

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

STEPHEN AND KATHY DARNEY,
Personally, and on behalf of
K.D. and S.D.,

Plaintiffs

v.

DRAGON PRODUCTS COMPANY, LLC

Defendant

*
*
*
*
*
*
*
*
*
*
*
*

Civil Action

Docket No. 2:08-CV-047

PLAINTIFFS' POST-TRIAL MEMORANDUM

Pursuant to the Court's Order of December 3, 2010, Plaintiffs Stephen and Kathy Darney, individually and on behalf of their children, K. and S., submit this Post-Trial Memorandum, that supplements their Trial Memorandum filed on October 20, 2010, and addresses the twelve issues identified by the Court at the conclusion of the trial as appropriate for further argument.

1. The Impact on Liability/Damages in Plaintiffs' Claims From Dragon's Compliance or Non-Compliance with its State License.

For the reasons given below, Plaintiffs contend that Dragon's compliance with its State license limits on dust emissions and ground vibrations is not relevant to Plaintiffs' damage claims. However, Dragon's non-compliance *is* relevant, and helps prove Plaintiffs' claims. This is because the license limits allow for more severe off-site impacts than do private trespass and nuisance standards. By State statute, regulatory limits may be imposed only to protect against the more severe level of harm to the public's "health, safety and general welfare". To prevail on a private nuisance, negligence, or trespass claim, however, Plaintiffs are not required to prove that their "health, welfare and safety" are harmed, but must only prove such trespass and nuisance

nuisance elements as "damage" and "annoyance". Thus, proof of Dragon's violation of the State's public health, safety and general welfare impact limits helps Plaintiffs prove the lesser damage and annoyance elements, particularly because Plaintiffs, as abutters, are the persons who would experience the greatest impact from those violations of the State's off-site impact licensing limits. *See Charlton v. Town of Oxford*, 2001 ME 104, 774 A.2d 366. A more comprehensive discussion is given below.

Cement plants and quarries are unlike other businesses like stores, restaurants, gas stations and other manufacturing facilities in that they can cause caustic dust and ground vibrations to travel off-site.¹ These off-site impacts give rise to concern for the public's health, safety and general welfare. Thus the State regulates such activities and imposes off-site impact limits. As a cement plant and quarry, Dragon is subject to State licensing, and is required by the terms of its licenses to self-monitor and report its dust emissions and blast vibrations, and to comply with the State's emission and ground vibration limits--so as not to adversely impact the health, safety and welfare of those who are next to or near the facility.

As stated in the Maine Department of Environmental Protection's 2008 Report on Total Suspended Particulate Sampling in Thomaston, Maine, the Maine Legislature enacted 38 M.R.S.A. § 581 to initiate Maine's Air Program, stating in relevant part:

"the Legislature by this chapter intends...to control present and future sources of emission of air contaminants to the end that air polluting activities of every type shall be regulated in a manner that reasonably insures the continued health, safety and general welfare of all the citizens of the State; protects property values and protects plant and animal life.'

¹ Plaintiffs assert that this is a matter of common knowledge subject to judicial notice, as noted by other courts and the Restatement (Second) of Torts. *See Boomer v. Atlantic Cement Company*, 26 NY2d 219, 222 (N.Y. 1970): ("Cement plants are obvious sources of air pollution in the neighborhoods where they operate."); Restatement (Second) of Torts, § 822, Comment *j* (Abnormally dangerous conditions and activities)(blasting activities are an example of an abnormally dangerous activity and "may create a private nuisance because of the resulting interference with the use and enjoyment of land in the vicinity.")

Exhibit 123.1 at p. 3.²

Plaintiffs contend that a 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. Legal authority for this argument is provided in *Charlton v. Town of Oxford*, 774 A.2d 366 (Me. 2001), where the *Charlton* Court found that an element of the Charltons' nuisance claim was proved by the permit violation, stating:

“The Charltons satisfied the first element of common law private nuisance because Delekto, by his code violations, acted with the intent of interfering with their use and enjoyment of the land.”

Id. at 774 A.2d 377 (emphasis supplied).

² Section 581 states in full as follows:

§ 581. Declaration of findings and intent

The Legislature finds and declares that air pollution exists with varying degrees of severity within this State; that such air pollution is potentially and in some cases actually dangerous to the health of the citizenry, often causes physical discomfort, injury to property and property values, discourages recreational and other uses of the state's resources and is aesthetically unappealing.

The Legislature by this chapter intends to exercise the police power of the State in a coordinated state-wide program to control present and future sources of emission of air contaminants to the end that air polluting activities of every type shall be regulated in a manner that reasonably insures the continued health, safety and general welfare of all of the citizens of the State; protects property values and protects plant and animal life.

Nothing in this chapter is intended, nor shall be construed, to limit, impair, abridge, create, enlarge or otherwise affect, substantively or procedurally, the right of any person to damage or other relief on account of injury to persons or property due to violation of air quality standards or emission standards and to maintain any action or other appropriate procedure therefor; nor to so affect the powers of the State to initiate, prosecute and maintain actions to abate public nuisances.

The third and last paragraph of Section 581 states that violation of emission standards does not limit or enlarge private causes of action. Plaintiffs contend that Dragon's noncompliance with its licensing limits is evidence in support of their damage claims, although it does not affect their underlying causes of action.

In like regard, the frequency, degree, and continuation of Dragon's license violations are evidence of the frequency, degree and continuation of Dragon's harm to Plaintiffs and other citizens living next to or near the plant. A State fine of \$50 for Dragon's violating its license requirements says one thing. A fine of \$10,000 says another. And a fine of \$149,432 says something more. (The amount of \$149,432 was the amount the State assessed against Dragon in 2007, Ex. 120.1(d), following its previous 2006 fine against Dragon of \$12,000 for similar violations, Ex. 120.1(b).) The amount of the State's fine indicates the degree of Dragon's misconduct, and the level of the State's concern as to which its misconduct risks the public's health, safety and general welfare. Further, the fact that Dragon continued and *increased* its violations of its license standards after representing it would comply with the State limits if permitted to expand its production by 40% with a \$50,000,000 investment and to expand its blasting operation, which permits were issued based on Dragon's assurances that it would take extra measures to reduce impacts, *see, e.g.*, Ex. 121 at 133, is relevant to prove the degree, frequency and extent of the harm to Plaintiffs, and the degree of Dragon's deceptive and reckless disregard for their and the public's health, safety and welfare.

The State's imposition of significant fines (and the U.S. Environmental Protection Agency's own imposition of a significant fine in its separate enforcement action) for Dragon's violation of its license limits on dust and blasting, argues for comparable punitive damages in this private civil action for harms to Plaintiffs, who, as abutters, are the citizens who are most intended to be protected by those licensing limitations.

2. The Impact on Plaintiffs' Claims of the State's Approvals of Dragon's Business in this Particular Location.

Under Maine law, the fact that the State approved Dragon's operation in its current location has no relevance to Plaintiffs' claims.

