

[8] 4. Finally, appellant contends that the trial court improperly intimated while charging the jury that there was direct evidence in this case. As there was direct evidence in this case, it was not error for the trial court to inform the jury that it was to determine whether it relied on direct or circumstantial evidence in deciding the case.

*Judgment affirmed.*

All the Justices concur.



263 Ga. 470

STONE MAN, INC., et al.

v.

GREEN, et al.

GREEN, et al.

v.

STONE MAN, INC., et al. (Three Cases).

Nos. S93A1060, S93X1061, S93A1062.

Supreme Court of Georgia.

Oct. 4, 1993.

Reconsiderations Denied Oct. 28, 1993.

Landowners living near or adjacent to quarry brought action seeking to have quarry declared a nuisance and closed. The Bartow County Superior Court, Shepherd Lee Howell, J., awarded compensatory and punitive damages, granted partial injunction, but denied landowners' motion for second injunction to completely abate operation of quarry. Quarry operator appealed and landowners cross-appealed. The Supreme Court, Hunt, P.J., held that: (1) award of punitive damages was not supported by the evidence; (2) trial court did not abuse its discretion in issuing partial injunction; and (3) trial court properly denied application for second injunction.

Affirmed in part and reversed in part.

#### 1. Nuisance ⇨50(6)

Award of punitive damages for nuisance in operation of quarry was unsupported by the evidence, in view of operator's compliance with county, state and federal relations. O.C.G.A. § 51-12-5.1(b).

#### 2. Nuisance ⇨50(6)

While compliance with the law will not preclude finding that business activities constitute nuisance, such compliance tend to show that there is no clear and convincing evidence such as would support award of punitive damages. O.C.G.A. § 51-12-5.1(b).

#### 3. Appeal and Error ⇨169

Issue not raised at jury trial was deemed waived.

#### 4. Nuisance ⇨6, 37

Operation of quarry, permitted and regulated by state, is a lawful business which cannot be a nuisance at law; instead, such a lawful business becomes a nuisance because of manner in which it is conducted or because of its surroundings or circumstances, and in such case it is proper for court to enjoin only those parts of operation which constitute nuisance rather than entire enterprise.

#### 5. Nuisance ⇨37

Upon finding that operation of quarry, though in compliance with county, state and federal regulations, was a nuisance, trial court properly imposed additional restrictions on those aspects of the operation which constituted the nuisance, rather than totally abating it.

#### 6. Nuisance ⇨36

Where trial court, in its original order on motion for injunction of quarry operation as a nuisance, specifically dealt with prospect of future sinkhole formation, trial court properly denied application for second injunction after further sinkhole damage.

H. Wayne Phears, Mark Ford, Rebecca Linley Laymon, Phears & Moldovan, Norcross, Charles Crawford, Cartersville, for Stone Man, Inc.

William M. Akin, Warren and William Morgan Akin, P.C., Cartersville, for Green.

HUNT, Presiding Justice.

These three cases center around the operation of a quarry by defendant Stone Man, Inc. (Stone Man) and have been consolidated for consideration by this Court. The plaintiff landowners, who live near or adjacent to the quarry, brought an action seeking to have the quarry declared a nuisance and closed. Finding the quarry to be a nuisance, a jury awarded the landowners compensatory and punitive damages. The trial court awarded the plaintiffs attorney fees and granted a partial injunction which allowed Stone Man to continue operating the quarry but imposed restrictions and conditions on the operation in addition to those mandated by state and federal law. The trial court denied Stone Man's motions for judgment n.o.v. and new trial, as well as the landowners' motion for a second injunction to abate completely operation of the quarry. Stone Man appeals the initial injunction and the denial of its motions for judgment n.o.v. and new trial; the landowners cross-appeal the initial injunction and appeal the denial of the second injunction. We affirm in part and reverse in part.

1. Stone Man contends that the award of punitive damages in this case is not supported by the evidence. We agree. Under Georgia law,

[p]unitive damages may be awarded only in such tort actions in which it is proven by clear and convincing evidence that the defendant's actions showed willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to consequences. OCGA § 51-12-5.1(b). In addition, the purpose of punitive damages is not to provide compensation to the plaintiff but rather "to punish, penalize, or deter a defendant." OCGA § 51-12-5.1(c).

