RENDERED: AUGUST 14, 2015; 10:00 A.M.
TO BE PUBLISHED

MODIFIED: SEPTEMBER 4, 2015; 10:00 A.M.

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000762-MR

NAMI RESOURCES COMPANY, LLC;
TRUST ENERGY COMPANY, LLC;
VINLAND ENERGY OPERATIONS, LLC;
VINLAND ENERGY EASTERN, LLC;
AND VINLAND ENERGY GATHERING, LLC — APPELLANTS

v. — APPEAL FROM BELL CIRCUIT COURT
HONORABLE ROBERT COSTANZO, JUDGE
ACTION NO. 06-CI-00566

ASHER LAND AND MINERAL, LTD;
VANGUARD NATURAL RESOURCES, LLC;
AND VANGUARD NATURAL GAS, LLC — APPELLEES

AND — NO. 2012-CA-001438-MR
AND
NO. 2012-CA-001439-MR

ASHER LAND AND MINERAL, LTD — CROSS-APPELLANT

v. — CROSS-APPEALS FROM BELL CIRCUIT COURT
HONORABLE ROBERT COSTANZO, JUDGE
ACTION NO. 06-CI-00566

NAMI RESOURCES COMPANY, LLC — CROSS-APPELLEE

<u>OPINION</u>
<u>AFFIRMING</u>

** ** ** ** **

BEFORE: DIXON, J. LAMBERT AND NICKELL, JUDGES.

DIXON, JUDGE: Appellant[1]/Cross-Appellee, Nami Resources Company, LLC ("NRC"), appeals from a jury verdict in the Bell Circuit Court awarding Appellee/Cross-Appellant, Asher Land and Mineral, Ltd ("ALM"), $1,308,403.60 in compensatory damages and $2,686,000.00 in punitive damages for breach of contract and fraud. ALM has filed a cross-appeal challenging the trial court's summary judgment in favor of NRC on its conversion claim as well as the refusal to allow ALM to amend its complaint to assert a claim for encroachment/trespass.

FACTS

ALM is the successor in interest to lessor Asher Coal Mining Company under three oil and gas leases separately executed in 1929, 1952, and 1953. For all relevant purposes herein, the leases are the same. NRC subsequently became the successor lessee under these leases in 2000, and operates gas wells on ALM's property as part of a network of small pipelines that connect more than eight hundred of NRC's wells to larger transmission pipelines.

The dispute herein concerns the amount of royalties that NRC paid to ALM under the leases. The 1929 lease provided in relevant part, "1st . . . to pay to

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[1] There are five Appellants in the direct appeal, Nami Resources Company, LLC; Trust Energy Company, LLC; Vinland Energy Eastern, LLC; Vinland Energy Operations, LLC; and Vinland Energy Gathering, LLC. For brevity's sake, this opinion will refer to all Appellants collectively as "NRC."

the lessor, as royalty for gas from each well, while the same is sold off the premises, the equal of one-eighth of the market price of said gas, to be paid monthly." The 1952 and 1953 leases simply provided, "to pay lessor for gas from each well where the gas is found, the equal of (1/8) of the gross proceeds, at the prevailing market rate, for all gas sold, used or manufactured into gasoline, carbon black or other by-products, on or off premises."

Gas is measured by meters located within a few feet of the wellhead. The meters measure the volume of gas produced by each well on a monthly basis and record the information on integration sheets. Each month, NRC would send ALM a royalty check with a report (pay sheet) as to the volume of gas – stated in terms of one thousand cubic feet of gas ("Mcf") – allegedly produced by each well on ALM's property subject to the leases, as well as the price received for each Mcf. Because the leases provided for market price at the well, NRC deducted from the royalty payments post-production expenses that it alleged were necessary to move the gas from the wellhead to the point of sale, as well as each lessor's proportionate share of Kentucky's severance tax.

In December 2006, ALM filed a complaint in the Bell Circuit Court against NRC for breach of the leases and for an accounting as to the royalties paid to ALM thereunder. Subsequently, in March 2011, ALM filed its fifth amended complaint asserting a claim for conversion with respect to NRC's drilling and operation of Well # 35, arguing that NRC operated Well # 35 in violation of the 500-foot spacing requirements imposed under Kentucky Revised Statutes (KRS)

353.610(2), as well as confiscated natural gas underneath an unleased parcel of ALM's property known as the Carlson tract.

Prior to trial, the trial court ruled as a matter of law that the market price at the well applied to royalty calculations and that NRC had the right to deduct post-production costs. However, the court ruled that there was a material issue of fact as to whether NRC's deduction figures reflected costs that were actually incurred and reasonable. The trial court further found that NRC was not entitled to deduct severance taxes and NRC thereafter paid the disputed amount in to court. Further, the trial court granted NRC's motion for summary judgment on ALM's conversion claim with regard to Well # 35.

