

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

STEPHEN DARNEY and)	
KATHY DARNEY, personally)	
and on behalf of KD and SD,)	
)	
Plaintiffs)	
)	
v.)	Civil No. 2:08-cv-00047-GZS
)	
DRAGON PRODUCTS)	
COMPANY LLC,)	
)	
Defendant)	

**REPORT OF FINAL PRETRIAL CONFERENCE
AND ORDER**

**CAVEAT: READ THIS REPORT AND ORDER ON RECEIPT.
IT SPECIFIES THE COURT'S ORDERS AND
REQUIREMENTS FOR FURTHER PRETRIAL
DEVELOPMENT AND TRIAL OF THIS CASE.
LACK OF KNOWLEDGE OF ITS CONTENTS CAN
HAVE SERIOUS ADVERSE CONSEQUENCES TO A
LITIGANT'S POSITION AT TRIAL.**

A final pretrial conference of the court and counsel was held by telephone on
Wednesday, September 8, 2010, at 11:00 a.m.

Presiding: Margaret J. Kravchuk, U.S. Magistrate Judge

Appearances: For Plaintiffs : Peggy L. McGehee, Esq.

For Defendant : Eric J. Wycoff, Esq., Peter W. Culley, Esq.
and John Jewett, Esq.

The plaintiffs bring this action claiming nuisance; common law trespass; statutory
trespass; negligence; strict liability and injunctive relief against Defendant. Plaintiffs
claim that defendant's manufacturing and blasting cement facility near plaintiffs' home

causes caustic dust and ground vibrations to plaintiffs' property. Plaintiffs claim the dust not only damages their personal property, by corroding the paint on their vehicles and clogging their computer, but also causes rashes, red eyes, sore throats and headaches. Plaintiffs further claim these concerns cause them distress, sleeplessness, disturb their peace of mind and cause discomfort, inconvenience and annoyance to themselves and their children.

The pleadings are complete. The matter is in order for non-jury trial.

1. Damages.

A. Plaintiff's Claimed Special Damages:

1. Damage to home and barn: \$90,000, and attendant expenses for them to live elsewhere while the home, barn and yard are repaired in the estimated amount of \$15,000,
2. Damage to personal property including computers and vehicles, in the estimated amount of \$10,000
3. Compensation to Mr. Darney for his time and efforts to obtain enforcement of environmental impact regulations against Defendant over the past 5+ years in the amount of \$30,000 per year
4. To the extent defendant's blasting vibrations and noise and air contamination from dust and odor have not ceased permanently as of the date of trial, plaintiffs seek further an award in damages sufficient to fund their relocation to a home away from defendant's facility, in the amount of \$220,000.

B. Compensatory damages - Elements: \$400,000 for distress, sleeplessness, disturbance of peace of mind, discomfort, inconvenience and annoyance;

C. Other: Punitive damages, attorney fees and costs.

2. **Discovery**. There is an issue regarding the final date for all expert reports and discovery supplementation. The parties will confer and stipulate as to the appropriate date, if possible, agreeing that it is somewhere between March-September 2009. If they cannot reach agreement, they are to contact my chambers for conference.

Counsel advised the court at the conference that there are no other outstanding discovery issues requiring action by the court.

3. **Pending Motions**. The deadline for filing dispositive and so-called Daubert motions was April 30, 2009. At the time of the final pretrial conference, there were no motions formally pending.

Motions in Limine: Defendant does intend to file motions in limine, including one in connection with damages. Any motion in limine shall be filed by September 17, 2010; responses are due by October 8, 2010; and replies are due by October 15, 2010.

4. **Estimated Trial Time**. Counsel estimate that this case will require approximately five (5) days of trial time.

5. **Scheduling for Trial**. This matter is presently scheduled for nonjury trial as the only case on District Court Judge George Z. Singal's October 4, 2010, nonjury trial list.

Protection: Defendants requested protection from trial from October 4 through October 15, 2010, as an expert witness is unavailable. Plaintiff requested protection from trial from October 18 through 22, 2010. I granted these oral motions and indicated that they would not be reached for trial prior to October 25, 2010.

6. **Stipulations.** In the interest of shortening the required trial time, the court encouraged counsel to stipulate to all those facts as to which there is no actual contest. the court **ORDERED** that counsel reduce all stipulations to which agreement can be obtained to a single written document, signed by all counsel, indicating agreement to the stipulations in a form satisfactory to permit the document to be marked as an exhibit and offered in evidence at trial. The documents will be filed with the court on or before October 18, 2010.