In June 2010, the Maine Law Court, in *Johnston v. Maine Energy Recovery Co., LP*, 2010 ME 52, 997 A.2d 741, overturned a lower court’s dismissal of an odors and emissions nuisance claim by a resident against a solid waste incinerator ("MERC"), finding that the fact that the State had approved MERC's operation where it was located had no effect on a private nuisance claim arising from that operation. The *Johnston* court stated:

Johnston’s claim is not barred by the fact that Maine Energy Recovery’s activity was licensed. We have never held that any activity conducted pursuant to a license is necessarily immune from private actions. To the contrary, the licensing status of an activity does not affect the determination of whether it is a private nuisance. ...*see also Burbank*, 75 Me. At 384 (finding that while defendants were authorized to operate a steam mill, ‘their charter [does not] authorize them to...use it in such a manner that it will be a nuisance to others...’).

See Gillison v. Farrin, 632 A.2d 143 (Me. 1993) (the fact that a wharf was permitted was properly excluded as evidence as being irrelevant in a nuisance action arising from the use of the wharf: the question was not whether it was lawful to build the wharf, but whether its use was unreasonable); *Norcross v. Thoms*, 51 Me. 503, 504 (1863) (“A lawful as well as unlawful business may be carried on so as to prove a nuisance.”)³

3. The Applicability of Injunction in this Case and What Factors the Court Should Consider, Both Factual and Legal.

To grant injunctive relief, this Court has held that generally four criteria must be met:

1. That the party seeking injunctive relief will suffer irreparable injury if injunctive relief is not afforded;
2. That the threatened irreparable injury outweighs any harm to the defendant that would result from granting the plaintiff injunctive relief;
3. That the party seeking injunctive relief has shown a likelihood of success on the merits;
4. That affording injunctive relief will not adversely affect the public interest.

Women's Community Heath Center v. Cohen, 477 F. Supp. 542, 544 (D. Me. 1979). The facts of this case meet each of these four criteria, as shown below:

³ On the other hand, the fact that Dragon created an unlicensed 14 acre uncovered cement kiln dust (CKD) pile of 800,000 tons, and a 13 acre cement clinker pile, is relevant, for the same reasons discussed in Section 1 above.

1. An irreparable injury is one for which there is no adequate remedy at law. *Bar Harbor Banking & Trust Co. v. Alexander*, 411 A.2d 74, 79 (Me. 1980). “[E]conomic injury standing alone generally will not constitute irreparable injury.” *Maine Cent. Railroad Co. v. Brotherhood of Maintenance of Way Employees*, 646 F.Supp.367, 371(D. Me. 1986).

A remedy is considered not adequate at law if the plaintiff’s legal remedy for the defendant’s wrongful acts can be realized only through a multiplicity of actions at law. This Court held in *Bangor Baptist Church v. State of Maine Dep’t of Educ. and Cultural Service*, 576 F. Supp.1299, 1324 (D. Me. 1983) that “an available legal remedy generally is considered inadequate if it can be secured only through a multiplicity of actions, as when the conduct is likely to be of a recurring nature.” Dragon intends to continue its operations into the future: operations that it has already expanded, intensified, and (as to blasting) moved closer to Plaintiffs' property since Plaintiffs purchased their home in 2002. To the extent the Court finds such expanded operation has caused trespass and nuisance to Plaintiffs, 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, in addition to an award of compensatory, special and punitive damages for past damage, an award of permanent damages, and are able, thereby, to buy a new home away from Dragon, without having to sell their presumably unsaleable current home.)

2. The balance of harms criterion is of special significance with a mandatory injunction, although, to the extent the purpose of a mandatory injunction is to enforce compliance with the law, the defendant may not cite the burden and cost of compliance as harm to be weighed in the balance. *Dep’t of Environmental Protection v. Emerson*, 563 A.2d 762, 770 (Me. 1989).

As to other considerations in balancing the harm, courts will weigh the financial harm to the plaintiff from the continuation of the tort, with the financial harm to the defendant in being

enjoined from continuing the tort. In *Eaton v. Cormier*, 2000 ME 65, 748 A.2d 1006, the Law Court upheld an injunction issued by the lower court which restricted the hours of operation of the defendant quarry's activities: however, the quarry's activities were allowed to continue as limited. In *Natale v. Kennebunkport Board of Zoning Appeals*, 363 A.2d 1372, 1377 n. 9 (Me. 1976) the Law Court indicated that the existence of a nuisance under Maine's nuisance statute does not automatically entitle the plaintiff to an injunction, since the traditional balancing of equities might reveal the injunctive remedy to be unduly harsh under the circumstances.

There is an extended discussion about the balance-of-harms criterion in the New York case of *Boomer v. Atlantic Cement Company*, 26 NY2d 219 (N.Y. 1970), as applied to the operation of a cement plant. The plant's operation was found to be a nuisance that caused substantial damage to plaintiffs' properties from dust, smoke and blast vibrations, but the question was whether the nuisance should be enjoined. In weighing the issue on appeal, the New York court noted:

Cement plants are obvious sources of air pollution in the neighborhoods where they operate . . . [but] [t]he total damage to plaintiffs' properties is. . . relatively small in comparison with the value of defendant's operation and with the consequences of the injunction which plaintiffs seek...[and there is a] large disparity in economic consequences of the nuisance and of the injunction.

Id. at 222-223. The court found that the damage to plaintiffs from Atlantic Cement Company's air pollution was "not 'unsubstantial' viz, \$100 year", with a total of permanent damages of \$185,000, *id.* at 224-25, but found that such damage amount was small in comparison to the economic consequences of the injunction against the cement company. On the other hand, the court found that the lower courts' repeated denial of plaintiffs' petitions for injunction on the ground that "plaintiffs could maintain successive actions at law for damages thereafter as further damage was incurred." to be contrary to New York's standards for injunctive relief *Id.* at 225.

The appellate court hence struck a middle ground. It *granted* the injunction *conditioned* on the payment of permanent damages to plaintiffs which would compensate them for the total economic loss to their property, present and future, caused by defendant's operations, noting that "to grant the injunction unless defendant pays plaintiffs such permanent damages as may be fixed by the court seems to do justice between the contending parties". *Id.* at 225 *citing Northern Indiana Public Serv. Co. v. Vesey*, 210 Ind. 338, 353-354 (1936) (injunction denied where gases, and smoke from the plant were found to have damaged property, and instead permanent damages "present, past, and future" were granted).

The Restatement (Second) of Torts, § 821B, Comment *i*, states:

Although a general activity may have great utility it may still be unreasonable to inflict the harm without compensating for it. In an action for injunction the question is whether the activity itself is so unreasonable that it must be stopped. It may be reasonable to continue an important activity if payment is made for the harm it is causing, but unreasonable to continue it without paying.

See also Restatement (Second) of Torts, § 930 (Damages for Future Invasions), Comment *b* (as to plaintiff's election to recover for future invasions: "when it appears that the wrong will probably continue indefinitely, the person injured is empowered to elect to be compensated once and for all, for the prospective invasions...[t]he exercise of the power of election, followed by satisfaction of a judgment for damages for prospective invasions, confers an easement or privilege to continue the invasions thus paid for in advance."); and § 930 (c) (Damages for Future Invasions) (damages for past and prospective invasions of land include compensation for...(b) either the decrease in the value of the land....or the reasonable cost to the plaintiff of avoiding future invasions).

An injunction is appropriate as to Dragon's future activities, because its expanded operation is a continuing tort. *Jacques v. Pioneer Plastics Inc.*, 676 A.2d 504 (Me. 1996); *Jacobs v. Boomer*, 267 A.2d 376, 377-78 (Me. 1970); *Pettengill v. Turo*, 159 Me. 350 (1963).

