

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

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Civil Action

Docket No. 2:08-CV-047

**PLAINTIFFS' TRIAL MEMORANDUM**

Plaintiffs herein file this Trial Memorandum for the Court's consideration.<sup>1</sup>

**STATEMENT OF THE CASE**

Plaintiffs ask this Honorable Court award them compensation and attorneys' fees for harm caused them by Defendant Dragon Products Company, LLC's ("Dragon's") fugitive dust and blast vibrations from its limestone quarry and cement-making facility.

The way Dragon operates its recently expanded quarry and cement-making facility in Plaintiffs' neighborhood would not be tolerated in Falmouth's or Cape Elizabeth's neighborhoods, where the parties' attorneys reside. It is hard to imagine the wealthier residents in those towns putting up with having to use vinegar to wash accumulated dust off their vehicles

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<sup>1</sup> Many of the legal standards and issues in this case have already been briefed by the parties in pre-trial motions. Those briefs include Plaintiffs' Memoranda in Opposition to Dragon's five Motions *in limine* to exclude evidence that Plaintiffs' filed on October 8, 2010; and Plaintiffs' Memorandum in Opposition to Dragon's Motion for Summary Judgment, which Plaintiffs filed on October 14, 2008; and Plaintiffs' Memoranda in Opposition to Dragon's Motion for Partial Summary Judgment that Plaintiff filed on June 1, 2009 and July 13, 2009 and July 28, 2009; and Plaintiffs' Motion and Memorandum to Amend their Complaint to add a strict liability claim, filed on January 22, 2010, and their Reply to Dragon's Objection that Plaintiffs filed on February 26, 2010. Rather than repeat those arguments here, Plaintiffs herein incorporate into this Trial Memorandum the arguments set forth in the above listed memoranda.

(cement dust film can harden when wetted with water), or withstanding an average of 2 blasts a week that shake their homes, scare their children, and crack their windows, chimneys, roofs, ceilings, driveways, walls and foundations.

Residents in Plaintiffs' Thomaston neighborhood, however, have more limited means, and are less able to spare the time and resources to challenge Dragon's conduct. Moreover, many worry about taking on a big Town employer and taxpayer.

Even were such obstacles overcome, it was not until recently that Maine afforded citizens reasonably achievable judicial remedies for such dust and blasting damage.

In December 2009, the Maine Law Court held that blast damage claimants will no longer be required to prove that a blasting company is negligent in order to recover. In *Dyer et al. v. Maine Drilling & Blasting, Inc.*, 2009 ME 126; 2009 Me. LEXIS 129, the Law Court held that it would now allow a strict liability cause of action for abnormally dangerous activity, overruling its "prior opinions requiring proof of negligence in blasting cases", and noting that it has "recognized that blasting is inherently dangerous". *Id.* at ¶¶ 15, 19.

In recent decades, more state courts have been holding that accumulated fugitive dust and blast damage may give rise to trespass claims. Although the Maine Law Court did not rule on this one way or the other when the Court certified the question to it, implicit in its reason for declining to answer-- that there were facts in dispute-- is that trespass *could* be found, *depending on the facts*. As the Law Court stated, "the evolving law governing trespass...claims depends on factual distinctions". *Darney v. Dragon Products Company*, 2010 ME 39, ¶16, 994 A.2d 804. Thus, Plaintiffs believe that, if they show that the accumulated dust and blast damage they have sustained has not been *de minimus* and are more likely than not to be caused by Dragon, they

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may recover for trespass. This is highly significant to them (and other similarly situated residents), as, without a trespass claim, they are left only with a nuisance claim for the dust accumulations, and, as the Law Court stated, "[n]uisance claims require proof of a substantial, unreasonable interference with the use and enjoyment of land." *Id.* at ¶14, n. 3. It is also highly significant because Maine's trespass statute allows for successful plaintiffs to recover their attorneys' fees. Without the prospect of an attorneys' fee award, residents are less able to find attorneys willing to represent them on these property damage and emotional distress cases where there is no accompanying high-damage personal injury proof.

