UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

STEPHEN AND KATHY DARNEY, Personally and on behalf of K. AND S. D. Plaintiffs, v. DRAGON PRODUCTS COMPANY, LLC, Defendant.	CIVIL ACTION DOCKET No.: 2:08-cv-47

DEFENDANT'S REPLY TO THE DARNEYS' POST-TRIAL SUBMISSIONS

The most notable thing about the Darneys' Post-Trial Memorandum (the "Darney Brief") is what it does not include: reference to any evidence supporting their claims, other than the Darneys' own testimony. And the Darneys' testimony is both contradictory and incredible. They portray living near Dragon as hellish, but nevertheless feel that the value of their house has increased from $80,500 to $140,000 in seven years. Dragon is rarely upwind of the Darney house, and in recent years has been operating well below capacity, is frequently shut down, and, yet the Darneys allege that they feel the effects of dust emissions from Dragon "every day." The Darneys offered no expert testimony, nor any rebuttal to Dragon's experts. They did, however, *prevent* the collection of scientific evidence – air monitoring data, seismograph readings, pre-blast surveys – that would have supported their claims if in fact they had any basis. The Darneys did not offer any evidence or testimony contrary to the expert testimony of Mr. McKown concerning alleged blasting damage or of Mr. Gwinn relating to the source of dust appearing on the Darney property. On the record before this Court, the Darneys utterly failed to prove their claims. The Darney Brief - indeed, their whole case - is completely lacking the factual foundation necessary to establish liability on the part of Dragon.

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I. THE DARNEYS HAVE OFFERED NO EVIDENCE OF CAUSATION.

The key issue in this case is causation. That is, whether, during the period of November 12, 2004 through April 17, 2009, Dragon's blasting caused damage to the Darneys' house and/or Dragon caused dust to invade the Darneys' property. In its Post-Trial Memorandum of Law ("Dragon's Brief"), Dragon cites extensive evidence that the answer to that question is unequivocally "No." The Darney Brief, on the other hand, devoted a grand total of one paragraph to this issue. The sum of their argument on the causation issue is the following:

> Plaintiffs maintain that they have met their burden of proving that it is more likely than not that they have sustained material and substantive damage from Dragon's blasting activities and from its caustic dust pollution, both in the air and as has accumulated on their persons and property. *See* Plaintiffs' proposed Findings of Fact and Conclusions of Law, and it [sic] attached evidentiary references.

Darney Brief at 25-26.[1] Plaintiffs can "maintain" all they want, but the fact remains that the Darneys failed to provide evidence of causation.

A. None of the Evidence Cited by the Darneys Proves Any Ground Vibrations From Dragon's Blasting Operations Harmed Them.

Attachment 1, which is the Darneys' evidentiary hodge-podge provided with their brief, appears to address the evidence in support of Dragon's causation of blasting at page 7. The sole evidence cited by them with any nexus to their property is Trial Exhibit 24.[2] Attachment 1 at 7. The Darneys apparently refer to pages SMITH000000063-64 of Exhibit 24, and characterize it as

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[1] The Darneys also argue that this Court should take judicial notice that cement plants and quarries can cause caustic dust and ground vibrations to travel off-site. Darney Brief at 2 fn 1. However, there is no Maine authority for this proposition. To the contrary, Maine law would suggest that this Court should take judicial notice that if a blaster uses reasonable care "substantial damage is very unusual." *See Cratty v. Samuel Aceto & Co.*, 151 Me. 126, 131, 116 A.2d 623, 627 (1955) ("It is nevertheless rare that damage is caused to adjoining property, if the blaster uses the reasonable care that the law requires that he should use. This is common knowledge to every school boy and to every adult citizen. Dishes may rattle on our shelves and our house may slightly shake if the blast is heavy and a short distance away, but substantial damage is very unusual.").

[2] The Darneys refer to Exhibit 25, but reviewing the exhibits demonstrates that their reference is in error and should be to Exhibit 24.

being "a report by Dr. Smith that *observes* in his report that the Darney 'basement' has 'cracks' from blasting" and that 'Blasting knocks loose fieldstone mortar in basement.'" Attachment 1 at 7 (emphasis added). The Darneys' characterization of this exhibit is so inaccurate as to be laughable.

Exhibit 24 was apparently prepared by Dr. James Smith. Dr. Smith is a toxicologist. *See* Ex. 22. He was designated by the Darneys as an expert in *Darney I,* on issues relating to dust which appears on their property. *See* Defendant Dragon Products Company, LLC's Statement of Material Facts (October 17, 2008) ("DSMF") at ¶ 10; Plaintiffs' Response to Defendant's Statement of Material Facts (November 14, 2008) ("DSMF") at ¶ 10; Declaration of Eric J. Wycoff (October 17, 2008) ("Wycoff Decl.") at ¶ 23.c and Ex. C thereto. The Darneys subsequently withdrew their designation of Dr. Smith as an expert. *See* DSMF at ¶ 11; PSMF at ¶ 11. As is clear from Dr. Smith's proposal to the Darneys' legal counsel, the tasks for which he was retained consisted only of tasks relating to dust and did not relate to any alleged blasting damage. Ex. 26. In fact, as demonstrated by his resume, Dr. Smith has no engineering or other expertise which would permit him to opine on issues of causation of alleged blasting damage. *See* Wycoff Decl. ¶ 23.c and Ex. C thereto.