The matter went to trial in March 2012. At the close of evidence, the jury found that NRC had breached its contract with ALM by deducting post-production costs that were either not actually incurred or were unreasonable, and awarded ALM unpaid royalties in the amount of $1,308,403.60, which represented the full amount of ALM's demand less the severance tax amount that NRC had previously paid into the court. The jury further found that NRC fraudulently misrepresented the amount of royalties it owed ALM and awarded $1,308,403.60, again representing the amount of unpaid royalties ALM had demanded. Finally, the jury awarded ALM $2,686,000.00 in punitive damages.

The trial court subsequently entered its final judgment on March 27, 2012. The trial court limited the compensatory damages under Counts I and II to $1,308,403.60 because the jury had awarded duplicative damages on the breach of

contract and fraud claims. Accordingly, ALM was awarded a total of $4,106,088.00, which included the $111,686.40 in severance taxes that NRC had previously paid into court. NRC thereafter filed a motion for judgment notwithstanding the verdict (JNOV) or, alternatively, a new trial, which was denied by order entered July 23, 2012. This appeal ensued. Additional facts are set forth as necessary.

BREACH OF CONTRACT

NRC first argues that the trial court erred in failing to find that, as a matter of law, there was no breach of contract. Specifically, NRC contends that because the trial court had previously ruled that deductions for gathering, compression, treatment, and transportation of natural gas were permissible, the jury's award of the maximum compensatory damages assumed that NRC incurred no expenses, and must have been based on speculation, conjecture, and misrepresentation.

ALM's breach of contract claim concerned certain deductions taken by NRC from the price of the natural gas extracted on ALM's land when calculating the royalty payments owed to ALM. In an October 25, 2011 order, the trial court granted partial summary judgment in favor of NRC with respect to "the propriety of deducting from its royalty payments the costs of gathering, compression, treatment and transportation of the gas from the well."[2] The trial court concluded that NRC's reconstruction approach was a valid method for

[2] ALM has not appealed such ruling.

determining the market price of the gas "at the well" and that deducting the costs of gathering, compression, treatment and transportation were appropriate under that method. However, the trial court further ruled that any deductions made by NRC were required to "reflect actual, reasonable expenditures," and that because it was unable to discern from the record whether NRC's deduction figures reflected costs that were actually incurred and reasonable, such was an issue to be decided by a jury.

At trial, to rebut NRC's evidence that its post-production costs were reasonable, ALM presented the expert testimony of Mark Enderle, who prepared a royalty underpayment report. Enderle testified that in calculating the amount of royalties he believed NRC owed to ALM, he allowed for NRC's expenses associated with marketing and third-party transportation of gas. With respect to gathering expenses, which from his testimony appears to constitute the compression and transportation of gas across NRC's own lines, Enderle testified that such expenses were illusory "non-cash" charges. Enderle explained that his audit of NRC revealed no accounting records substantiating the expenses claimed by NRC for the installation and operation of its gathering system. Enderle stated that he did not take into account NRC's alleged line loss or its internal transportation charges because there was also no documentation to justify such items.

In addition to Enderle's testimony, the jury heard testimony from Vicki Griffith, NRC's former CEO, who was called by NRC to explain its internal

transportation charge but conceded on cross-examination that she had not conducted any analysis as to the reasonableness of the charge. Arthur Bowman, a CPA and CFO of Vinland Energy Gathering, LLC, was also called by NRC to testify about NRC's calculation and payment of royalties to all owners. On cross-examination, however, Bowman admitted that he created two separate sets of financials for the purposes of trial, each containing material differences with regard to several categories of gathering expenses. Finally, NRC's expert witness, Michael Miller, acknowledged on cross-examination that he did not know how much money NRC spent to build its gathering system, did not know the cost to gather gas on ALM's leased premises, and did not know whether there was any correlation between the actual costs and NRC's internal transportation charge.

It was ALM's burden to establish that the expenses claimed by NRC were either not actually incurred or were unreasonable. We agree with the trial court that the jury's damage figure did not assume that *no* post-production costs were incurred. Rather, it reflected ALM's position that no costs other than those permitted by Enderle were, in fact, actually incurred. NRC was entitled to contradict ALM and Enderle's position. However, by awarding the full $1,308,403.60, the jury obviously believed that, except for third-party transportation expenses and marketing fees, the other deductions included in NRC's royalty calculations did not reflect expenses actually incurred.