The third recent development that can help Plaintiffs and other residents prevail on their damage claims is that they now have scientific data to help prove that the dust on their properties is from the Dragon facility. Although Dragon's licenses from the Maine Department of Environmental Protection ("DEP") require Dragon to self-monitor its blast vibrations and dust opacity and toxicity on its own property, they do not require Dragon to monitor off-site impacts. Thus, residents have had no scientific data, but only personal observation, to prove that the dust on their properties was Dragon dust. However, in 2007, the DEP undertook, at its own cost, off-site dust monitoring at two locations, one location being Plaintiffs' property, which resulted in a DEP air monitoring report that provided scientific data that led the DEP to conclude that a substantial component of the tested dust consisted of calcium oxide, which was "probably" Dragon dust, as calcium oxide is a product of high-heat kilns.

With this scientific data and causal link, and with trespass and strict liability claims now being justiciable, Plaintiffs now believe that they will prove that their damage from accumulated dust and blast vibrations is caused by Dragon, and that they are entitled to compensation for that damage, and to an award of attorney's fees and other relief.

## **BURDEN OF PROOF**

It is the “plaintiff’s burden of proof in a civil action . . . to establish each factual element of a claim by a preponderance of the evidence.” *Petit v. Key Bank of State*, 688 A.2d 427, 431 (Me. 1996). Plaintiffs have the burden of proof regarding their claims for both trespass and nuisance. The burden of proof extends to all essential elements of a trespass, *Hayes v. Bushey*, 196 A.2d 823, 827 (Me. 1964), and the standard of proof is by a preponderance of credible evidence, see *Pettigrow v. Carr*, 1999 Me. Super. Lexis at \* 12-13. Similarly, “[t]he burden of proving nuisance is upon the party alleging it,” 58 Am. Jur. 2d *Nuisances* § 233 (2010); see also *Estate of Mary Dixon v. Wentworth*, 2002 Me. Super. Lexis 249 at \*5, the standard of proof being a preponderance of the evidence. 58 Am. Jur. 2d *Nuisances* § 233 (2010).

## **LEGAL ARGUMENT**

### **I. Trespass: Plaintiffs' Evidence Proves the Elements of Trespass:**<sup>2</sup>

Trespass<sup>3</sup> has two elements: (1) interference with the right of exclusive possession, and (2) intent. The Restatement (2nd) of Torts, section 329, states: "A trespasser is a person who

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<sup>2</sup> As noted in footnote 1, Plaintiffs incorporate by reference their arguments made in opposition to Dragon's Motion for Partial Summary Judgment on Plaintiffs' trespass claim, and assume, for the purposes of this Trial Brief, that claims of accumulated dust and blast concussion damage state justiciable trespass claims, and that Plaintiffs' burden is only to prove the facts of such dust accumulations and blast vibrations on their property, and that they are caused by Dragon.

<sup>3</sup> Plaintiffs assert both common law and statutory trespass. As to their claim of statutory trespass, Subsection 7551-B (1)(B) of Title 14 M.R.S., provides that “[a] person who intentionally enters the land of another without permission and causes damage to property is liable to the owner in a civil action if the person . . . deposits . . . litter, as defined in Title 17, section 2263, subsection 2, in any manner or amount, on property not that person's own.” “Litter” is defined as “all waste materials” *excluding* “the wastes of the primary processes of mining, logging, sawmilling, farming or manufacturing.” *Id.* Here, Dragon discarded or deposited its waste materials in the form of limestone and cement kiln dust on Plaintiffs’ property. Although the dust originating from Dragon’s quarry would be excluded under the terms of this provision as to “primary processes” of Dragon's cement manufacturing facility, it would not apply to its “secondary” processes of its manufacture of cement kiln dust.

enters or remains upon land in the possession of another without a privilege to do so created by the possessor's consent or otherwise." Plaintiffs will submit evidence at trial that will prove both elements, both as to dust and to blast vibrations.