However, Plaintiffs recognize that the monetary value of the damage to them is small compared to the monetary value of Dragon's \$100+ million operation. Plaintiffs therefore ask this Honorable Court to consider the approach taken in *Boomer* and *Eaton* and to grant an injunction conditioned on the payment of permanent damages to plaintiffs which would compensate them not only for the total economic loss to their property past, present and future, but to their emotional distress, and other consequential and special damages (including Steven Darney's time expended to avert further harm) this are past, present and future. Such an award in permanent damages should be a sufficiently high amount to account for decades more of continued consequential and special damage caused to all 4 members of the Darney family.

The remaining two criteria to be considered in determining whether an injunction should issued are briefly addressed below.

3. The third criterion of "likelihood of success" is relevant only during the pendency of litigation. The criterion is proved upon a finding of Dragon's nuisance, negligence, strict liability, or negligence.

4. As to the public interest criterion, there are cases where an application for injunctive relief implicates competing public interests. In such cases the courts balance the competing public interests against each other and against the private interests involved. *Maine Human Rights Comm'n v. City of Auburn*, 425 A.2d 990. To the extent there are public interests implicated in this matter, they would be the public's interest in the health, safety and welfare of all its citizens, and the right of its citizens not to be subject to pollution and blast vibrations, competing with the public's interest in having a cement manufacturing facility in this area.

4. The Availability of Punitive Damages Given the Facts of this Case.

In addressing the availability of punitive damages, given the facts of this case, Plaintiffs incorporate by reference the discussion on punitive damages on pages 12-15 of their Trial Memorandum to supplement their arguments below.

In Maine, punitive damages are recoverable in all actions based upon tortious acts in which the defendant had acted with malice. *See C.N. Brown Co. v. Gillen*, 569 A.2d 1206, 1213-14 (Me. 1990). In 1985, the Law Court comprehensively reviewed the doctrine of punitive damages in the case of *Tuttle v. Raymond*, 494 A.2d 1353,1356-58 (Me. 1985): finding that the doctrine serves as a deterrent against serious misconduct and an incentive for private civil enforcement of society's rules against such misconduct, the court refused to abolish the common law doctrine of punitive damages in Maine. To be awarded punitive damages, the plaintiff must prove that the defendant acted with malice. Malice can be implied where deliberate conduct by the defendant, although motivated by something other than ill will, is outrageous toward the injured plaintiff. *Id.* at 1361.

Under Maine law, deterrence of the tort-feasor and incentive for private civil enforcement of serious misconduct are the proper justification for punitive damages. *Caron v. Caron*, 577 A.2d 1178 (Me. 1990). The wealth of the defendant may be considered in determining the amount of punitive damages to be awarded. *Id.* The plaintiffs' personal cost in bringing the action may also be considering in awarding punitive damages. *See Estate of Berthiaume v. Pratt*, 365 A.2d 792, 795 (Me. 1976).

Plaintiffs maintain that an award of punitive damages is particularly appropriate against Dragon. Its 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. The fines imposed on Dragon by the State are further evidence of its lack of regard for the public's health, welfare and safety. The facts adduced at trial reveal such malice, as set forth in Plaintiffs'

Plaintiffs' proposed Findings of Fact with supporting references to exhibits and testimony in its Attachments. The proposed findings include the following:

DRAGON'S RECKLESS DISREGARD OF OFF-SITE BLASTING DAMAGE:

- Dragon knows that its blasting can cause damage to nearby structures.
- Dragon knew before the November 2004 that its blasting was not complying with State licensing limits.
- Dragon knows that its blasts explode thousands of tons of stone, which can occur at any location in the quarry.
- Dragon represented that it would comply with its impact limits as a condition of its licensing but it has continually failed to do so.
- Dragon knows that it is supposed to conduct preblast surveys, and that they are supposed to propose such surveys to residents by registered mail, and yet it hasn't: Dragon represented to the State when it applied to expand its blasting operation that it would take additional pre-blast surveys of residences, but there is no evidence that it did so.
- Dragon represented to the State that it would use a second monitor that it would "move around as needed" to assess whether its expanded blasting operation damaged nearby residences, but it not do this.
- Dragon's current blasting operation does not conform to current licensing standards that require pre-blast surveys within a half-mile of blasting.
- Dragon's blasting has intensified in number and has approached closer to Plaintiffs' and others residences since 2002.
- Dragon is required to undertake a self-monitoring blast program, that it failed to do, and it failed to correct its violations of those requirements when advised by the MDEP to do so, including failing to locate monitors at the correct locations, keeping the monitors properly calibrated, failure to install the monitors properly, and frequent failure to activate the monitors at all.
- Dragon would intentionally "manage" complaints and license limit violations, instead of addressing them.
- Dragon's blasting has damaged Plaintiffs' residence.

DRAGON'S RECKLESS DISREGARD OF OFF-SITE DUST POLLUTION:

- Dragon admits that exposure to its dust has adverse health effects, but did nothing to alert the residents who lived next to the facility, including Plaintiffs.
- Dragon was aware that residents were experiencing similar adverse health effects as typically experienced from exposure to cement dust.
- Dragon knew that its cement clinker dust contained toxic metals and silica.
- Dragon knew that its dust dispersed off-site, from its own expert analysis, and from observations reported among its own personnel.

- Dragon repeatedly violated its licensed limits for opacity, and continually created opacity, whether it was above or below licensing limits.
- Dragon had the ability to reduce its fugitive dust opacity violations, but did not, and was strategic when to expend more effort to reduce fugitive emissions to mislead regulators.
- Dragon's President, Manuel Llop, demonstrates no interest in environmental effects of the fugitive dust, but only in profits, and denies the health risks from exposure to limestone.
- Dragon knew that its quarry dust was alkaline and caustic.
- Dragon maintained an uncovered 14 - acre mountain of CKD that was uncovered until the summer of 2005, that created fugitive dust and that was unlicensed.
- Dragon has trespassed and damaged Plaintiffs and their property from repeated accumulations of dust.

Plaintiffs maintain that these facts, supported by substantial evidence, amply warrant the imposition of punitive damages. As to the amount of punitive damages to be awarded, Dragon's wealth is relevant, since the purposes of exemplary damages is to punish for a past event and to prevent future offenses, and unless a sufficiently large award is made, it will not deter it from continuing such reckless disregard of its harm to its neighbors.

5. Standard of Liability for Nuisance: Whether there is a Requirement to Prove Negligence; Strict Liability; or of Other Remedies within State Law.

Section 822 of the Restatement (Second) of Torts describes the elements of liability for private nuisance and answers this question in good part. It states:

"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."

Plaintiffs maintain that, if they prove that Dragon's blasting activities are abnormally dangerous, then they have proved all elements of nuisance as to blasting, and need only further prove that its activities proximately caused physical damage to their property and/or emotional distress. Further, Comment *c* to § 520 of the Restatement (Second) of Torts states, as to strict liability's relation to nuisance:

If the abnormally dangerous activity involves a risk of harm to others that substantially impairs the use and enjoyment of neighboring lands or interferes with rights common to all members of the public the impairment or interference may be actionable on the basis of a public or private nuisance. (See Section 822, and Comment *a* under that Section).