This Court is to affirm the trial court's denial of NRC's motion unless "there is a complete absence of proof on a material issue in the action, or if no

disputed issue of fact exist[ed] upon which reasonable men could differ." *Fister v. Commonwealth*, 133 S.W.3d 480, 487 (Ky. App. 2003) (quoting *Taylor v. Kennedy*, 700 S.W.2d 415, 416 (Ky. App. 1985)). We believe there was sufficient evidence presented at trial from which the jury could have reasonably concluded that the deductions taken by NRC from ALM's royalty payments were either unreasonable or not actually incurred. As such, the jury's finding that NRC breached its contract with ALM was not "palpably or flagrantly against the evidence" nor was it reached as a result of passion or prejudice. *Peters v. Wooten*, 297 S.W.3d 55, 65 (Ky. App. 2009).

SEVERENCE TAXES

NRC argues the trial court erred in ruling as a matter of law that NRC could not deduct from the royalty payment ALM's proportionate share of severance taxes paid to extract gas from the well. NRC relies upon a slip opinion of the United States District Court in *Appalachian Land Co. v. EQT Prod. Co.*, No. CIV.A. 7:08-139-KKC, 2012 WL 523749, *3 (E.D. Ky. Feb. 16, 2012). Therein, the Court stated:

> The Kentucky severance tax is simply another post-production cost that leads to a market price that is higher than the at-the-well price. Therefore, it is appropriate for EQT to deduct taxes, in addition to post-production costs, from the market price to determine the at-the-well price and then pay ALC royalties based on that price.

The District Court pointed out that "[o]ther states that have adopted the at-the-well rule have included severance taxes as a deductible cost."

Notwithstanding that the *Appalachian Land* decision was not rendered at the time the trial court considered the issue herein, we are of the opinion that it is at odds with the plain language of Kentucky's Natural Resources Severance and Processing Taxes statutes, KRS Chapter 143A.

KRS 143A.020 provides:

> (1) For the privilege of severing or processing natural resources in this state, a tax is hereby levied at the rate of four and one-half percent (4.5%) on natural gas and four and one-half percent (4.5%) on all other natural resources, such rates to apply to the gross value of the natural resource severed or processed except that no tax shall be imposed on the processing of ball clay.
>
> (2) The tax shall apply to all taxpayers severing and/or processing natural resources in this state, and shall be in addition to all other taxes imposed by law.

"Taxpayer" is defined as "any individual, partnership, joint venture, association, corporation, receiver, trustee, guardian, executor, administrator, fiduciary, or representative of any kind engaged in the business of severing and/or processing natural resources in this state for sale or use." KRS 143A.010(4)(a). It is also stated within the definition of "taxpayer" that if there is a contract between the parties whereby persons are "engaged in the business of severing and/or processing a natural resource but do not obtain title to or do not have an economic interest therein, the party who owns the natural resource or has an economic interest is the

taxpayer." *Id*. Finally, one "who only receives an arm's length royalty shall not be considered as having an economic interest." KRS 143A.010(4)(b).

In ruling that NRC could not deduct severance tax from the royalty payments owed to ALM, the trial court herein observed:

> KRS 143A.010(3) defines "severing" or "severed" as "the physical removal of the natural resource from the earth or waters of this state by any means." In this sense, since severance tax attaches in this instance at the moment the natural gas leaves the ground at the wellhead, it might reasonably be viewed as a post-production expense. However, Kentucky jurisprudence is clear on the issue of whether the lessor, having no interest in the extraction and processing operations other than the royalty received, should be made to bear its proportionate share of severance taxes. The clearest instance in which the severer's obligation was divided from the lessor is found in *Burbank v. Sinclair Prairie Oil Co.*, 202 S.W.2d 420 (Ky. 1946). Burbank concerned [sic] between a lessor and lessee for the extraction of oil, under which the lessor received a one-eighth royalty. *Id.* at 421. The tax in question was an oil production tax under Chapter 137. The lessee in that case contended as much as NRC does in the case at bar, that the severance taxes should be apportioned between the royalty owner and the lessee. *Id.* at 422. "This would be so if the tax was on the product," the Court said. *Id.* The final holding in *Burbank* was stated thus: "Upon the authorities cited, and after careful consideration of the question, we are of the opinion that the original act as amended cannot be construed as placing any of the tax in question on one who is simply a royalty owner." *Id.* at 425. Thus, the Court did not permit the lessee to deduct a proportionate share of the oil production tax from the lessor's royalty payment. Of course, the severance tax, like the oil production tax at issue in *Burbank*, is not a tax on the product itself. Rather, it is an excise tax, imposed on "the privilege of severing or processing natural resources" in Kentucky. KRS 143A.020 . . . . It requires

> little imagination to extend the holding of Burbank to the instant case.

The trial court further pointed out that in Kentucky, the severance tax is an excise tax that is not in lieu of other taxes imposed upon landowners/lessors, and that royalties themselves are subject to taxation under KRS Chapter 141.