**(1) Interference with the Right of Exclusive Possession:**

**(a.) Dust Interference:** Plaintiffs will testify to the continual accumulation of dust everywhere on their property, including vegetation, furniture and vehicles, with some days being worse than others depending on the direction of the wind and level of Dragon's activity. They will submit photographs of dust on their cars, computer, tables and elsewhere around their home. They will submit an April 2008 DEP air monitoring report documenting the presence of caustic dust accumulated on their property, which report also notes, the "predominance of calcium oxide...produced in a kiln...by high temperatures [and] probably coming from Dragon Products Company". Plaintiffs hope to have other residents come to Portland to testify about their similar observations as to dust on their properties and dust blowing their way from the Dragon facility. Plaintiffs will also submit photographs showing dust emissions from various locations on the Dragon facility, including the 15 acre uncovered CKD pile in 2005, the stacks, and facility buildings. They will submit records from Dragon reporting its repeated dust "opacity exceedances", and records of citizen complaints regarding Dragon's dust traveling off-site into the community. They will submit DEP's air emission license, its notices of violation,

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Even were Dragon's Section 7551-B (1)(B) littering of cement kiln dust found to be exempt from liability, it is not exempt from liability under Section 7551-B (1)(A), which states that a person is liable for trespass if the person "[d]amages...any structure on property not that person's own". All blast concussion and dust accumulation damage to structures would be compensable under this subsection, and the attorneys fee provision triggered.

finest and consent orders showing that Dragon continued to violate dust emission limits even after the DEP approved Dragon's 40 per cent expansion of its facility in 2002.

**(b.) Blast Vibration Interference:** Plaintiffs will testify that when they bought their home in 2002, they did not know Dragon's quarry facility was in use, and when they heard a rumble on the horizon, they thought it was faraway thunder. They will submit Dragon's blast records over the same 4 month period for each year from 2002 (when they bought their home), and 2005 through 2009, showing that the number of Dragon's blasts increased several fold during those periods, and migrated substantially closer to residences, including Plaintiffs' residence. They will submit documents from DEP to Dragon complaining that Dragon's self-monitored blast monitoring was inadequate due to placement in the wrong locations, improper calibration, and improper installation, resulting in a tendency to under-report the blast's concussive off-site impacts. They will also submit DEP's follow-up letter to Dragon inquiring why it was not implementing the monitoring corrections that it said it would.

Plaintiffs will submit Dragon's old blasting license, that grandfathered it from conforming with current regulatory standards, including conducting pre- and post- blast surveys of nearby residences. They will submit Dragon's grandfathered blasting site plan, showing future expansion ever closer to Plaintiffs' and others' residences, and will submit photos of the quarry and its proximity to Plaintiffs' residential neighborhood. It will submit current industry best-practices documents illustrating how blasting can be conducted to minimize off-site concussive impacts, which best-practices Dragon does not use.

Plaintiffs will submit copies of citizen and business complaints to Dragon about off-site blast impacts, and Dragon's response being that it was not at fault for any damage, but would keep "monitoring" its blasts. They will also submit documents of Dragon's in-house

discussions about their repeated blast impact exceedances, and about the DEP and EPA notices of violation and fines.

Plaintiffs will testify about the repeated damage they have sustained to their property from the force of the blasts, and Mr. Darney's continual efforts to repair that damage, only to have it happen again. They will submit photographs of their home and barn showing examples of that damage. Mr. and Mrs. Darney will testify about how the trespassing blast vibrations have startled them, scared their children, and shaken them and their personal belongings, and have caused the ground in their yard to buckle<sup>4</sup>, windows to shatter (above their children's basketball hoop), and bricks to fall off their chimney, rain to seep in through the roof and cause extensive mold, and the barn to shift from its foundation (despite Mr. Darney's repeated repairs to the rebar/retaining wall he constructed at one corner of the barn foundation). Plaintiffs will submit the expert testimony of Mr. Richard Hunt on the kind and extent of blast damage to Plaintiffs' home and barn from November 2004, and the estimated cost to repair such observed damage.<sup>5</sup>