Section 821-A of the Restatement states in Comment *c*:

[F]or a nuisance to exist there must be harm to another or the invasion of an interest, but there need not be liability for it. Thus 'nuisance' does not signify any particular kind of conduct on the part of the defendant. Instead, the word has reference to two particular kinds of harm [public nuisance and private nuisance].

In the case at bar, the Restatement's § 822 (a) element of "intent" is proved as law of the case, under this Court's ruling in its Order on Defendant's Motion for Partial Summary Judgment issued on August 6, 2009, that Plaintiffs' prior lawsuit served as notice to Dragon, and having such notice, Dragon nevertheless continued the same activities Plaintiffs had already complained of. Further, Dragon's blasting is "abnormally dangerous", for the reasons described below in Section 6. Thus Plaintiffs may assert damage claims from Dragon's blasting activities under either standard, (a) or (b), of §822. Under the § 822(b) analysis, if Dragon's activity is abnormally dangerous, then there is strict liability, meaning that Dragon is "liable for the harm caused by [its] acts whether the harm was done intentionally, negligently or accidentally". § 822, Comment *b*.⁴ Comment *j* to § 822 notes that blasting activities are an example of an abnormally dangerous activity and, accordingly, "may create a private nuisance because of the resulting interference with the use and enjoyment." Thus Plaintiffs maintain that, as Dragon's blasting activities constitute an abnormally dangerous activity, Plaintiffs need only prove that those activities interfere with their use and enjoyment of their property to prevail on their claim of private nuisance. As Comment *k* states:

⁴ Comment *b* states in full on this point as follows: "In early tort law the rule of strict liability prevailed. an actor was liable for the harm caused by his acts whether that harm was done intentionally, negligently or accidentally...[a change in the law] has occurred, and an actor is no longer liable for accidental interferences with the use and enjoyment of land but only for such interferences as are intentional and unreasonable or result from negligent, reckless or abnormally dangerous conduct."

[a]n abnormally dangerous activity is not treated as unreasonable conduct in the same sense that negligent or reckless conduct is...An abnormally dangerous enterprise is required to pay its way by compensating for the harm it causes. Compare the similarity to intentional invasions [which is more relevant to the dust-as-nuisance part of Plaintiffs' nuisance claims] where it is sometimes held to be reasonable to carry on a socially useful enterprise if a payment is made for the harm it causes but unreasonable to continue it without paying." (emphasis supplied).

As to Dragon's off-site dispersion of dust, the dust from its *blasting* is subsumed as damage caused by abnormally dangerous activity, but the dust from its *plant* is arguably not part of an abnormally dangerous activity. The legal analysis to apply to Plaintiffs' claims of nuisance from dust from the manufacturing facility, therefore, is set forth in § 822(a), wherein Plaintiffs must prove that the cement and limestone dust is 'more likely than not' to have come from Dragon's manufacturing plant, and that the nuisance is "intentional" and "unreasonable". It is unreasonable when "(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 compensation for this and similar harm to others would not make the continuation of the conduct not feasible." § 826 (unreasonableness of intentional invasion) Restatement (Second) of Torts.

6. Whether Dragon's Blasting Activities Meet the Six Factors in the Restatement's § 520 Provision for Strict Liability Adopted in the *Dyer* Decision.

In *Dyer v. Drilling and Blasting, Inc.*, 2009 ME 126, the Maine Law Court adopted the Second Restatement of Tort's principle in § 519 of strict liability for abnormally dangerous activity as determined by the Restatement's § 520's six-factor test.

Section 519's general principle for strict liability states that: "(1) One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he exercised the utmost care to prevent the harm;" and "(2) This strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous".

Section 520 applies six factors to determine what activities are 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.

Dragon's blasting activities meet each of § 520's six factors (although meeting all six factors is not required to establish that an activity is abnormally dangerous), establishing that its activities are abnormally dangerous.

Plaintiffs note as a preface to the six factor analysis that strict liability for blasting activity is based on the principle that "the law will not permit a blaster to defend himself on the ground that he carefully prepared and detonated the explosive; to carefully injure another is no longer an acceptable exercise of one's legal duty of due care." 31-A Am. Jur.2d, Explosions and Explosives, § 83 at p. 478. As stated by the Federal District Court for the Western District of Tennessee, one who conducts a highly dangerous activity should prepare in advance to bear the

financial burden of resulting harms. *Sterling v. Velsicol Chemical Corp.*, 647 F. Supp. 303 (WDF Tenn)(1986). The Restatement (Second) of Torts states that blasting activities are an example of an abnormally dangerous activity stating: "blasting activities...may create a private nuisance because of the resulting interference with the use and enjoyment of land in the vicinity." Comment *j.* (Abnormally dangerous conditions and activities) to § 822.

Below, Plaintiffs show how the facts of this case meet Section 519's six factors, (a)-(f):

(a) Existence of a high degree of risk of some harm to the person, land or chattels of others:

As all blasting activities are "inherently" dangerous as a matter of Maine law, and require "special precautions at all times to avoid injury, and [are] dangerous per se", all blasting activities involve a "high degree of risk of some harm" to others' persons, land or chattels..

The Law Court held in *Dyer* in 2009, and in *Maravell* in 2007, that blasting activities are "inherently dangerous", stating: "we have recognized that blasting is inherently dangerous, *Dyer* at 216; *Maravell v. R.J. Grondin & Sons*, 2007 ME 1, P 17, 914 A.2d 709, 714 ("...blasting, an inherently dangerous activity, was being conducted...").

Black's Law Dictionary defines "dangerous", when applied to a "person" or "object", as "likely to cause serious bodily harm". *Id.* (9th ed., West Publishing) at p. 451. The term "inherently dangerous" is defined by Black's Law Dictionary, when applied to an "activity", as "requiring special precautions at all times to avoid injury; dangerous per se". *Id.* Plaintiffs maintain that the inherently dangerous activity of blasting thus meets this first factor of "a high degree of risk".

(b) Likelihood that the harm that results from it will be great;

In Maine, the likelihood that harm from blasting may be great is assumed. In the blasting damage case of *Reynolds v. W.H. Hinman Company*, 145 Me. 343 (1950), the Law Court noted: "A jury will be told, and will usually find, that the amount of care required in fact will increase in