7. **Deposition Transcripts, Audiotape or Videotape Evidence.** The court, in order to assure the expeditious and orderly progress of the trial without unwarranted consumption of time or unjustified delay, hereby **ORDERS** in respect to any deposition transcripts, audiotapes or videotapes to be offered in evidence at trial:

- A. That each party shall provide to all other parties by October 15, 2010, a designation of those witnesses whose testimony is expected to be presented by means of a deposition and, if not taken stenographically, a transcript of the pertinent portions of the deposition testimony.
- B. That any deposition transcripts, audiotapes or videotapes to be shown at trial be thoroughly and completely edited to excise therefrom all extraneous, unnecessary, redundant and irrelevant matter;
- C. That counsel meet and resolve all objections to admissibility of any portion of such deposition transcripts, audiotapes or videotapes or, failing consensual resolution thereof, cause any dispute to be presented to the court for resolution prior to the commencement of trial in conformity with Subparagraph D hereinbelow:

- D. That all trial counsel meet on or before October 18, 2010, and review all deposition transcripts, audiotapes and videotapes to be offered as evidence by any party at trial and agree upon editing of such deposition transcripts, audiotapes or videotapes to comply with Subparagraphs A and B hereinabove; and
- E. That counsel shall present any outstanding issues as to editing of any such deposition transcripts, audiotapes and videotapes to the court on written motion, to be filed no later than October 18, 2010.

Counsel are hereby notified that failure to comply with the foregoing terms of this paragraph may result in the imposition of sanctions, including, but not limited to, the exclusion of evidence at trial, if such noncompliance is found by the court to have caused, or threatened to cause, undue delay of trial, unwarranted inconvenience to the court or prejudice to any party.

8. Settlement. The court and counsel discussed the present posture of this matter with respect to settlement by voluntary agreement. Counsel shall advise the court, on or before October 18, 2010, whether the case is settled or is firm for trial. If at any time a settlement conference is scheduled with the court and in camera papers are filed, such papers shall be mailed or delivered directly to the chambers of the settlement judge and not to the clerk's office.

Counsel are hereby placed on **NOTICE** that, if at any time the court is satisfied that any counsel herein has failed to exhaust settlement negotiations as required by the court's order hereinabove and that such failure has caused needless trial proceedings, the

court will assess as a sanction against such counsel and his/her client the jury costs associated with trial and such additional sanctions as the court shall find to be warranted.

9. Trial Management Conference. Counsel may request a further trial management conference with Judge George Z. Singal if they believe that such a conference would be beneficial. Any such request should be made through his chambers in Portland sufficiently in advance of the date set for commencement of trial.

Trial Procedures to be Applicable at Bench Trial

The court directs that in preparation for nonjury trial and in order to facilitate the orderly and expeditious course of trial proceedings, trial counsel shall achieve the following items of trial preparation by the deadlines specified.

1. All counsel shall meet no later than October 18, 2010, and shall Pre-mark and exchange copies of all exhibits of a documentary nature, including all demonstrative exhibits to be utilized by either a witness or counsel at trial, and display to counsel exhibits of a physical nature, to be offered in the court of trial. The original of all exhibits and designated deposition transcripts shall be submitted immediately prior to the commencement of trial.

2. Counsel shall jointly prepare a consolidated and comprehensive list of all exhibits to be offered at trial. As to each listed exhibit, the list shall concisely describe it, identify it by identification marking, note the sponsoring party, and indicate whether the sponsoring party expects to offer it in evidence or may offer it if the need arises and whether objection is anticipated, and, if so, on what basis. The consolidated exhibit list (without the exhibits) shall be provided to the court with the trial briefs.

If deposition testimony is offered in lieu of live testimony (whether read into the record or by way of video deposition) counsel are placed on notice that the court reporter shall not record that testimony stenographically as part of the trial transcript unless one or both parties so request sufficiently in advance of the offer. The deposition transcript or video shall be marked as any other exhibit and offered in evidence, but shall not accompany the jury when it retires to deliberate. The deposition shall remain part of the record until such time as all appeal deadlines have expired and the exhibits are returned to the parties.

Counsel were advised of the proper form exhibit list which must be used at trial.

If counsel will need the electronic evidence presenter for trial, counsel should contact the Clerk's Office at least two weeks in advance of trial to reserve its use.

3. Each party's lawyer shall prepare a comprehensive witness list indicating the name and address each witness, separately identifying those whom the party expects to present and those whom the party may call if the need arises, indicating, as to each, whether the witness is an occurrence witness or an expert witness and stating concisely the general subject matter of the witness's testimony and the estimated time required for the testimony of the witness on direct examination. The witness list shall be provided to the Court with the trial briefs.

4. All counsel shall make arrangements to schedule the attendance of witnesses at trial so that the case can proceed with all due expedition and without any unnecessary delay.

5. Each party's lawyer shall prepare a concise trial brief setting forth the significant evidence to be adduced at trial, all significant factual and legal issues anticipated to be raised and the party's position on each issue so identified. No trial brief shall exceed fifteen (15) pages without the prior express consent of the Court. All trial briefs will be submitted, together with all related documents, to the Court by October 18, 2010.

Counsel are advised that for unjustified failure to comply with the foregoing requirements, the Court may refuse to admit exhibits or testimony of witnesses or impose other appropriate sanctions where noncompliance is found by the Court to have caused undue delay or prejudice.

SO ORDERED.

CERTIFICATE

This report fairly reflects the matters processed in the Final Pretrial Conference to which it refers and shall control the subsequent course of the action.

Counsel shall submit any objections to this Final Pretrial Conference Report to the Clerk of this Court within fourteen (14) days from the date of its filing.

September 9, 2010

/s/ Margaret J. Kravchuk
U.S. Magistrate Judge