(2) **Intent to Trespass with Dust and Blast Vibrations**: As this Court has already determined, “[t]he filing of [Plaintiffs’ first suit] informed Dragon of the substantial likelihood that its conduct was resulting in physical presence on the Darneys’ property. Since November 12, 2004, then, Dragon has knowingly operated with certainty sufficient to establish intent under

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<sup>4</sup> In 2007 the Maine Law Court held that the buckling and erosion of land on a landowner’s property by the actions of another give rise to a justiciable claim of trespass. *Dalphonse v. St. Laurent & Sons, Inc.*, 2007 ME 53, 922 A.2d 1200. While the buckling in that case was not caused by blasting, the Law Court did recognize that an act that causes the land of another to move forcibly may constitute common law trespass. *Id.*

<sup>5</sup> Mr. Hunt will testify that he is a long-time building contractor who also lives in the neighborhood and has personally witnessed adverse impacts to his own home and children from Dragon's dust and blast vibrations.

Maine law.” *Darney v. Dragon Products Co., LLC*, 640 F. Supp. 2d 117, 124 (D. Me. 2009) (internal citations omitted). Plaintiffs assert that the Court's finding of Dragon's "intent" in this trespass claim based on such evidence, is the law of the case.<sup>6</sup> In addition, Dragon has had such notice from Plaintiffs personal complaints to it made numerous times prior to their filing suit, and from complaints from other residents and businesses.

## **II. Nuisance: Plaintiffs' Evidence Proves the Elements of Nuisance.**

“[T]he essence of a private nuisance is an interference with the use and enjoyment of land.” *Charlton v. Town of Oxford*, 2001 ME 104, ¶ 36, 774 A.2d 366, 377 (quoting *Town of Stonington v. Galilean Gospel Temple*, 1999 ME 2, ¶ 15, 722 A.2d 1269, 1272). Generally, the tort of private nuisance “lies where a defendant’s use of its own land causes injury to adjoining or neighboring land.” *Saco Steel Co. v. Saco Defense*, 910 F. Supp. 803, 812 (D. Me. 1995).

The elements of a private nuisance are: (1) intent to interfere with the use and enjoyment of the land by those entitled to do so, (2) actual interference with the use and enjoyment of the land that is (3) substantial, and (4) unreasonable given the circumstances. *Charlton*, 2001 ME 104, ¶ 36, 774 A.2d at 377. Plaintiffs will submit evidence at trial proving each of these elements, both as to dust and blast vibrations.<sup>7</sup>

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<sup>6</sup> The Court also noted in its Order on Dragon's Motion for Partial Summary Judgment that Dragon’s conduct has resulted in a “physical presence on the Darneys’ property”, *Darney*, 640 F. Supp. 2d at 124, which supports the argument that Dragon may be held liable under the traditional approach to trespass for any damage that was caused as a result of such physical presence.

<sup>7</sup> The Maine Law Court has previously found blasting activities to constitute a private nuisance. For example, in *Town of Stonington v. Galilean Gospel Temple*, the Law Court upheld an award for nuisance when the plaintiffs complained “that the defendants' operation of the quarry ‘generated noise, dust and interfered with plaintiffs' possession and use of their property and residence,’ and that the defendants' ‘cutting and burning . . . deprived Plaintiffs of the safe and quiet enjoyment of their home.’” 1999 ME 2, ¶ 15, 722 A.2d 1269, 1272. Similarly, in *Maravell v. R.J. Grondin & Sons*, the Law Court overruled summary judgment for a defendant and restored the plaintiff’s nuisance claims based upon defendant’s blasting activities. 2007 ME 1, ¶¶ 16-17, 914 A.2d 709, 714.

**(1.) Intent:** As to intent, Plaintiffs incorporate herein their discussion above, *supra* at pp. 7-8. “[O]ften the situation involving a private nuisance is one where the invasion is intentional merely in the sense that the defendant has created or continued the condition causing the interference with full knowledge that the harm to the plaintiff’s interests are occurring or are substantially certain to follow.” William L Prosser & W. Page Keeton, *Prosser and Keeton on the Law of Torts* § 87 at 624-25 (5th ed. 1984). In this context, aware of the consequences of its actions, Dragon acted with intent in creating the nuisance complained of now.