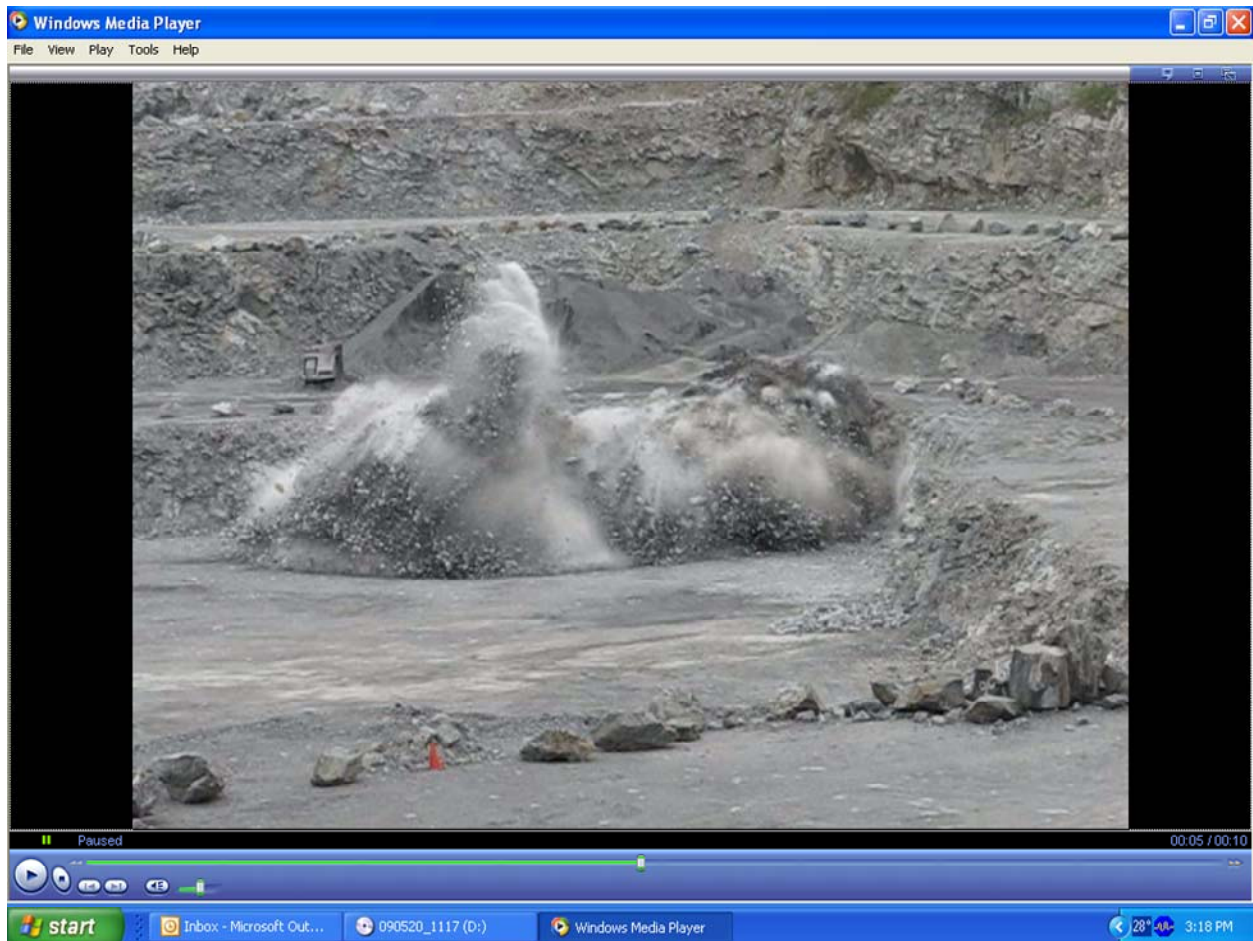
in proportion to the danger to be apprehended in case of neglect. Hence they will generally find that the amount of care required of a blaster is in fact very great.”

This principle in *Reynolds* was quoted with approval by the Law Court in *Albison v. Robbins*, 151 Me. 114 (1955), another blasting case where the Court stated, in referring to blasting activities that, “[w]here the risk is great a person must be especially cautious.” *Id.* at 122 (emphasis supplied).

In *Maravell*, in 2007, the Law Court, in describing a general contractor's standard of care supervising a subcontractor's blasting activities referred to the fact that “the activities of the subcontractor involve an *unreasonable risk of physical harm to [] third parties*”. 2007 ME 1, 914 A.2d 709, 712. As is stated in Am. Jur. 2d, Explosions and Explosives, § 81, p. 476 “blasting involves a substantial risk of harm regardless of the degree of care exercised”.

Historically, blasting activities have been grounds for an imposition of strict liability because of the likelihood of harm caused by debris hurled through the air by the explosion itself and vibration or concussion. Prosser, Torts, 4th ed. § 78; 31 Am. Jur. 2d, Explosions and Explosives §§ 36-37 and 56 ALR 3rd 1017, “Absolute Liability for Blasting Operations as Extending to Injury or Damage not Directly Caused by Debris or Concussion From Explosion.” Strip mining has traditionally been found to be the classic example of an abnormally dangerous activity because of the inability to control flying rock and/or vibrations or concussions resulting from the blasting. *See* 31 Am. Jur. 2d, Explosions and Explosives §§ 36-37. *See* photographs below from Dragon’s Exhibits 46 and 48 (videos of the blasts reported in Exhibits 47 and 49 respectively (which are photographs of blasts caused by 4310 lbs. and 3822 lbs. of explosives respectively). (Dragon did not submit video examples of its greater blasts or its double blasts (*e.g.*, Shots 38-08 and 39-08 (5-29-08)) which used 10,644 lbs. of explosives each (Ex. 37 at FedDrag 20167). The majority of case law applying strict liability to abnormally

dangerous activity involves the violent disruption of a natural mass and damages resulting from flying rock, vibrations and concussions, such as occurs with Dragon's blasting operation.



“Screenshot” halfway through play of video: (Def. Ex. 46, Shot 64-08, July 22, 2008; FedDrag 11392)



“Screenshot” halfway through play of video: (Def. Ex. 48, Shot 17-09, April 15, 2009; FedDrag 23404)

The determination by the Law Court that blasting is inherently dangerous also addresses this second factor as to the likelihood that the harm that results from it will be great. It is common knowledge that persons are prohibited from coming near a blasting site and required to wear hard hats. *See* U.S. Bureau of Mines safety regulations, and blasting regulations from the Maine Department of Public Safety (referred to in *Dyer* at p. 216, n. 5. As is noted in *Dyer*, the Maine Department of Public Safety rules require a blaster maintain insurance "in the amount of \$500,000 to cover losses, damages or injuries that may ensure to persons or property...prior to issuance of a permit to use, store or transport explosives". 9 C.M.R. 16 219 031-2 (2007).

(c) Inability to eliminate the risk by the exercise of reasonable care;

If this factor does not apply to blasting, then it is difficult to imagine what activity it does apply to. No matter how much reasonable care is taken, a blast of rock into the air with explosives involves risk. This is particularly the case with the uncontained blasting by Dragon with thousands of pounds of explosives shattering rock in explosions several stories high. As the Law Court has held in 2007 and 2009, it finds blasting to be "inherently dangerous", meaning "requiring special precautions at all times to avoid injury; dangerous per se".

In 57-A Am.Jur. 2d, Negligence, § 415, p. 402, it is assumed that blasting operations are unable to "eliminate the risk by the exercise of reasonable care", noting: "[f]or example, *unlike blasting operations* or crop dusting where the chances of damage or injury are inevitable despite the amount of care taken, the manufacture of household bleach with chlorine gas does not encompass the same unavoidable mishaps: the exercise of reasonable care would negate the risk of chlorine gas escaping into the atmosphere." *Id. citing Erbrich Products Co., v. Wills*, 509 NE2d 850 (Ind. App.1987) (emphasis supplied).

Plaintiffs accordingly assert that Dragon's blasting meets this third factor.

(d) Extent to which the activity is not a matter of common usage

It is common knowledge that individuals do not commonly engage in blasting activities. *See Luthringer v. Moore*, 31 Cal 2d 489, 190 P.2d 1 (an activity is a matter of common usage and thus does not come within the category of ultrahazardous activity if it is customarily carried on by the great mass of mankind or by many people in the community.) Moreover, Dragon's blasting operation is not even common among blasters. As Mr. Stebbins of the Maine DEP testified, Dragon's blasting operation is unusual as being the largest rock quarry blasting operation he regulates in the State of Maine.