Further, the pages on which the Darneys seek to rely for proving causation of the alleged blasting damage, *i.e.,* SMITH000000063-64, consist of a completed "Indoor Air Quality Building Survey." It looks to have been completed by Dr. Smith based upon information provided by Mr. and Mrs. Darney. It appears the word "blasting" handwritten by "cracks" and the statement "Blasting knocks loose fieldstone mortar in basement" are nothing more than notes taken by Dr. Smith of comments to him by the Darneys when he surveyed their residence. Nothing indicates Dr. Smith did anything to consider the causation of the alleged blasting

damage or that he had the expertise to do so. To construe Exhibit 24 as providing reliable evidence on the issue of causation is absurd.

The only other evidence the Darneys presented at trial on causation consisted of their own unsupported testimony. Weighed against the expert testimony provided by Mr. McKown that during the relevant period there were no ground vibrations from Dragon which caused any damage to the Darneys' property, the Darneys' testimony obviously falls short.[3] However, even if the Court ignored Mr. McKown's testimony, the Darneys' testimony is still insufficient to prove any actionable damage. As described in Dragon's Brief at pages 19 through 20, the great majority of the Darneys' alleged damage occurred in February 2004. The only alleged items of damage the Darneys identified as occurring during the relevant time period consist of cracks getting longer in their son's room and in the stairway, and window sills separating from vertical molding. Dragon's Brief at 20; *see also* Tr. at 694:5-695:16, 703:7-18, 719:2-721:5; Ex. 102C, Ex. 102D, Ex. 102E. Because this alleged damage is de minimis, it cannot be construed as "significant harms" which are "definitely offensive, seriously annoying, or intolerable"; they are nothing more than a slight inconvenience or petty annoyance which is not actionable as a nuisance under Maine law. *Charlton v. Town of Oxford,*, 2001 ME 104, ¶ 36 fn 10, 774 A.2d 366, 377; W. Page Keeton, *et al., Prosser and Keeton on the Law of Torts* § 88 at 628 (5th ed. 1984) ("*Prosser and Keeton*"); Restatement (Second) of Torts, § 821F, cmt. c. Further, it is not actionable in negligence or strict liability because there is no evidence of the cost to repair such alleged damage or how it decreased the value of the Darneys' property. It is not actionable in

[3] Although William Flanders did not testify at trial, Plaintiffs moved the admission of a document he prepared in which he considered the causation of the alleged blasting damage to the Darney house. Ex. 127. Mr. Flanders did not determine that any damage that occurred to the Darney house was more likely than not caused by Dragon's blasting. Quite to the contrary. Mr. Flanders determined the alleged damage was likely the result of seasonal changes, use of poor materials in construction, freeze/thaw cycles, heavy truck traffic on Old County Road, the age of the structure, seasonal movement in an old house, heavy human traffic and use, water damage, or poor construction methods. Ex. 127.

trespass, because as described in Dragon's Brief, vibrations cannot trespass. Therefore, the Darneys failed to prove they suffered any actionable harm as a result of vibrations from Dragon.[4]

B. None of the Evidence Cited by the Darneys Proves Dragon Caused Any Dust to Appear on the Darneys' Property.

Attachment 1 appears to marshal the evidence in support of the Darneys' contention that dust on their property is from Dragon, at pages 17 through 20, and pages 45 through 46. The only real evidence cited by them on this issue consists of Exhibit 123.1, the Report on Total Suspended Particulate Sampling in Thomaston, Maine during 2007, prepared by Richard Marriner (the "Marriner Report") and Mr. Marriner's trial testimony.

As part of the Marriner report, the Department of Environmental Protection ("DEP") installed total suspended particulate samplers at the Darney residence and at the Midas Muffler shop in Thomaston on June 19, 2007, to gather data regarding particulate matter in the area. Ex. 123.1 at 2. The samplers were located about one mile apart from each other. Tr. at 568:23-24; Ex. 123.1 at 5. Sampling at the Darney residence stopped, at the Darneys' request, on November 19, 2007. Ex. 123.1 at 4. The sampler in front of the Darneys' house was blocked from any winds that might come from the west. Tr. at 568:25-569:2. As Mr. Marriner testified at trial, the sampler at the Darneys' house was not representative of the area. Tr. at 569:6. Similarly, the sampler placed at the Midas location was placed behind the bay where they do work and was also not representative of the area. Tr. at 569:8-12. Mr. Marriner testified that the Darney and Midas sites were microscales with "extenuating circumstances." Tr. at 567:25-568:20, 576:16-24; Ex. 123.1 at 6 ("The physical location of the TSP samplers limits the relevancy of the data

[4] The Darneys try to make some hay out of the fact that at times seismographs used by Dragon to monitor blasts do not trigger. Darney Brief at 23. The Darneys misconstrue the evidence. As Mark Stebbins testified, when a seismograph does not trigger it is because the ground vibration level was lower than the recording limits of the instrument. Tr. at 804:6-11. Therefore, because the trigger limits are relatively low, the failure of a monitor to trigger means the vibrations were even lower and well below Dragon's limits. *See e.g.,* Tr. at 804:12-805:24.

obtained to a micro-scale area, and the specialized data obtained should not be considered as representative of the wider Rockland/Thomaston area. … The two complainants[, *i.e.,* the Darneys and Midas] were interested in the dust conditions where they lived or worked so the monitors were set to sample in these specific locations.") Consequently, both the Darney site and the Midas site were specific to themselves and not representative of anything else, with the results from each limited to the specific location at which the results were obtained. Tr. at 576:6-24, Ex. 123.1 at 6.