We would note that the Kentucky Oil and Gas Association, Inc. has filed an amicus brief herein arguing that the deduction of a proportionate share of severance taxes from the landowner/lessor's royalty payment is a widespread and long-standing industry practice. The Association asserts that contrary to the trial court's interpretation, KRS Chapter 143A does not determine the allocation of costs between a gas lessee and a lessor in calculating royalties, but rather simply establishes who must remit the tax to the Commonwealth and who is responsible to the Commonwealth if the tax is not paid. We are of the opinion, however, that neither the plain statutory language nor Kentucky jurisprudence supports such an interpretation. Accordingly, the trial court did not err in ruling that NRC was not entitled to deduct severance taxes from the royalty payment.

FRAUD

NRC next argues that the trial court erred in failing to find that ALM's fraud claim failed as a matter of law. Specifically, NRC contends that (1) no fraud can exist for a breach of contract, (2) the economic loss doctrine bars a fraud claim, and (3) ALM failed to prove fraud by clear and convincing evidence.

NRC first claims that even if a reasonable jury believed that its post-production expenses were unreasonable, the issue of excessive costs lies exclusively within the context of an action for breach of contract rather than an action in tort for fraud. Quoting an unpublished decision from this Court, NRC claims that "tort damages, including punitives, are sometimes recoverable in the context of a contract breach . . . but this is so only when the breach involved independently tortious conduct[,]" and further that fraud claims arising out of the same conduct alleged to have caused the breach must be dismissed "unless the misrepresentation occurred before the contract was formed, it satisfied all of the elements of that tort, and it involved either a matter extraneous to the contract's terms or a risk not contemplated to be part of the contract."[3]

The cases relied upon by NRC are inapposite to the facts herein. In the *Thomas* case, quoted above, the plaintiff's cause of action was for the breach of a construction contract, not fraud, yet the trial court therein allowed an award of punitive damages. In reversing the jury's award, a panel of this Court noted that the contractor's decision not to perform the contract was a breach of contract, not a tort, and thus did not subject him to punitive damages. In *Pioneer Res. Corp. v. Nami Res. Co., LLC*, No. 6:04-465-DCR, 2006 WL 1778318, *8 (E.D. Ky. June 26, 2006), the federal district court determined that no claims for fraud or fraud in the inducement had been pled. As such, we must conclude that any comments concerning the "fraudulent underpayment" of royalties was clearly dictum and has

[3] *Thomas v. Brooks*, No. 2005-CA-001983-MR, 2007 WL 1378510, *2 (Ky. App. May 11, 2007).

no precedential value herein. Finally, although NRC claims that the Sixth Circuit Court of Appeals in *Poplar Creek Development Co. v. Chesapeake Appalachia, LLC*, 636 F.3d 235 (6th Cir. 2011), addressed the issue of excessive fees and held that "it only gives rise to a breach of contract claim, never a tort such as fraud," we find nothing within that decision to support such a conclusion.

NRC was under no contractual obligation to furnish ALM with information concerning gas volumes and prices. Because NRC voluntarily took on the reporting obligation, and certainly had superior knowledge as to volumes and pricing, it owed ALM an independent duty to accurately report the information on the monthly statements. Thus, we are of the opinion that since ALM accepted royalty payments in reliance upon NRC's representations contained in those statements, it was entitled to pursue both breach of contract and fraud actions for intentional underpayment of such royalties. *See John Hopkins Hospital v. Peabody Coal Co.*, 920 F.Supp. 738, 742-44 (W.D. Ky. 1996).

By way of a footnote, NRC claims that ALM's fraud claim is barred by the economic loss doctrine, arguing that ALM's fraud and misrepresentation claims are founded on contractual duties, and that tort claims cannot be maintained absent a basis independent of any alleged breach of contract. We disagree.

"The 'economic loss rule' prevents the commercial purchaser of a product from suing in tort to recover for economic losses arising from the malfunction of the product itself, recognizing that such damages must be recovered, if at all, pursuant to contract law." *Giddings & Lewis, Inc. v. Industrial Risk Insurers*, 348