**(2), (3), and (4); Actual, Substantial, and Unreasonable.** The evidence described in the discussion *supra*. at pp. 4-8, on trespass, also proves that Dragon's ambient and accumulated dust and blast damage is actual, substantial and unreasonable.

### **III. Strict Liability: Plaintiffs' Evidence of Blasting Damage Proves the Elements of Strict Liability**

In the 2009 case of *Dyer v. Me. Drilling & Blasting, Inc.*, 2009 ME 126, ¶¶ 33-35, 984 A.2d 210, 219-20, the Maine Law Court established strict liability as a justiciable cause of action, stating that "the Second Restatement has provided a scheme of clear criteria for delineating which activities require a strict liability approach, being those that are "abnormally dangerous". Section 520 of the Second Restatement identifies 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.

Plaintiffs will submit evidence meeting these criteria showing that Dragon's quarry blast operation is abnormally dangerous, including the evidence described in the discussion above, and Dragon's blast ("shot") records showing the typical amount of explosives used and the blasts' proximity to residences, including Plaintiffs' residence.

#### **IV. Damages:**

Plaintiffs' trespass, nuisance and strict liability claims entitle them to compensation for the following harm they have sustained from Dragon's blasts and dust:

- Structural and mold and aesthetic damage to their home, barn and yard;
- Corrosive dust damage to the paint on their vehicles, door, computer and other personal property;
- Loss of peace of mind, and for the anxiety and distress caused by their concern with the adverse health effects to them and their children from exposure to Dragon's dust <sup>8</sup>;
- Loss caused by the many hundreds of hours Mr. and Mrs. Darney has expended since 2004 to repair the physical damage to their property caused by the blast effects and to clean off the dust from surfaces; and to help prepare the prosecution of this lawsuit, including extensive research and contacts with advisors and potential witnesses <sup>9</sup>;

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<sup>8</sup> Mr. and Mrs. Darney will testify to their researching and reading Dragon, government and other documents describing the adverse health effects caused by exposure to cement kiln dust and its caustic and toxic components, and will submit copies of some of those documents. They will submit Dragon's warning notice about how exposure to cement kiln dust can cause rashes, gooey eyes, and sore throats, and their concern that their and their children's own rashes, gooey eyes and sore throats have been caused by their 24/7 exposure to Dragon dust. They will submit Dragon's reports on their employees' adverse health effects, and submit documents regarding the carcinogenic, neural and other personal injury damage that can be caused by exposure to the toxic components in the Dragon dust. They will submit a hair analysis report showing elevated levels of certain toxins in their daughter's and Mrs. Darney's hair, which have contributed to their concern about the long-term adverse health effects on them and their children.

Plaintiffs will also submit evidence that manifest their concerns and anxiety, through all their advocacy efforts to alleviate the Dragon's adverse off-site impacts to them and their neighbors through complaints and petitions to Dragon, the DEP, the BEP, the congressional delegation, and local and state agencies, and to form a citizens advocacy group, Neighbors for a Safe Dragon.

<sup>9</sup> In the Court's Order on Dragon's Motions *in Limine*, the Court granted in part Dragon's Motion to Exclude Evidence Relating to Certain Categories of Damages (Docket #115) as applied to Plaintiffs' claim of negligence, but denied the Motion as applied to "Plaintiffs' claims for common law trespass, statutory trespass, nuisance, or strict liability...related to damages connected to the time spent in connection with prosecuting this lawsuit".

- Permanent loss in value in their property should that part of Dragon's operation that causes the nuisance and trespass not be enjoined, and be allowed to continue with its trespass and nuisance;
- Punitive damages for Dragon's malice in striving to continue its nuisance and trespass activities by misleading Plaintiffs, the public and its regulators.