After samples were obtained from the Darney residence and from Midas, one sample from the Darney residence and five samples from Midas were subjected to gross analysis to determine the percent distribution of five categories of material (biological, general minerals, ambiguous opaques, vehicular dust/soot, and lime). Tr. at 579:5-581:1; *see also* Ex. 123.1 at 9-11. As the results of the gross analysis indicate, 44% of the weight of the Darney sample was made up of lime. Ex. 123.1 at 10. However, as Mr. Marriner testified, calcium-containing materials are a significant component of the soil in the area of the Darney residence and limestone is very common in the area, therefore, there are significant amounts of lime in the soil and in the road and other background dust that may be blowing around the area. Tr. at 625:24-626:14; *see also* Ex. 123.1 at 11.

Four samples from the Midas site were also subjected to scanning electron miscroscopy analysis to determine what the lime contained in those samples was composed of. Tr. at 553:25-554:5. None of the Darney samples were subjected to scanning electron microscopy. Tr. at 578:18-24. More than 50% of the lime component of samples taken from the Midas site were composed of calcium oxide. Tr. at 555:22-556:1. Calcium oxide is not found naturally and is produced as a result of a process involving high amounts of heat. Tr. at 556:24-557:3. It is

highly reactive and when exposed to moisture becomes calcium hydroxide. Tr. at 607:6-13. The four Midas samples were analyzed in two different sets. Tr. at 607:6-13. The results of the first set presented the percentages of calcium oxide. Tr. at 556:2-9, 607:6-7. Because calcium oxide is so reactive, the fact that the first set of results only presented percentages of calcium oxide posed a question to Mr. Marriner as to whether the percentages were of calcium oxide, only, or of calcium oxide and calcium hydroxide. Tr. at 556:2-9, 607:6-20. The second set of results called the category “calcium oxide/calcium hydroxide” rather than “calcium oxide.” Tr. at 607:9-13. Mr. Marriner did not enquire as to whether it was calcium oxide only, or calcium oxide and calcium hydroxide, in the first set of results, nor did he enquire as to why the label for the category changed between the two sets of results. Tr. at 607:17-20.

Because calcium oxide is not found naturally, but can be produced as a result of limestone being subjected to high amounts of heat, Mr. Marriner concluded that if calcium oxide was present in the Midas samples, it was from Dragon. Tr. at 568:9-13. Mr. Marriner also testified that to the extent calcium oxide was present in any one of the Midas samples, then the other samples taken in the same manner, in the same fashion, would also contain calcium oxide. Tr. at 593:20-25. Although Mr. Marriner did not specifically testify that he was speaking only of the Midas samples, it is clear from Mr. Marriner’s testimony that is the case and that his conclusion did not relate to any samples taken at any other location.[5] That conclusion is supported by several facts. First, the Darney samples were never analyzed for calcium oxide. Therefore, it is unknown whether the dust from the Darneys contained any calcium oxide or not. Second, as Mr. Marriner testified, the samplers placed at the Darney site and the Midas site were

[5] It appears from the transcript at 594:19-595:20, that the Court misapprehended Mr. Marriner’s testimony to mean that his conclusion was that he would expect calcium oxide to also be present in samples taken at other locations, including Dragon, taken in the same manner. A review of Mr. Marriner’s testimony demonstrates that it only related to samples taken at the Midas location.

not representative of the area and the results of each were limited to the micro-scales of the specific locations where the samplers were placed. Tr. at 568:14-20, 576:16-24. As Mr. Marriner acknowledged at trial, it was not possible for the data from Midas to be extrapolated to the Thomaston area as a whole. Tr. at 568:9-20. This makes sense because the purpose of the samplers was to determine whether the individual complainants, *i.e.,* Midas and the Darneys, had reason to complain, therefore, the DEP was not trying to gather data from which general conclusions could be drawn. Tr. at 568:14-23. Third, the monitors placed at the Darney site and the Midas site were approximately one mile apart from one another. Tr. at 568:23-24; Ex. 123.1 at 5. Fourth, for the time period June 19 through December 31, 2007, the predominant winds in the area prevent the data from the sampler at either Dragon or Midas from being extrapolated to the other location. The predominant wind comes out of the west and northwest, whereas Dragon is neither west nor northwest of the Darneys or Midas. Tr. at 588:14-19. Further, the wind blew from Dragon's kiln to the Darneys only 3% of the time, whereas the wind blew from Dragon's kiln to Midas about 10-12% of the time. Tr. at 588:25-589:4, 589:20-590:2. Because Dragon and Midas are one mile apart from each other at opposite ends of Dragon's quarry, when the wind was blowing from Dragon to Midas, it would not be blowing towards the Darneys. Given the predominant wind directions, together with the individualized results gained from the samplers, there is no reasonable basis on which to conclude that dust gathered at Midas would have the same makeup as dust gathered at the Darneys. Further, to construe Mr. Marriner's statement that he would expect other samples taken in the same manner, in the same fashion as the Midas samples to also contain calcium oxide makes no sense. That would mean a sample taken in the same manner and in the same fashion by the Edward T. Gignoux Courthouse would also contain calcium oxide. As is obvious, that is not true.

The only credible evidence this Court has as to the source of the Darney dust is Mr. Gwinn's determination that Dragon is not the source of the dust appearing at the Darney residence. Therefore, the Darneys simply failed to prove that any dust from Dragon is on their property.