S.W.3d 729, 733 (Ky. 2011). The trial court herein noted that the two most recent cases in Kentucky providing guidance on the doctrine are *Presnell Construction Managers, Inc. v. EH Construction, LLC*, 134 S.W.3d 575 (Ky. 2004), and *Giddings & Lewis, Inc.,* 348 S.W.3d 729. The doctrine was first given express treatment in Justice Keller's concurrence in *Presnell,* wherein he stated that with the adoption of Restatement (Second) of Torts § 552 (1977), the Court "created the independent tort action of negligent misrepresentation, which is not barred by the economic loss doctrine." *Presnell* at 590. The majority, however, made no mention of the doctrine and did not base its decision and reasoning on it. The majority concluded that negligent representation under § 552 "defines an independent duty for which recovery in tort for economic loss is available." *Id* at 582. However, the Court's characterization of negligent misrepresentation as an independent tort was made in a specific context, i.e., the issue of whether privity between the plaintiff, EH Construction, and the defendant, Presnell Construction Managers, was necessary, as a source of duty, to maintain a claim of negligent misrepresentation against Presnell. The Court concluded that negligent misrepresentation does not depend on the existence of contractual privity as a source of duty defined by the tort and EH Construction could maintain its claim against Presnell even though there was no contract between them. Significantly, however, as the trial court herein observed, the Court did not address whether negligent misrepresentation defines an "independent" duty in the sense that even if there is a contract, that tort is another source for an actionable duty.

Subsequently, the Court in *Giddings* unanimously adopted the economic loss rule in Kentucky. The negligent misrepresentation claim therein was premised on the assertion that Giddings and Lewis negligently misrepresented to Ingersoll Rand that a diffuser cell system could operate safely at a speed specified by Ingersoll Rand. Thus, the *Giddings* Court considered the economic loss doctrine only in the context of a commercial product sale with the Court concluding, "Today we hold that the economic loss rule applies to claims arising from a defective product sold in a commercial transaction . . . . [T]he rule's application is not limited to negligence and strict liability claims but also encompasses negligent misrepresentation claims." *Id*. at 733.

The trial court herein observed that although there is no doubt that the economic loss rule now exists in Kentucky, the instant case is controlled by neither *Presnell* nor *Giddings*. In *Presnell*, the parties did not have a contract, whereas there is a contract in this case. In *Giddings*, there was a contract but it concerned the provision of a product and a product liability suit, whereas there is no product involved herein. Furthermore, we agree with the trial court that there is little in the *Giddings* opinion to suggest that the doctrine should be applied to a negligent misrepresentation claim outside the context of a commercial product sale. As the trial court aptly concluded:

> The Court would note that this result is suggested by § 552 itself, the standard for negligent misrepresentation in Kentucky after *Presnell*. That section applies to those "who, in the course of his business, profession or employment, or in any other transaction in which he has

> a pecuniary interest, supplies false information for the guidance of others in their business transactions." Restatement (Second) of Torts § 552 (1977). To conclude that negligent misrepresentation as defined by § 552 is not available if there is a contractual relationship controlling the parties would severely curtail the effect of § 552. Those who supply false information while operating in the course of their business, profession, or employment, or in a transaction in which they have a pecuniary interest, will no doubt frequently have a contractual relationship with those to whom the information is supplied; and the contract between them is likely to be related to the provision of false information. To describe the class of persons subject to liability under § 552 as that section does, and then to limit the tort created thereby to cases in which there is no privity of contract governing the relationship between the parties would be patently inconsistent. . . . The Supreme Court in *Giddings* indicates that if any Restatement provision applied to the case before it there it would be Restatement (Third) of Torts § 9, not the § 552 discussed in *Presnell*. This is further indication of the difference between *Presnell* and *Giddings* with regard to negligent misrepresentation under the economic loss doctrine outside of a commercial product sale. It would be too great a speculation for this Court to conclude based on *Giddings* that the economic loss doctrine would apply to the negligent misrepresentation claim of ALM. Therefore, the Court concludes that negligent misrepresentation, under current Kentucky law, is not prohibited outside the context of a commercial product sale by the economic loss doctrine if there is a related contractual relationship.

We likewise agree with the trial court that *Giddings* expressly left undecided the interaction between common law fraud and the economic loss doctrine. Based upon the same reasoning as is applied above with regard to negligent misrepresentation, we are of the opinion that Kentucky law does not extend the

economic loss rule beyond the realm of commercial product sales and, as a result, ALM's fraud claim was not barred.

Finally, NRC argues that there was no clear and convincing evidence of fraud because ALM failed to meet its burden of proving that it relied on any alleged misrepresentations contained in the royalty statements. NRC contends that it

produced evidence to suggest that ALM had expressed some concern as early as 2003 about whether the royalty amounts were correct. NRC points out that James Golden, ALM's manager at that time, questioned an NRC representative about why the reported prices on which ALM's royalties were based were lower than those for other producers on property also owned by ALM. As such, NRC claims that because ALM did not believe the truth of NRC's royalty statement after 2003, it cannot claim misrepresentation premised on those same statements.

