
Kevin E. Brown, Esq.
P.O. Drawer 351
Middlebury, Vt 05753

(802) 388-6356

Attorneys for Plaintiffs

183771.1