II. THE DARNEYS HAVE NOT SHOWN ANY DAMAGES.

A. The Darneys Have Not Proven Any Damages.

In their post-trial brief, the Darneys ask this Court for a "large damages award." Darney Brief at 31. However, they made no effort to specify the level of damages warranted and made no effort to provide any factual basis on which this Court could award damages. Therefore, the Darneys are not entitled to any damage award, let alone a "large" one.

Under Maine law, the usual measure of damages to property is either cost of repair or diminution in value of damaged property. *Sullivan v. Young Bros. & Co., Inc.*, 91 F.3d 242, 255 (1st Cir. 1996); *Sullivan v. Young Bros. & Co., Inc.*, 893 F.Supp. 1148, 1161 (D. Me. 1995) (reversed in part on other grounds). For a continuing private nuisance claim, a plaintiff may recover for the loss of use and enjoyment of their property during the continuance of the nuisance, together with such special damage, including permanent injury to the land, as may be proved. *Murray v. Bath Iron Works*, 867 F.Supp. 33, 49 (D. Me. 1994) (citing *Pettingill v. Turo,* 159 Me. 350, 357, 193 A.2d 367 (1963)). In the case of a nuisance which is not temporary in nature and susceptible to abatement, a landowner is entitled to be compensated for the depreciation in the usable value of the property caused by the nuisance during the continuance of the injury, together with such special damage as may be proved, including elements for inconvenience and annoyance. *Eaton v. Cormier,* 2000 ME 65, ¶ 5, 748 A.2d 1006, 1008**.** The measure of damages for trespass to real property is the difference in value of the land

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immediately before and after the trespass. *Borneman v. Milliken*, 123 Me. 488, 124 A. 200, 203 (1924).

At trial, the evidence presented regarding property damage was extremely limited. The Darneys testified that although they made some repairs to their property, they could not estimate the cost of such repairs. Tr. at 716:21-717:3. They presented no evidence of how their property's value has been diminished because of Dragon. Similarly, they presented no evidence as to what, if any, their property's appreciation might have been but for Dragon's conduct. Further, they presented no evidence that their property has suffered any permanent injury as a result of Dragon's operations, much less what the associated damages are and failed to present evidence relating to damages they have suffered from any loss of use of their property. Moreover, they presented no evidence as to the value of their property immediately before and immediately after the alleged interference, *i.e.,* on or about November 11, 2004 and April 18, 2009. Under the facts of this case, no damages are permissible as any award of damages would be speculative and without a basis. *See Reardon v. Lovely Development, Inc.*, 2004 ME 74, ¶ 8, 852 A.2d 66, 69.

B. Assuming That Dragon is Jointly and Severally Liable, its Liability Is Not Greater Than 11.5% of the Darneys' Nuisance Damages.

The Darneys argue that if this Court were to determine Dragon is jointly and severally liable with other tortfeasors in creating a nuisance, because there is no basis which would enable the Court to separate out Dragon's contribution from that of other sources, Dragon is liable for all of the Darneys' damages. Darney Brief at 28, 30. As discussed above, there is absolutely no evidentiary support to find that Dragon created any nuisance conditions at the Darneys' residence, whether individually or jointly and severally. Assuming, however, for purposes of this argument only, that this Court determined that dust from Dragon's operations played a role

in creating a nuisance at the Darney residence, there is a basis on which this Court could separate out Dragon's contribution.

As Mr. Gwinn testified at trial, Dragon is not responsible for the dust appearing on the Darneys' property. However, Mr. Gwinn testified at trial that he engaged in a theoretical exercise to determine what the maximum possible contribution from Dragon might be, if there is any at all, if one ignored the evidence that Dragon is not responsible for dust appearing at the Darney residence and assumed that Dragon contributed some amount of the dust. The result of his theoretical exercise was that Dragon's maximum possible contribution, if any, to the Darneys' dust, assuming some is from Dragon, is no more than 11.5%. Therefore, if this Court found Dragon jointly and severally liable for a nuisance, Dragon could only be responsible for, at most, 11.5% of the nuisance.

According to the Restatement (Second) of Torts, "the fact that other persons contribute to a nuisance is not a bar to the defendant's liability for his own contribution." Restatement (Second) of Torts at Sec. 840E. However, the Restatement also states that:

> [M]any nuisances are capable of apportionment among two or more persons who contribute to them, because a reasonable basis can be found for dividing the harm done on the basis of the extent of the contribution of each party…. In these cases, under the rule stated in Sec. 433A, the liability may be apportioned among those who contribute, either in proportion to the contribution of each or upon some other reasonable basis afforded by the evidence. Under the rule stated in Sec. 433B, the burden rests upon the defendant to produce sufficient evidence to permit the apportionment to be made.

Restatement (Second) of Torts at Sec. 840E, cmt. b.

Mr. Gwinn considered what Dragon's maximum possible contribution to the dust on the Darney property could be, assuming that Dragon was, in fact, one of the sources. Tr. at 1076:9-23; Ex. 93. To perform that analysis, Mr. Gwinn took the concentrations of the elements contained in the Darney samples and divided them by the concentration of the average for that

element from the Dragon samples. Tr. at 1076:24-1077:10. For example, in the case of aluminum he determined that the DH1 sample had 85.2% of the amount of aluminum that the Dragon samples had and that the DH2 sample had 62.1% of the amount of aluminum that the Dragon samples had. In the case of calcium, he determined that the DH1 sample had 11.5% of the calcium that the Dragon samples had and that the DH2 sample had 24.8% of the calcium that the Dragon samples had. Ex. 93. This same analysis was done for iron, magnesium and for sodium. Ex. 93.