Reliance is an essential element of fraud. "The very essence of actionable fraud or deceit is the belief in and reliance upon the statements of the party who seeks to perpetrate the fraud." *Wilson v. Henry*, 340 S.W.2d 449, 451 (Ky. 1960). Any reliance, however, must be reasonable or justifiable. *Flegles, Inc. v. TruServ Corp.*, 289 S.W.3d 544, 549 (Ky. 2009). As such, if investigation reveals the true facts behind fraudulent misrepresentations, a party can no longer claim to have relied on those representations. *See* 37 C.J.S. *Fraud* § 61 (2012). On the other hand, if a party has undertaken no inquiry, but has passively relied on the information of another, a case for lack of reasonableness could be made in that

situation as well. *Cf.* 37 Am. Jur. 2d *Fraud and Deceit* § 231 (2012) ("reliance cannot be deemed 'reasonable' for purposes of a claim for fraud or negligent misrepresentation, when the alleged misrepresentation is preposterous or obviously false, when minimal investigation would have revealed the truth, or when the plaintiff closes its eyes and passively accepts the contradictions that exist in the information available to it.").

As the trial court herein pointed out, there was a question of timing as to when ALM ceased to believe in the veracity of the representations contained in NRC's royalty statements. Clearly, at some point, ALM did cease to believe NRC's representations or this claim would never have been asserted. Nevertheless, the fact that some level of suspicion existed, and some level of inquiry was made, does not necessarily preclude a finding of reasonable reliance. This is particularly so in cases where the party asserting fraud cannot easily obtain the information necessary to ascertain the falsity of the representations, and where such information is peculiarly in the possession of the party making the allegedly fraudulent misrepresentations. *See Addison v. Wilson*, 238 Ky. 143, 37 S.W.2d 7, 12 (1931).

The royalty statements were the only records NRC furnished to ALM containing information as to the volumes of gas produced by the wells and the price at which the gas was sold, information that was necessarily used to calculate the royalties due ALM under the leases. It is indisputable that the information contained in those statements was peculiarly within NRC's possession. James

Golden testified that when he questioned NRC about the payments in 2003, the NRC representative used a lot of "technical terms" that he did not understand in giving a "big long explanation" of how the royalties were calculated. Golden further stated that he did not have a sufficient understanding of the matter to argue about the calculations.

We agree with the trial court that while there was conflicting evidence as to ALM's reliance on NRC's royalty statements, the evidence was nevertheless sufficient to create a jury question as to whether ALM reasonably relied on the alleged misrepresentations by NRC during the time in question.

PUNITIVE DAMAGES

NRC argues that the punitive damage award was improper and unsupported by the evidence. Specifically, NCR contends that (1) punitive damages are prohibited in breach of contract claims, (2) ALM suffered no "separate and distinct" injury from the alleged misrepresentation of the royalty payment due to ALM, and (3) there was no outrageous or evil conduct to warrant an award of punitive damages.

As we previously stated, ALM was entitled to maintain a cause of action for both breach of contract and fraud. KRS 411.184 permits an award of punitive damages for "fraud," which is defined as "an intentional misrepresentation, deceit, or concealment of material fact known to the defendant and made with the intention of causing injury to the plaintiff." The greater level of culpability required to support punitive damages is one of "conscious wrongdoing." *Fowler v.*

Mantooth, 683 S.W.2d 250, 252 (Ky. 1984) ("The threshold for an award of punitive damages is misconduct involving something more than merely commission of the tort."). "Conscious wrongdoing" need not be expressly shown; rather it is sufficient for purposes of punitive damages if the evidence demonstrates conduct from which the requisite culpability may be inferred. *Id.*

NRC erroneously relies on decisions involving gross negligence in arguing that there was no evidence that its alleged misconduct was "outrageous" or "willful, malicious, and without justification." As a panel of this Court in *Pezzarossi v. Nutt*, 392 S.W.3d 417, 420 (Ky. App. 2012), observed, KRS 411.184 "does not provide that a plaintiff must prove that the defendant acted toward him with oppression, fraud, AND malice; rather, only one of those three elements must be present." *See also United Parcel Service Co. v. Rickert*, 996 S.W.2d 464, 470 (Ky. 1999) ("Rickert was entitled to have the jury consider punitive damages because he had demonstrated fraud by clear and convincing evidence. KRS 411.184.").

We agree with the trial court that there was sufficient evidence of conduct from which conscious wrongdoing could be inferred to permit the matter of punitive damages to be submitted to the jury. As the trial court noted:

> Particularly, if the jury were satisfied that ALM's inquiry regarding the statement or royalties did not preclude a fraud verdict altogether due to the lack of reasonable reliance, it might reasonably conclude that NRC's responses to ALM's inquiry were intentionally calculated to put ALM unduly at ease, which indicates a specific

intent to perpetuate any allegedly fraudulent misrepresentations.