[1] The evidence shows that the land on which the quarry is operated is zoned for mining by the Bartow County Commission. Stone Man has been issued the surface mining permit required by OCGA § 12-4-70 et seq., the air quality permit required by OCGA § 12-9-1, et seq., and the water quality permit required by OCGA § 12-5-20, et seq., and has operated in compliance with the standards established by those permits. In addition, with the exception of an incident in 1989, it is undisputed that Stone Man has been in compliance with the Blasting Standards Act (OCGA § 25-8-1) and, in 1990, voluntarily reduced the intensity of blasting in an effort to lessen its undesirable consequences. Finally, Stone Man is in compliance with all federal environmental regulations.

[2] While compliance with the law will not preclude a finding that business activities constitute a nuisance, *Galaxy Carpet Mills, Inc. v. Massengill*, 255 Ga. 360(1), 338 S.E.2d 428 (1986), such compliance does tend to show that there is no clear and convincing evidence of "wilful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of a conscious indifference to consequences." *General Refractories Co. v. Rogers*, 240 Ga. 228, 230, 239 S.E.2d 795 (1977). This is especially true in the case of a commercial enterprise the operation of which is accompanied by a certain amount of unpleasant but unavoidable effects or byproducts. Stone Man's compliance with county, state, and federal regulations is not the type of behavior which supports an award of punitive damages; indeed, punitive damages, the purpose of which is to "punish, penalize or deter," are, as a general rule, improper where a defendant has adhered to environmental and safety regulations. Accordingly, we hold that the award of punitive damages in this case is not supported by the evidence and must be reversed.

[3] 2. Stone Man argues that the nuisance standard of OCGA § 41-1-1 is unconstitutionally vague because a jury was

allowed to find the operation of the quarry a nuisance even though the quarry is on land zoned for mining and is operated in compliance with all state and federal regulations. As Stone Man did not raise this issue at the jury trial, it is deemed waived. *Hammond v. Paul*, 249 Ga. 241(1), 290 S.E.2d 54 (1982). In addition, under *Galaxy Carpet Mills, Inc. v. Massengill*, 255 Ga. 360(2), 338 S.E.2d 428, supra, such an argument is without merit.

[4, 5] 3. In their cross-appeal, the landowners contend that the trial court erred by imposing additional restrictions on the operation of the quarry, and thus allowing operation to continue, rather than totally abating it. The operation of the quarry, permitted and regulated by the state, is a lawful business which cannot be a nuisance at law; instead, such a lawful business becomes a nuisance because of the manner in which it is conducted or because of its surroundings or circumstances. *Simpson v. DuPont Powder Co.*, 143 Ga. 465, 466, 85 S.E. 344 (1915). In such a case, it is proper for the court to enjoin only those parts of the operation which constitute the nuisance rather than the entire enterprise. *Warren Co. v. Dickson*, 185 Ga. 481, 484, 195 S.E. 568 (1938); *Wilson v. Evans Hotel Co.*, 188 Ga. 498, 500, 4 S.E.2d 155 (1939). In its order, the trial court identifies specific aspects of the operation which constitute the nuisance and fashions remedies which address those problems without making continued operation impossible. The evidence supports the trial court's findings, and the trial court did not abuse its discretion in issuing a partial injunction. Likewise, Stone Man's argument that the partial injunction was not authorized by proper evidence is without merit.

[6] 4. After further sinkhole damage, two of the landowners filed a motion for a second injunction, asking that the court either abate operation of the quarry or enjoin removal of water from the quarry pit. After a hearing, the court denied the motion because the earlier order of the court had already fashioned a remedy for future sinkhole formations. The landowners appeal this decision.

Generally, where an application for injunction is denied, a second application should not be granted unless based upon grounds which were unknown to the applicant at the time of the first application, and which could not, by the exercise of ordinary diligence, have been discovered. [Cits.].

*Cook v. Huckabee Transport Corp.*, 215 Ga. 9, 14, 108 S.E.2d 710 (1959). In its original order on motion for injunction, the trial court specifically dealt with the prospect of future sinkhole formation because the possibility of the continued formation of sinkholes formed one of the bases on which the landowners sought injunctive relief. The trial court properly denied the application for a second injunction, based as it is upon grounds known to the landowners at the time of the original application and set forth in that application as grounds for relief.

5. Any remaining enumerations of error not disposed of by our holdings in Divisions 1 through 4 are without merit.

*Judgment affirmed in part and reversed in part.*

All the Justices concur.



263 Ga. 424

ROBINSON

v.

The STATE.

No. S93A1041.

Supreme Court of Georgia.

Oct. 12, 1993.

Defendant was convicted in the Superior Court, DeKalb County, Wayne M. Purdom, J., of malice murder and possession of firearm by convicted felon, and he appeal-