If one assumed that some of the Darney dust was coming from Dragon, the fact that different percentages existed for each of the elements demonstrated that any dust from Dragon would necessarily be diluted by dust from other sources. Tr. at 1079:2-14, 1080:5-1081:7. For example, if the Darney samples were composed entirely of dust from Dragon, the concentrations for each element in the samples would be the same, or 100%, because each of the elements would be transporting to the Darney residence at the same rate. Tr. at 1079:2-1081:7. However, the concentrations are not uniform. In the case of iron, the percentage for DH1 is 220.3%, as compared to the Dragon samples, indicating that a source other than Dragon is significantly affecting it. Tr. at 1082:10-18, Ex. 93. Similarly, because sodium for DH2 is 203.5%, it is being enriched by something other than Dragon. Tr. at 1082:10-18, Ex. 93. The diverse percentages for the five elements clearly demonstrate that the Darney dust samples are being enriched by sources other than Dragon, because if they were all coming from Dragon the percentages would all be the same. Tr. at 1082:19-24. Therefore, to determine the maximum theoretical amount that Dragon could be contributing, Mr. Gwinn identified which percentage existed uniformly for each element. Tr. at 1082:24-1083:2. That percentage was the percentage for calcium, at 11.5%. Tr. at 1083:2-22. Therefore, Mr. Gwinn concluded that the maximum possible amount of the

dust that could be contributed by Dragon to the Darney residence, assuming that some portion of the dust came from Dragon, was 11.5%. Tr. at 1083:2-22.

As stated in comment b to Restatement § 840E, a reasonable method of apportioning responsibility for a nuisance is by a party's proportionate contribution to the nuisance. Contrary to the Darneys' assertions otherwise, there is a basis on which this Court could separate out Dragon's contribution from that of other sources, and apportion damages. Assuming that some of the dust on the Darneys' property is from Dragon, Dragon's maximum theoretical contribution is no more than 11.5%, therefore 11.5% is greatest possible portion of the Darneys' damages that Dragon can be liable for.

C. The Darneys May Not Recover For Any Time Spent Assisting in the Prosecution of This Case.

The Darneys argue that the Law Court in *In re Hannaford*, "state[d] in dictum" that nuisance permits recovery for loss of time. Darney Brief at 27. They do not assert an entitlement to recover for time spent in connection with this case under any theory other than nuisance. *Id.* The Darneys argue Mr. Darney has expended time to obtain relief from the harm Dragon has already caused him and his family, but also to avert continuing harm from Dragon. Darney Brief at 27. This has included "extensive research and investigation; photographing and videotaping; petitioning Dragon, local, state and federal agencies and legislative representatives and opinion makers; creating and maintaining a website on Dragon's continuing damage to the community; organizing others in the community to form a citizens advocacy group, called Neighbors for a Safe Dragon, to advocate for the covering of the CKD pile to the Board of Environmental Protection and the containment of yellow leachate into the wetlands and streams; researching the effects of exposure to CKD, and preparing this case in the hope of obtaining judicial relief." Darney Brief at 27-28. Mr. Darney maintains that his efforts against Dragon

"became for him, from 2004 to date, nearly a full time job, causing him to expend an average of 100 hours a month on the effort, for which is he is entitled to compensation." Darney Brief at 28. Contrary to the Darneys' arguments otherwise, they may not be compensated for Mr. Darney's time spent in connection with this case.

As described in Dragon's Brief, Maine law does not contemplate compensation to a litigant for time spent assisting in the prosecution of the matter. Dragon Brief at 50-52. Although it permits a plaintiff in a nuisance action to recover for loss of time or inconvenience directly resulting from the nuisance, *see Brown v. Watson,* 47 Me. 161, 163 (1859), there is no Maine authority which permits a litigant to be compensated as the Darneys seek. Even if Maine law did, the Darneys presented no evidence as to how the time spent by Mr. Darney assisted Ms. McGehee in prosecuting this action. For example, the time spent by Mr. Darney creating his website regarding Dragon's alleged damage to the community had nothing to do with assisting in the prosecution of the case. Similarly, his time spent forming Neighbors for a Safe Dragon likewise had nothing to do with assisting in the prosecution of this case. Further, since Mr. Darney has not had a full-time job since 2005 since he is disabled, any time spent in connection with this case does not take away from time he would otherwise be working, therefore the time spent by Mr. Darney, whatever it might be, did not damage the Darneys.

D. The Darneys Failed to Prove the Factual Predicate to Punitive Damages.

The Darneys argue they are entitled to punitive damages. They argue Dragon's "campaign to deny its responsibility has been deliberate, and is outrageous against the Plaintiffs, including their two children, and other residents in the surrounding community." Darney Brief at 10. They argue that fines imposed on Dragon by the State are "evidence of its lack of regard for the public's health, welfare and safety." Darney Brief at 10. The facts adduced at trial reveal

"such malice, as set forth in Plaintiffs' Plaintiffs' [sic] proposed Findings of Fact with supporting references to exhibits and testimony in its attachment." Darney Brief at 10-11. As evidence of the "malice," the Darneys cited Dragon's alleged "reckless disregard" of off-site blasting damage and off-site pollution. Darney Brief at 11-12. The Darneys argue that the amount of punitive damages should be enough to deter Dragon from "continuing such reckless disregard of its harm to its neighbors." Brief at 12. The Darneys' arguments notwithstanding, they are not entitled to recover punitive damages under Maine law.