(e) Inappropriateness of the activity to the place where it is carried on

As the Law Court noted in *Dyer*: "[S]trict liability is entirely a question of the relation of the activity to its surroundings, Keeton, Prosser & Keeton on Torts § 78 at 554, and because of this quarries require a wholly different analysis than blasting in other areas." *Dyer* at 218.

This factor takes into account the location of the blasting activity and recognizes the more limited likelihood of injury in "extremely remote localities". *Ward v. H.B. Zachry Const. Co.* 570 F.2d 892 (10th Cir. 1978) (holding that blasting activity that was 4,250 feet from plaintiff's residence was not "extremely remote")⁵; *Alonso v. Hills*, 95 Cal. App. 2d 778, 214 P.2d 50 (holding that as to remote places, blasting would be actionable only when negligence or tortious intent was proved). The blasting activity undertaken by Dragon is not in an extremely remote locality, however, but is in a locality surrounded by residences. Although Plaintiffs' and other residences on Old County Road have existed since before Dragon began its expanded blasting activities, Dragon nevertheless has repeatedly sought to expand its blasting activity area: in 1987 by 3 acres (Ex. 62); in 1990 by 13 acres (Ex. 64); and in 1994 was granted an expansion of 123 acres to its already 85 acres (Ex. 69).

The Darneys and other residents have endured more than 100 blasts in each of 2005 (108 per Def's Ex. 34), 2006 (127 per Def's Ex. 35), 2007 (117 per Def's Ex. 36) and 2008 (104 per Def.'s Ex.37). Moreover, Dragon's blasting activities have intensified in explosive power over the same period. In 2005, there were **2** blasts which used just over 10,000 lbs. of explosive. Then in 2006, there were **8** blasts employing 10,000+ lbs of explosive (one which was 13,000+ lbs.; 3 which were 11,000+ lbs.; and 4 which were 12,000+ lbs.) In 2007, there were **6** blasts

⁵ In *Ward*, strict liability was found where the defendant was conducting blasting operations at a distance of 4,250 feet from the plaintiff's residence, and at that distance, the "extremely remote locality" exception did not apply, the U.S. Federal Court for the Tenth Circuit stating: "We are aware that under all circumstances the use of explosives would not be considered as ultra-hazardous, but the facts of this action do not bring it with the exception provided for extremely remote localities." *Id.* at p. 896. (In recent years,

which used over 10,000 lbs. of explosive, one of which used **16,000+ lbs.** and one of which used **17,000+ lbs.** In 2008, 5 blasts used 10,000+ lbs. of explosive and 2 blasts used 11,000+ lbs. In addition, the number of blasts which were very close to Plaintiffs' residence have increased, as the blast locations have been migrating significantly closer to Plaintiffs' residence since they purchased the home in 2002.

Blasts less than 1,000 feet away from the closest residence (very often the Darney residence) numbered 23 in 2005, 25 in 2006, 29 in 2007 and 27 in 2008. More telling, though, is a look at **blasts over the same period which were less than 800 feet away: 6 in 2005, 4 in 2006, 18 in 2007 and 17 in 2008.** And most compelling, it was many of these very close blasts in those more recent years which resulted in **violations:**

- Shot 02-05 (1-5-05) was 668 feet from the nearest residence and 508 feet from the OCR 1 monitor (the closest monitor to the Darney residence); it resulted in an exceedance **1.47** PPV reading. (This is also the same blast as to which Dragon states in its 1-6-05 in-house memo (Ex. 114 at 17478): “As I said earlier, all of these factors are manageable and there is no excuse for not controlling them.”)
- Shot 12-5 (2-23-05) was 568 feet from the nearest residence and 510 feet from the OCR 1 monitor; it resulted in an exceedance **1.44** PPV reading;
- Shot 22-05 (3-22-05) was 573 feet from the nearest residence and 409 feet from the OCR 1 monitor; it resulted in an exceedance **1.37** PPV reading;
- Shot 28-05 (4-11-05) was 573 feet from the nearest residence and 461 feet from the OCR 1 monitor; it resulted in two exceedance PPV readings of **1.74 and 1.16**;
- Shot 75-05 (8-16-05) was 581 feet from the nearest residence and 476 feet from the OCR 1 monitor; it resulted in an exceedance **1.19** PPV reading;
- Shot 102-07 (12-13-07) was 556 feet from the nearest residence and 519 feet from the OCR 1 monitor; it resulted in an exceedance **1.13** PPV reading.

recent years, Dragon's blasts are frequently conducted well within 1000 feet of residences.)

Although these examples show exceedances when blasts were very close, other times blasts were very close but did not even trigger the monitors. For example, Shot 10-08 (1-31-08) was 782 feet from the nearest structure, 745 feet from the OCR 2 monitor (and 1626 feet from the OCR 1 monitor), and **neither** monitor triggered. Again with Shot 102-08 (12-11-08), the blast only was 710 feet from the nearest residence and 662 feet from the OCR 1 monitor, and the monitor did not trigger. Looking at Dragon's Table of 2008 blasts (Ex. 37) over 50% of the blasts did not trigger one or more (sometimes all) of the monitors supposedly properly in place to monitor the blast. Many of these employed very large quantities of explosives.

Further, in seeking its 123 acre quarry expansion it represented that it would use a monitor to move around with each blast, so as to be between the blast and the nearest residence. It never did this, but kept the monitors in the same locations, as Mr. Stebbins confirmed in his testimony, and the fixed location of those monitors were distant from Plaintiffs property and the other homes where clustered on Old County Road. *See* Ex. 112.

In seeking the expansions, Dragon made a number of representations as to the safety and care it would use, including conducting pre-blast surveys and correct monitoring. Its blasting plan for its expanded operation, Exhibit 112.1 represented that it was "very confident of our ability to predict and control ground vibration and therefore to prevent damage to nearby structures" and that it would undertake preblast surveys. It did not honor those representations. Injury has resulted from Dragon's intentional and planned expansion and intensification of its blasting activities, while violating its blasting license limits as to impacts, and underreporting its blast effects with improperly located, installed, and uncalibrated monitors.

(f) Extent to which its value to the community is outweighed by its dangerous attributes.

The "community's" prosperity does not depend on Dragon. Indeed, the residents surrounding Dragon's facilities tend not to be prosperous at all, and its property values are negatively affected by Dragon's expanding operation.

Dragon is owned by an international Spanish corporation. Its profits do not go to the community surrounding it, but presumably to Spain. Its president does not even live in Maine. There is no evidence that any of its 100 on-site employees even live in the community. The product it makes is national in its distribution, and as the Federal District Court for the Northern District of Illinois has held, what is to be considered with this community-value factor is the value of the activity to the *specific* community or area damaged by the activity. *Indiana H.B.R. Co. v. American Cyanamid Co.*, 662 F. Supp. 635 (ND Ill. 1987). What would be of value to the specific community surrounding the facility is if Dragon would include, as its cost of doing business, compensation to the residents and properties it damages from its blasting activities and offers from it to purchase the residential properties abutting its expanded operation. As the Law Court held as to blasting activities in *Dyer*:

strict liability seeks to encourage both cost-spreading and incentives for the utmost safety when engaging in dangerous activities. Additionally, blasters are already required by the rules of the Maine Department of Public Safety and by many town ordinances to have liability insurance covering damages that result from blasting. Thus, a strict liability scheme should not greatly increase costs for these businesses.