The Court denied Dragon's motion *in limine* to exclude evidence of Plaintiffs' emotional distress, inconvenience and annoyance, all of which are compensable in nuisance claims.<sup>10</sup> As Plaintiffs argued in opposition to the motion, the scope of Plaintiffs' emotional distress, includes Plaintiffs' "fear of future adverse health effects", citing, *inter alia*, *in re Moorenovich*, 634 F. Supp. 634 (D.Me. 1986) (defendants' *motion in limine* to exclude evidence of fear of increased cancer risk denied in claim of negligent infliction of emotional distress). In the *Moorenovich* case, the Court held that the plaintiffs' "anxiety must be reasonable". *Id.*

Plaintiffs will present evidence to show that their emotional distress, annoyance and discomfort is reasonable, not only because they have had continually to wash down surfaces to get rid of the dust, and continually to make repairs to their roof, chimney, walls, ceilings, and barn, but also because their research indicates that the adverse health issues they have been experiencing since they moved to their home in Thomaston are the same adverse health effects reported from exposure to the caustic and toxic components in cement kiln dust. Mr. and Mrs. Darney will testify that they are in constant fear that they and their children may suffer injury (such as from falling chimney bricks and broken glass) from blasts, or may develop cancer, sterility, attention deficit disorder and other ailments from their cumulative, long-term exposure

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<sup>10</sup> As Plaintiffs argued in their opposition to Dragon's motion, in the 2000 case of *Eaton v. Cormier*, 2000 ME 65, the Law Court held that compensation for a nuisance, "may include elements for inconvenience and annoyance", citing *Gillison v. Farrin*, 632 A.2d 143, 144 (Me. 1993). In *Gillison*, the Law Court held that a jury was properly instructed that damages in a nuisance case may include "inconvenience and annoyance", citing *Pettingill v. Turo*, 159 Me. 350, 357, 193 A.2d 367 (1963) and *Brown v. Watson*, 47 Me. 167, 163 (1859)(damage recovery for 'trouble and loss of time').

to the various metals and toxins in Dragon's caustic dust, to which they are exposed 24 hours a day, 7 days a week. In further support of their claim that their fear is reasonable, they will submit documents from regulatory and other governmental agencies and treatises, and Dragon's own monitoring and test records showing the presence of antimony, arsenic, barium, beryllium, cadmium, chromium, lead, mercury, nickel, selenium, silver, thallium, tricalcium silicate, dicalcium silicate, tricalcium aluminate, tetracalcium aluminoferrite, calcium sulfate dehydrate (gypsum), and other trace elements in the dust; and how they have personally observed glittery silica floating in the air by their porch light at night, and will submit documents describing what adverse health effects can be caused by long-term exposure to such toxins, such as allergic dermatitis; skin damage; circulatory problems; kidney damage; increased risk of cancer; deficits in learning abilities; hypertension; and others.

1. Plaintiffs are Entitled to an Award of Punitive Damages

“[I]n order to recover punitive damages, a plaintiff must prove by clear and convincing evidence that the defendant acted with malice.” *Tuttle v. Raymond*, 494 A.2d 1353, 1354 (Me. 1985); *Palleschi v. Palleschi*, 1998 ME 3, ¶ 6, 704 A.2d 383, 385; *Fine Line, Inc. v. Blake*, 677 A.2d 1061, 1065 (Me. 1996). Malice may be express or implied. *Tuttle*, 494 A.2d at 1361. Express malice exists “where the defendant’s tortious conduct is motivated by ill will toward the plaintiff.” *Id.* Implied malice will be found when “deliberate conduct by the defendant, although motivated by something other than ill will toward any particular party, is so outrageous that malice toward a person injured as a result of that conduct can be implied.” *Id.*