First, the Darneys' argument that Dragon's "campaign to deny its responsibility" and the fines paid by Dragon evidence its lack of regard for the public's health, welfare and safety is unsupported, and misplaced, and completely ignores what is required to prove punitive damages. Punitive damages may only be awarded for tortious conduct motivated by malice. *Tuttle v. Raymond*, 494 A.2d 1353, 1361 (Me. 1985). The tortious conduct alleged here is Dragon's blasting operations and its alleged release of dust. It is that conduct which must be motivated by malice for punitive damages to lie, not Dragon's denial of regulatory violations or the fines it might have paid. Further, the Darneys' attempt to base an entitlement to punitive damages on conduct it describes as "reckless disregard" ignores the high level of proof required under Maine law for punitive damages. Under Maine law, punitive damages are available where the defendant's conduct was motivated by actual ill will or was so outrageous that malice may be implied. *Id.* However, the Law Court has emphasized that "such 'implied' or 'legal' malice will *not* be established by the defendant's mere reckless disregard of the circumstances." *Id.* (emphasis in original). *See also Morgan v. Kooistra,* 2008 ME 26, ¶ 29, 941 A.2d 447, 455 ("Malice is proven by evidence that a party acted with ill will toward the plaintiff or that the conduct was so outrageous that malice can be implied; it is not established by a "mere reckless

disregard of the circumstances."). Thus, the bases on which the Darneys seek to have punitive damages assessed are impermissible bases under Maine law and the necessary factual predicate for the imposition of punitive damages does not exist.

III. DRAGON'S COMPLIANCE STATUS IS IRRELEVANT.

The Darneys argue that Dragon's alleged non-compliance with its State license limits on dust emissions and ground vibrations is relevant to and helps them to prove their claims. Darney Brief at 1. They argue the State's determination that "Dragon has breached public health, safety and general welfare dust and vibration impact limits is compelling evidence that the lesser impact elements of Plaintiffs' claims of negligence, nuisance and trespass are met, given that Plaintiffs' property abuts Dragon's facility and is therefore among those of the public who are most greatly affected by Dragon's off-site impacts." Darney Brief at 3. Even if Dragon was occasionally not in compliance with the requirements of its licenses – which has not been shown – under Maine law it would not be relevant to the issue of liability.

As discussed in Dragon's Brief, in *Johnston v. Maine Energy Recovery Co., L.P.*, the Law Court held that the "licensing status of an activity does not affect the determination of whether it is a private nuisance." 2010 ME 52, ¶ 17, 997 A.2d 741, 746. Further, non-compliance with the terms of a license also does not affect the determination of whether particular conduct constitute a nuisance. The important inquiry, rather, is what the conduct in question consists of.

This is illustrated in *Gillison v. Farrin.* In that case, the defendants built a new wharf and the manner in which they used the wharf caused the plaintiffs to experience difficulty and delay getting to and from their wharf. 632 A.2d 143, 143 (Me. 1993). The plaintiffs sued alleging that the manner in which the defendants used their wharf created a nuisance. *Id.* At trial, the trial

court permitted evidence of the fact that federal and state agencies had issued permits to build the wharf, but excluded the permits themselves and testimony from officials about the permits. *Id.* at 143-144. On appeal, the Law Court affirmed holding that “neither these particular permits nor the testimony relating to them addressed the central issue in the case – whether the Gillisons’ *use* of their wharf was unreasonable – the proffered evidence was not only irrelevant but also likely to confuse the jury and therefore was property excluded.” *Id.* at 144 (emphasis in original). Similar to this case, whether Dragon has a license or not, or is in compliance with a license or not, is irrelevant to the question of liability. The important inquiry, rather, is whether the underlying conduct establishes liability.

IV. THE DARNEYS DID NOT PROVE THE NECESSARY PREREQUISITES TO INJUNCTIVE RELIEF.

Before a Court can grant injunctive relief, the Court must find that the following four criteria are met:

a. that the plaintiff will suffer irreparable injury if the injunction is not granted,

b. that such injury outweighs any harm which granting the injunctive relief would inflict upon the defendant,

c. that the plaintiff has exhibited a likelihood of success on the merits, and

d. that the public interest will not be adversely affected by granting the injunction.

Ingraham v. University of Maine at Orono, 441 A.2d 691, 693 (Me. 1982). The Darneys failed to meet any of them.

A. The Darneys’ Have an Adequate Remedy At Law.

The Darneys argue they have no adequate remedy at law, because they can only realize a remedy for Dragon’s alleged wrongful acts through a multiplicity of actions at law. Darney Brief at 6. As they acknowledge in their brief, however, they have an adequate remedy.

Under Maine law, a legal remedy is inadequate if it can only be secured through a multiplicity of actions. *Bangor Baptist Church v. State of Maine Department and Cultural Serv.*, 576 F.Supp. 1299, 1324 (D. Me. 1983). In this case the Darneys seek an award of damages for permanent injury to their property. An award of such damages would obviate the need for multiple actions. The Darneys acknowledge so much in their brief, in that they acknowledge that if they receive a damage award for permanent injury to their property, they are not entitled to an injunction. *See* Darney Brief at 6 ("Dragon's continuation of its operation means that Plaintiffs will have no adequate remedy and will be left with having to file a multiplicity of suits (unless, as is discussed below, they are awarded … an award of permanent damage"). Because an adequate remedy at law is available, injunctive relief is not.