Dyer at 216. The Law Court noted that "the majority of states [including Connecticut, Rhode Island and Vermont have] applied strict liability to all blasting cases, finding that "[i]t seems clear that the just result is to allocate the loss so that those gaining the benefit of the activity bear the cost, if the utility of the activity is great enough to justify the invasion of private rights." *Id.* at 217. See *Malloy v. Lane Constr. Corp.*, 123 Vt. 500, 194 A.2d 398, 400 (Vt. 1963).

Thus, Plaintiffs maintain that Dragon's blasting activities meets this sixth criterion of abnormally dangerous activities, and it is therefore strictly liable for any damage it causes from such activities.

7. Whether the Damages asserted by Plaintiffs from Dust and Blast Vibrations Were Proximately Caused by Dragon's Actions.

The Law Court held in *Dyer* that: "Under a strict liability analysis, proof of a causal relationship between the blasting and the property damage is still required. *See* Restatement (Second) of Torts § 519(1) (1977)." The Law Court noted that "[a] fact-finder could infer that these significant changes, observed over a short period of time in a home over seventy-years-old, were not likely to have been caused by normal settling. In *Cratty*, we held that expert testimony is not necessary to prove negligence, including causation, in a blasting damages case. *Cratty v. Samuel Aceto & Co.*, 150 Me. 123, 131, 116 A.2d 623, 626 (1955). 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 activities⁶ and from its caustic dust pollution,

⁶ Unlike personal injury claims, where expert testimony is typically required, with blasting damage claims, no expert testimony is required, because the cause and effect of the blast vibration and damage can be readily observed by the lay person. This is established Maine law. In 1955, the Law Court allowed the plaintiff to proceed on negligence and *res ipsa loquitur* theories of recovery, without the benefit of expert testimony on the damage to plaintiff's home asserted to have been caused by blasting. *Cratty v. Samuel Aceto & Co.*, 151 Me. 126, 130-135, 116 A.2d 623 (1955). In concurring in part and dissenting in part, Justice Alexander states in *Dyer* that "it is important to remember that *Cratty* has already established that expert testimony is not necessary to prove negligence, including causation, in a blasting damages case" (plaintiff *Cratty* testified to observing cracks in the foundation of his house, and extensions of cracks at the foot of the stairs, and development of "many small cracks" after blasting occurred, and testimony of "damage in other houses relatively close to mine ...[where]when a blast went off, [] the land tiles in the basement shook and rattled against the foundation, and plastic tile popped off the bathroom wall", *id.* at 127-128. In a footnote to his opinion in *Dyer*, Justice Alexander cites further:

"*See generally* M.R. Evid. 702; *Maravell v. R.J. Grondin & Sons*, 2007 ME 1, P 11, 914 A.2d 709, 713 (stating that expert testimony may not be necessary "where the negligence and harmful results are sufficiently obvious as to lie within common knowledge"); *see also Albison v. Robbins & White, Inc.*, 151 Me. 114, 124-25, 116 A.2d 608, 613 (1955).

Courts in other jurisdictions have concluded that causation may be shown, or that the plaintiff may survive a summary judgment motion, based on the observations of a layperson. *See, e.g., Birmingham Coal &*

both in the air and as has accumulated on their persons and property. See Plaintiffs' proposed Findings of Fact and Conclusions of Law, and its attached evidentiary references.

8. The Suggestion on the Record that Plaintiffs bought into Nuisance and What Impact Should that Have on the Issue of Liability and Damages.

In *Eaton v. Cormier*, 2000 ME 65, 748 A.2d 1006, the Law Court stated:

"...although we have recognized the well-established principle that 'coming to the nuisance' does not act as a bar to a suit for nuisance, see *Jacques v. Pioneer Plastics, Inc.*, 676 A.2d 504, 508 (Me. 1996) (citing *Restatement (Second) of Torts § 840D* (1979)), it is not wholly irrelevant to a determination of the appropriate remedy in a nuisance action, see, e.g., *Escobar v. Continental Baking Co.*, 33 Mass. App. Ct. 104, 596 N.E.2d 394, 397-98 (Mass. App. Ct. 1992) (noting that it is 'a significant factor in determining what is fair and reasonable').

As described in Section 1, *infra*, when Plaintiffs bought their residence in 2002, Dragon's blasts were significantly more distant and fewer. Its manufacturing production was also significantly less. In 2004, Dragon obtained approval to modify its manufacturing facility to expand its production by 40%, which it proceeded to do in 2005, both as to blasting and production. Prior to its expansion, it had no public nuisance air pollution exceedances in the course of a decade long monitoring program. In the period of 2005-2008, however, it not only was recorded as having public nuisance air pollution exceedances, but it was fined in two enforcement proceedings, yielding fines of \$12,000 and \$149,000 respectively, for air pollution violations of its license. Its blasting operation was tripled to over 100 blasts per year, and the distance of its blasts to Plaintiffs' and others' residences were cut down to a third. Plaintiffs did not come to the nuisance

Coal & Coke Co. v. Johnson, 10 So. 3d 993, 997-98 (Ala. 2008) (affirming award of damages in blasting case where plaintiffs presented evidence of feeling vibrations in the house and damage after blasting, but did not present expert testimony on causation); *King v. New Haven Trap Rock Co.*, 146 Conn. 482, 152 A.2d 503, 504 (Conn. 1959) (holding that expert testimony was not required to prove causation and damage in that blasting concussion case); *McCuller v. Drummond Co.*, 714 So. 2d 298, 299 (Ala. Civ. App. 1997) (holding that the defendant was not entitled to a summary judgment when the plaintiff provided evidence concerning causation that the home was damaged after blasting in a manner consistent with blasting damage, but did not provide testimony as to causation from a blasting expert)."

nuisance as Dragon suggests, but the nuisance came to Plaintiffs.

9. The Impact of Dragon's Violating Any State Nuisance Standard

For the reasons given in Section 1, *infra.*, Plaintiffs contend that Dragon's violation of the State's public nuisance standard for air pollution or blasting impact limits helps prove their claim of private nuisance, *per se*. Because they are abutters to the Dragon facility, the nuisance to them can be inferred, as there is no member of the off-site public who would be closer to the nuisance than the Plaintiffs, as residents of property that abuts the Dragon facility.

10. The Issue of Compensation to Plaintiffs for the Time They Worked on this Case.

As the Maine Law Court states in *dictum* the 2010 case of *In Re Hannaford Bros. Co. Customer Data Security Breach Litigation*, 2010 ME 93, at note 1:

Some torts do recognize a remedy for loss of time without corresponding personal or property damage. These include nuisance, *see Brown v. Watson*, 47 Me. 161, 163 (1859); *see also Eaton v. Cormier*, 2000 ME 65, Par. 5, 748 A.2d 1006, 1008 (explaining that compensation for inconvenience is recoverable in nuisance...).