Punitive damages are awarded as a matter of public policy to deter similar conduct in the future. *McKinnon v. Kwong Wah Restaurant*, 83 F.3d 498, 508 (1st Cir. 1996); *Tuttle*, 494 A.2d at 1360 (“punitive damages should be available based only upon a limited class of misconduct

where deterrence is both paramount and likely to be achieved.”). “A punitive damages award should reflect the degree of outrage with which the factfinder views the defendant’s tortious conduct, as well as other relevant aggravating and mitigating factors.” *Haworth v. Feigon*, 623 A.2d 150, 159 (Me. 1993). The fact finder may consider the defendant’s wealth in determining the amount of a punitive damages award. *Hanover Ins. Co. v. Hayward*, 464 A.2d 156, 158 (Me. 1983) (stating that “[t]he amount of a punitive damage award should bear such a relationship to the actual wealth of the defendant that the award will serve to deter future behavior inimical to the well-being of society.”). Moreover, a defendant’s prior misconduct may also be considered. *Harris v. Soley*, 2000 ME 150, ¶ 23, 756 A.2d 499, 506. “This approach reflects one of the primary purposes of punitive damages in allowing that a ‘recidivist may be punished more severely than a first offender [because] repeated misconduct is more reprehensible than an individual instance of malfeasance.’” *Id.* (quoting *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 577 (1996)).

Dragon has knowingly and deliberately created a circumstance outrageous enough to imply malice. Fully aware of the consequences of its actions and aware that there are ways to operate a quarry and cement making plant to reduce air contamination and to reduce vibration, Dragon continued to engage in antiquated blasting operations that do not conform to existing statutory, trespass and nuisance standards. This damage has led to living conditions that are potentially unsafe or unhealthy. Moreover, Dragon has continued to emit dust containing caustic limestone and toxic silicon from its cement manufacturing plant, fully aware that those materials were reaching Plaintiffs and other residents of the area.

Moreover, Dragon failed to take action to reduce these harmful effects despite the fact that it could readily do so. After receiving hundreds of complaints regarding dust, noise, and

property damage over the years, Dragon did little or nothing in order to address those issues, but instead, expanded its operation significantly, causing greater, uncompensated, impacts on the community. (In contrast, for example, wind power projects purchase "negative" easements from nearby properties that may sustain noise and "flicker" effects.) Although other cement facilities have undertaken programs to compensate or relocate residents who are adversely impacted by the cement making operation, Dragon has chosen not to do so, but only to repeat blanket denials. Dragon has also failed to implement best practice blasting and cement manufacture measures to reduce off-site blast vibration and dust impacts, as have been instituted in other cement making plants in the country, to reduce the intensity of the vibrations caused to Plaintiffs' property, and to reduce the extent of the dust migrating onto Plaintiffs' property. In failing to take these measures, Dragon demonstrated ill-will towards Plaintiffs and other residents.

The federal and state agencies have fined Dragon nearly \$500,000 for its licensing violations, but those fines did not go to the community. The only way to bring Dragon to account to its malice towards Plaintiffs and other residents in this neighborhood is to impose a punitive damages award. When a BEP Board member at the BEP hearing on Dragon's uncovered and unlicensed CKD and waste clinker piles and uncontained leachate noted that the DEP lacked jurisdiction to require compensation to individual residents for their damage from the Dragon operation, and the Board member asked Dragon what it could do voluntarily to help the residents, Dragon's representative responded simply that the residents should sue Dragon and prove their claims.

This case has been exceptionally difficult. The pretrial record makes that clear. Dragon's conduct in this litigation gives true meaning to the phrase "millions for defense, but not a dollar for compensation". Dragon, a large corporation, has spent \$50,000,000 to expand its facility in

recent years but has refused to pay any compensation to Plaintiffs or any other resident or business for even the obvious collateral damage caused them. Given the extent of its available financial resources, Dragon can sustain a large judgment for punitive damages.

To close, Plaintiffs note that, when they first moved into their home in 2002, they were excited to have a safe place to raise their children. They did not contemplate then that they would have this future, for them and their children, of ailments, trouble, distress, and fear, and not even any means to move away. They ask this Court to provide them full relief to compensate for these extremely difficult years.

Dated at Portland, Maine this 20th day of October, 2010.

/s/ Peggy L. McGehee, Esq. \_\_\_\_\_  
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**CERTIFICATE OF SERVICE**

I hereby certify that on October 20, 2010, I electronically filed the foregoing Plaintiffs' Trial Brief 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. \_\_\_\_\_  
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