A party plaintiff is entitled to have its theory of the case submitted to the jury if there is any evidence to sustain it. "Accordingly, if there was *any evidence* to support an award of punitive damages, [the plaintiff] had a right to have the jury instructed on the option to award punitive damages." *Shortridge v. Rice*, 929 S.W.2d 194, 197 (Ky. App. 1996). As in *Pezzarossi*, ALM established its threshold claim of fraudulent misrepresentation by clear and convincing evidence, meeting the element of KRS 411.184(2) that NRC had acted toward it with fraud. Therefore, we conclude that the trial court properly found there was sufficient evidence to withstand NRC's motion for a directed verdict and the issue of punitive damages was properly submitted to the jury.

We likewise find no merit in NRC's claim that the award of $2,686,000 in punitive damages was plainly excessive and unconstitutional. NRC contends that the purpose of punitive damages is to punish or deter misconduct, neither of which is an appropriate sanction herein where it maintains its sole transgression was interpreting the leases differently from ALM. We disagree.

The imposition of punitive damages may be proper to further a state's legitimate interest in punishing unlawful conduct and deterring its repetition. *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 568, 116 S.Ct. 1589, 1595, 134 L.Ed.2d 809 (1996). Only when an award enters the zone of arbitrariness by being grossly excessive in relation to a state's legitimate interests does it violate

the Due Process Clause of the Fourteenth Amendment. *Id.* In determining whether an award is grossly excessive, the court must consider three guideposts: (1) the degree of reprehensibility of the defendant's conduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damage award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in similar cases. *Id.,* 517 U.S. at 574-75, 116 S.Ct. at 1598; *Ragland v. DiGuiro*, 352 S.W.3d 908, 917 (Ky. App. 2011).

In its motion for a new trial, NRC only challenged the jury's award under the reprehensibility factor,[4] arguing that its conduct was neither outrageous nor reprehensible but rather was only a misinterpretation of the lease. As noted in *Ragland*, the degree of reprehensibility is "[p]erhaps the most important indicium of the reasonableness of a punitive damages award . . . ." *Id.* The reprehensibility guidepost has five factors:

> [T]he harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.

Id. (quoting *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419, 123 S.Ct. 1513, 1521, 155 L.Ed.2d 585 (2003)). Further, not all reprehensibility factors must be present.

[4] As NRC only challenged the award on the reprehensibility guidepost, we will assume, as did the trial court, that a consideration of the other two guideposts would support the award as well.

In upholding the punitive damages award, the trial court herein concluded,

> Considering the circumstances of this case, the Court is inclined to sustain the jury's award as far as the factor of reprehensibility is concerned. In particular, the fourth and fifth factors are present in this case. . . . Taking the facts of this case as a whole, the Court concludes that the reprehensibility element of *Gore* is satisfied. As the Supreme Court stated in *Gore*: "[The] infliction of economic injury, especially when done intentionally through affirmative acts of misconduct, or when the target is financially vulnerable, can warrant a substantial penalty." *Id.* at 576 (internal citations omitted). The facts of the instant case reflect a similar situation. The injury to ALM may have been economic, rather than physical; but in finding for ALM, the jury found it was the result of intentional and affirmative misrepresentations as to the proper amount of royalties owed, which were repeated in each monthly royalty statement.

We agree with the trial court's analysis. While NRC maintains that its conduct was mere misinterpretation, the jury heard an abundance of evidence demonstrating NRC's intentional, affirmative and repetitive misrepresentations as to the volumes of gas produced, the prices at which the gas was sold, and the proper amount of royalties owed to ALM. We conclude that the trial court properly found that sufficiently reprehensible conduct on the part of NRC was proven and that the punitive damages award was commensurate with the Due Process Clause. *Gore*, 517 U.S. at 568, 116 S.Ct. at 1595.

COMPENSATORY DAMAGES

NRC argues that the trial court erred in denying its motion for a new trial on the grounds that the compensatory damage award was plainly excessive.

Specifically, the jury was instructed on damages for the breach of contract claim as follows:

> If the jury answered "Yes" on Interrogatory No. 1, state what sum of money the jury is satisfied from the evidence will fairly and reasonably compensate the Plaintiff, Asher Land and Mineral, LTD., for the unpaid royalties described in Interrogatory No. 1. The sum awarded by the jury should equal the amount of money that is the difference between (1) the amounts deducted from royalty payments by the Defendant, Nami Resources Company, LLC, for costs of gathering, compression, treatment, and transportation, and (2) the amounts for such costs that the jury determines were actually incurred and reasonable.