Id. at Para. 8 (court held that the tort of *negligence*, on the other hand, does not compensate individuals for the typical annoyances or inconveniences that are a part of everyday life...An individual's time, alone, is not legally protected from the negligence of others." [in contract to nuisance])

Plaintiff Steve Darney has not only expended time to obtain relief from the harm Dragon has already caused him and his family, but also to avert Dragon's continuing harm. His efforts 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

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. This effort is compensable. Section 919(2) of Restatement (Second) of Torts states:

One who has already suffered injury by the tort of another is entitled to recover for expenditures reasonably made or harm suffered in a reasonable effort to avert further harm.

Mr. Darney's efforts to end this continuing harm 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 he is entitled to compensation.

11. The Difference Between Nuisance and Trespass Regarding Dust and Interference with the Use of Property: Does Presence of Dust if Tied to the Defendant Constitute Trespass as a Matter of Law?

In response to this issue, Plaintiffs incorporates by reference their arguments made in opposing Dragon's Motion for Partial Summary Judgment filed June 1, 2009.

12. If Defendant is only a Part Contributor to a Condition that Constitutes a Nuisance, Is There Joint and Several Liability; If Not, What is the Minimum Needed to Create Any Liability?

It is Plaintiffs' position that Dragon is the source of all of the dust of which they complain. However, if the Court finds that the dust trespasses and nuisance are a combination of Dragon's dust and dust from some another source, such as its tenant, Ferriolo, Dragon is still liable for all of the Plaintiffs' harm from nuisance and trespass.

Under this scenario, Dragon and the other source would be joint tortfeasors, because their tortious acts of trespass and/or nuisance combined to cause the harm to the Plaintiffs. *See Gordon v. Lee*, 133 Me. 361, 363, 178 A. 353 (1935) ("Persons who contribute to the commission of a tort are joint tort feasers.") There is no basis in the evidence to suggest some trespasses or some incidents of nuisance were from Dragon only, and others were from a hypothetical other

hypothetical other source only. Plaintiffs do not concede or believe there is any such source other than Dragon, but if the Court finds that Dragon caused harm to the Plaintiff in combination with another source, Dragon must be deemed a joint tortfeasor with the other source.

Maine law is clear that there can be joint and several liability for nuisance. *See Town of Stonington v. Galilean Gospel Temple*, 1999 ME 2, ¶21, 722 A.2d 1269. Maine law is also clear that a party injured by joint tortfeasors may proceed against fewer than all of them, and that each of them is liable for all of the injured party's entire damages:

As every wrongdoer is responsible for his own act, it is a general rule that when two or more participate in the commission of a wrong, the injured party may proceed against them either jointly or severally; and if severally, whether the separate actions are brought at the same time or successively, each may be prosecuted to final judgment. But the sufferer is obviously entitled to only one full indemnity for the same injury - -"

Cleveland v. Bangor, 87 Me. 259, 262, 32 A. 892 (1895). Likewise, in *Allison v. Hobbs*, 96 Me. 26, 29, 51 A. 245 (1901), the Law Court observed, "It is of course a familiar rule that where several persons jointly commit a tort, the person injured has his election to sue all or any of the joint tort-feasors, and in an action against one or more may recover the damages caused by all jointly."

In a more recent case, the Law Court noted, "[T]he general rule in Maine is that joint tortfeasors are jointly and severally liable." *Mehlhorn v. Derby*, 2006 ME 110, ¶10, 905 A.2d 290, 292. *See also* Restatement (Second) of Torts § 879 (1979) (If the tortious conduct of each of two or more persons is a legal cause of harm that cannot be apportioned, each is subject to liability for the entire harm, irrespective of whether their conduct is concurring or consecutive.")

For all of these reasons, if the nuisance and trespass to Plaintiffs and their property came from Dragon and some other source, because there is no evidence that would allow the Court to separate out Dragon's contribution from that of the hypothetical other source, they must be

deemed joint tortfeasors, and Dragon is liable jointly and severally for Plaintiffs' entire damages.

PLAINTIFFS REQUEST A SIGNIFICANT AWARD OF DAMAGES.

Plaintiffs request this Honorable Court, when it weighs the equities and consequences, take judicial notice that the dust from Dragon's plant is damaging Plaintiffs' and others' health.

As is stated in the dissenting opinion in *Boomer*,

“Congressional hearings have revealed that air pollution causes substantial property damage, as well as being a contributing factor to a rising incidence of lung cancer, emphysema, bronchitis and asthma. The specific problem faced [in *Boomer*] is known as particulate contamination because of the fine dust particles emanating from defendant's cement plant. The particular type of nuisance is not new, having appeared in many cases for at least the past 60 years. (*See Hulbert v. California Portland Cement Co.*, 161 Cal. 239 (1911)). It is interesting to note that cement production has recently been identified as a significant source of particulate contamination in the Hudson Valley. This type of pollution, wherein very small particles escape and stay in the atmosphere, has been denominated as the type of air pollution which produces the greatest hazard to human health. We thus have a nuisance which not only is damaging to the plaintiffs, but also is decidedly harmful to the general public.” *Id.* at 230.

Further, Plaintiffs believe that Dragon can do much more to controlling off-site fugitive dust and blast vibrations than it has. It has gotten away with befriending and “pacifying”, as it says, the DEP regulators, and its substantial expansion has worsened off-site impacts, which is contrary to it what represented to the public and the DEP when it sought approval for such expansion. Its practice has always been to pacify those who are harmed--without taking measures to reduce the impacts, or to compensate for them. It deliberately places its monitors in locations that cause underreporting of impacts to residents, and either fails to activate them, or to have them calibrated to insure their accuracy. It denies dust clouds and dust emissions from its buildings, and when a dust cloud is caught on video or by camera, it asserts that the cloud was an

isolated incident that won't be repeated--until, of course, it is repeated, and repeated again. It has the ability to reduce its impacts, such as the time when it reduced its dust exceedances from 60 to 3 during the time when it was under more careful scrutiny by State regulators--so it can do it--it just chooses not to. Indeed, its president says he is too focused on the company's financial health to pay attention to the facility's impacts on the community. The impacts from this irresponsible disregard of its harm to others are severe, and a large damages award is warranted to help compensate Mr. and Mrs. Darney and their two children for the severe damage in many ways, and the relentless repetition of the damage-- nearly daily for over four years.

Dated at Portland, Maine this 7th day of January, 2011.

/s/ Peggy L. McGehee, Esq.

Peggy L. McGehee
Attorney for Plaintiffs

PERKINS | THOMPSON, P.A.

One Canal Plaza
P.O. Box 426
Portland, ME 04112-0426
(207) 774-2635
(207) 871-8026 (fax)
pmcgehee@perkinsthompson.com

CERTIFICATE OF SERVICE

I hereby certify that on January 7, 2011, I electronically filed the foregoing Plaintiffs' Post-Trial Memorandum with the Clerk of Court using the CM/ECF system which will send notification of such filing to all counsel of record in this action. I have mailed by United States Postal Service, the document on the following non-registered participants:

N/A

/s/ Peggy L. McGehee, Esq. _____
Peggy L. McGehee
Attorney for Plaintiffs

PERKINS | THOMPSON, P.A.
One Canal Plaza
P.O. Box 426
Portland, ME 04112-0426
(207) 774-2635
(207) 871-8026 (fax)
pmcgehee@perkinsthompson.com