B. The Darneys Acknowledge They Cannot Establish That Any Injury They Might Suffer is Outweighed by the Harm An Injunction Would Inflict Upon Dragon.

In their brief, the Darneys acknowledge that the damage to them in this case is "small," as compared to the monetary value of Dragon's operation. Darney Brief at 9.[6] If an injunction issued, Dragon would lose the value of the plant, because there is no other way to obtain limestone for Dragon's manufacturing operations. As the Darneys acknowledge, the harm to them of an injunction not issuing is "small" as compared to the harm that Dragon would suffer if one was. That being the case, the Darneys cannot prove their claim for injunctive relief.

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[6] In their discussion of the balance of harms, the Darneys also stated that their property has suffered a "total economic loss." Brief at 9. However, they claim their property is worth $140,000. Tr. at 522:11-15. Query whether a property that was purchased for $80,500 (Ex. 6) and which appreciated in value by nearly 70% in seven years can be considered a "total economic loss."

C. The Darneys Failed to Prove the Public Interest Would Not Be Adversely Affected by an Injunction.

It is unclear whether the Darneys argue that the public interest will not be adversely affected by granting an injunction. Darney Brief at 9. The Darneys acknowledge the community has an interest in having a cement manufacturing facility in Thomaston. Darney Brief at 9. The Darneys ignore, however, the number of persons employed by Dragon, the payroll and benefits paid to such employees, and the property taxes Dragon pays. Taking all of that into consideration, it is clear an injunction would adversely affect the public interest.

V. THE DARNEYS MUST PROVE INTENT TO PROVE THEIR NUISANCE CLAIM.

In their brief, the Darneys argue that in order to prove their nuisance claim, they must prove either "intentional and unreasonable" conduct by Dragon in invading their interest in the use and enjoyment of their land; or they must prove conduct that is "unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities." Darney Brief at 12. As support for this, rather than cite the applicable Maine law, the Darneys cite Section 822 of the Restatement (Second) of Torts. The Darneys also argue in their brief that the "intent" element is proved as the law of the case, under the Court's ruling in the Order on the Motion for Summary Judgment that Plaintiffs' prior lawsuit "served as notice to Dragon, and having such notice, Dragon nevertheless continued the same activities Plaintiffs had already complained of." Darney Brief at 13. Finally, the Darneys argue that if they prove that Dragon's blasting activities are "abnormally dangerous," then they have proved all of the elements necessary to prove nuisance, including intent. Darney Brief at 12-13. All of the Darneys' arguments ignore Maine law.

First, Maine law clearly provides that the first element of common law nuisance requires the plaintiff to prove that the "defendant acted with the intent of interfering with the use and enjoyment of the land by those entitled to that use." *Johnston,* 2010 ME 52, ¶ 15, 997 A.2d at 745; *Charlton,* 2001 ME 104, ¶ 36, 774 A.2d at 377 (citing *Prosser and Keeton* § 87 at 622-623). Contrary to the Darneys' arguments, nuisance does not lie under Maine law for conduct that is less than "intentional." The "intent" required for nuisance means 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 follow." *Johnston*, 2010 ME 52, ¶ 15, 997 A.2d at 745. Here, the Darneys have not pointed to – and cannot point to – any evidence that Dragon conducted any of its operations with "full knowledge" that they harm the Darneys' interests or are substantially certain to follow as a result of Dragon's operations.

Second, it is not the law of this case that the Plaintiffs proved intent on the part of Dragon at the summary judgment stage. In Dragon's motion for partial summary judgment, Dragon argued that there was no evidence of Dragon's intent to trespass. In disposing of that argument, this Court held that in light of the Darneys' complaint in *Darney I*, there was a "genuine issue of material fact … as to whether Dragon acted with 'substantial certainty' that its conduct would result in presence on the Darneys' property." Order on 10. This Court did not hold that the Plaintiffs had established that Dragon "acted with the intent of interfering with the use and enjoyment" of the Darneys' property, as it would have to for the law of the case to apply to the issue of intent for nuisance.

Finally, whether or not Dragon's blasting activities are "abnormally dangerous" has no effect on the proof necessary to prove a nuisance claim. There is simply no authority under Maine law for the proposition that if a plaintiff proves an activity is "abnormally dangerous,"

then a plaintiff automatically has proven a nuisance claim. Nothing under Maine law establishes special nuisance rules if the underlying conduct is "abnormally dangerous." Further, the authority cited by Plaintiffs as standing for that proposition does not provide that rule. In the case of comment c to Section 520 of the Restatement (Second) of Torts, it provides that abnormally dangerous activity which "substantially impairs the use and enjoyment of neighboring lands or interferes with rights common to all members of the public," *may* be actionable as a nuisance. It does not say that if you prove the conduct is abnormally dangerous you don't have to prove the elements of a nuisance claim.

Here, because Plaintiffs did not prove that Dragon acted with "full knowledge" that its actions harmed the Darneys' interests or that harm was substantially certain to follow, the Darneys did not prove their nuisance claim.

VI. DRAGON'S BLASTING IS NOT SUBJECT TO STRICT LIABILITY.

As described in Dragon's Brief, in *Dyer v. Maine Drilling & Blasting, Inc.,* the Maine Law Court recognized strict liability for abnormally dangerous activity and identified the following six factors to consider 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.

Dyer v. Maine Drilling & Blasting, Inc., 2009 ME 126, ¶ 15 fn 4, 984 A.2d 210, 215 fn 4 (quoting Restatement (Second) of Torts § 520). Contrary to the Darneys' arguments, a

consideration of these factors demonstrates that Dragon's blasting is not abnormally dangerous and is not subject to strict liability.

First, the Darneys argue Maine law recognizes blasting as "inherently dangerous," therefore, Dragon's blasting involves a "high degree of risk of some harm" to other persons, land or chattels. Darney Brief at 16. The Darneys also argue that because blasting is inherently dangerous, there is a likelihood that the harm that would result from Dragon's blasting is great. Darney Brief at 19. Although it is true that Maine law has recognized blasting as "inherently dangerous," that does not automatically mean that the first two strict liability factors are established. For example, in *Dyer* the Law Court stated that Maine law has recognized that blasting is "inherently dangerous," but then remanded the case to the Superior Court for a determination of whether the blasting at issue was an abnormally dangerous activity under the six factor test. 2009 ME 126, ¶ 15, 984 A.2d at 215. If blasting established, as a matter of law, the first two strict liability factors the Law Court would not have remanded the matter to the Superior Court for a determination of all six of the strict liability factors. Here, as Mr. McKown testified, based on the precautions taken by Dragon, Dragon's blasting operations pose a low degree of risk of harm to other persons or property. Tr. at 857:3-9. Further, there is a low likelihood that harm will result from Dragon's blasting operations, based on the procedures utilized by Dragon, the monitoring undertaken by Dragon, and the care taken by Dragon in conducting its blasting. Tr. at 857:10-23.

Next, the Darneys argue that it is "assumed" that blasting operations are unable to eliminate the risks of harm. However, to "assume" it would again ignore the Law Court's decision in *Dyer* that the Superior Court should consider the factors and determine whether the blasting at issue was abnormally dangerous, *i.e.,* the Law Court did not hold blasting is

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abnormally dangerous as a matter of law. The Darneys also ignore the factual evidence presented at trial that Dragon has taken such precautions as have permitted it to eliminate the risks of blasting. Tr. at 857:24-858:5.

Similar to the other factors, the Darneys argue that Dragon's blasting is not a matter of common usage. Darney Brief at 20-21. Although it is true that the "great mass of mankind" do not engage in blasting operations, it is not true that Dragon's blasting operations are uncommon. As Mr. McKown testified, the type of blasting conducted by Dragon is very common, throughout New England and the United States. Tr. at 858:6-20.

The Darneys also argue that Dragon's blasting operations are not appropriate to the location it is carried on because its operations are surrounded by residences. Darney Brief at 21. This, however, ignores the factual situation. Dragon has been conducting its blasting operations since 1928, and blasting was taking palace in Dragon's quarries even before that time. The Darneys have lived in their house only since 2002. Therefore, as a matter of timing, Dragon's blasting is not inappropriate vis-à-vis the Darneys. Further, as Mr. McKown testified, it is very common for residential structures to be near quarries in New England and Dragon's blasting operations are appropriate to the location in which they are being carried out. Tr. at 858:21-7.

Finally, the Darneys argue that Dragon does not constitute a value to the Thomaston area. Darney Brief at 24. This however ignores the large number of persons employed by Dragon, the amount of pay and benefits paid to such employees, and the large amount of property tax paid by Dragon to the Town of Thomaston. Dragon is very valuable to the community, and as described above, Dragon has successfully minimized the dangerous attributes of its blasting operations such that the dangerous attributes of blasting are substantially outweighed by the value Dragon provides to its community.

In sum, a consideration of the six strict liability factors demonstrates that Dragon's blasting operations are not subject to strict liability.

VII. EVEN IF THERE WERE A NUISANCE, THE DARNEYS CAME TO IT.

In their Brief, the Darneys argue that "Plaintiffs did not come to the nuisance as Dragon suggests, but the nuisance came to Plaintiffs." Darney Brief at 26-27. This, of course, ignores the factual record developed at trial. The existence of Dragon's cement-manufacturing operations predates the Darneys' purchase of their property by 74 years, and the quarry predates the cement-manufacturing at Dragon's facility. Further, the Darneys purchased their house with the knowledge that Dragon was open, in operation, and with the knowledge of what Dragon's operations consisted of. As a factual matter, the Darneys did, indeed, come to the nuisance, assuming there is one. As described in Dragon's Brief, that fact precludes the Darneys from establishing liability for nuisance on the part of Dragon, and/or should reduce the damages they may obtain. *See* Dragon's Brief at 28-30.

VIII. CONCLUSION.

For all of the aforementioned reasons and the reasons stated in Dragon's Post-Trial Memorandum of Law, the Darneys have failed to prove any of their claims against Dragon. This Court should enter judgment in Dragon's favor.

Dated: January 14, 2011

/s/ Eric J. Wycoff

Peter W. Culley
Eric J. Wycoff
PIERCE ATWOOD LLP
One Monument Square
Portland, ME 04101
(207) 791-1100
pculley@pierceatwood.com
ewycoff@pierceatwood.com

Attorneys for Defendant
Dragon Products Company, LLC

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of January, 2011, I caused a copy of Defendant's Reply to the Darneys' Post-Trial Submissions to be filed with the Clerk of Court using the CM/ECF system which will send notification of such filing to counsel of record.

/s/ Eric J. Wycoff
Eric J. Wycoff
ewycoff@pierceatwood.com
Pierce Atwood LLP
One Monument Square
Portland, ME 04101
(207) 791-1100

Attorney for Defendant
Dragon Products Company, LLC