NRC did not object to the above instruction, but only requested the addition of a "not to exceed" amount of $1,308,408.60. That figure represented the full amount of damages requested by ALM based upon Enderle's calculations less the $111,684.40 in damages for severance tax that had been paid into court prior to trial. As previously noted, Enderle testified that in reaching his damage estimate he disallowed any charges for hedging transactions, gas purchases from third parties, and "gathering" which he claimed constituted compression and transportation across NRC's own lines, as opposed to third-party lines. Enderle specifically stated, however, that his calculations did include NRC's marketing expenses and the expenses associated with third-party transportation of gas.

Kentucky Rules of Civil Procedure (CR) 59.01(d) allows a new trial based on "[e]xcessive or inadequate damages, appearing to have been given under the influence of passion or prejudice or in disregard of the evidence or instructions of

the court." Kentucky courts utilize the "first blush" rule in reviewing a damage award for excessiveness or inadequacy. "[The] rule provides that a damage award is excessive if the mind is immediately shocked and surprised at the great disproportion of the size of the verdict in relation to the amount authorized by the evidence, such that it must have been the result of passion and prejudice." *Morrow v. Stivers*, 836 S.W.2d 424, 430 (Ky. App. 1992). However, the "first blush" rule is a "general and flexible rule," and every case must be determined by the facts peculiar to it. *Fields v. Baker*, 329 S.W.2d 376, 378 (Ky. 1959); *Taylor-Green Gas Co. v. Newcomb*, 302 Ky. 564, 195 S.W.2d 307, 311 (1946). Furthermore, as noted by our Supreme Court in *Emberton v. GMRI, Inc.*, 299 S.W.3d 565 (Ky. 2009):

> The amount of damages is a dispute left to the sound discretion of the jury, and its determination should not be set aside merely because we would have reached a different conclusion. If the verdict bears any reasonable relationship to the evidence of loss suffered, it is the duty of the trial court and this Court not to disturb the jury's assessment of damages.

Id. at 579 (quoting *Hazelwood v. Beauchamp*, 766 S.W.2d 439, 440 (Ky. App. 1989)). *See also Childers Oil Co. v. Adkins*, 256 S.W.3d 19, 28 (Ky. 2008) ("The assessment of damages is a matter left in the hands of the jury, and their decision should be disturbed only in the most egregious circumstances.")

As the trial court herein observed, NRC's only support for its claim that the verdict was excessive is that by awarding the full amount of damages, the jury must have assumed that NRC incurred no expenses for gathering, compression,

treatment and third-party transportation during the relevant period. However, as we previously concluded, the damage figure did not assume no post-production costs; rather it reflected the jury's conclusion that no costs other than those permitted by Enderle were incurred and/or reasonable.

Whether this Court would have reached the same decision as the jury on damages is irrelevant. The sole question is whether the award was so great as to shock the conscience of the trial court given the evidence presented at trial. Giving all due deference to the jury, we cannot conclude that the compensatory damage award was so flagrantly against the evidence as to suggest it was the result of passion or prejudice.

In a footnote, NRC also argues that the trial court erred by including in the compensatory damages award prejudgment interest and further that the trial court abused its discretion in not assessing more "appropriate and realistic" pre- and post-judgment interest rates. However, NRC raised this issue in its motion for a JNOV or, alternatively, a new trial. As the trial court noted in its order denying said motion, such was not the appropriate vehicle to challenge an award of interest. Since the trial court did not address the issue, this Court declines to do so as well.

CLOSING ARGUMENT

NRC argues that it was prejudiced by ALM counsel's "calculated, highly prejudicial, and obviously fruitful" closing arguments. Specifically, NRC contends that ALM's counsel improperly (1) told the jury that the case against NRC was more worthy of punitive damages than any case he had seen in his thirty-two years

of practice; (2) referenced the size of NRC to suggest it could afford to pay a large punitive damages award; (3) insinuated that NRC's "army of lawyers" used technical legal maneuvers to hide the truth and that NRC's evidentiary objections were intended to hide relevant information from the jury; and (4) attempted to provoke racial and nationalistic prejudices by referring to Majeed "Mike" Nami as Majeed, despite knowing that he was a United States citizen who had gone by Mike since the 1960's. NRC concedes that no objections were raised during closing arguments but asserts that CR 61.02's palpable error rule should apply. We disagree.

"Opening and closing statements are not evidence and wide latitude is allowed in both." *Wheeler v. Commonwealth*, 121 S.W.3d 173, 180 (Ky. 2003) (citing *Slaughter v. Commonwealth*, 744 S.W.2d 407 (Ky. 1987)). However, closing arguments calculated to arouse the passions and prejudices of the jury are not looked favorably upon in Kentucky. *See Clement Brothers Co. v. Everett*, 414 S.W.2d 576, 577 (Ky. 1967). Nevertheless, "counsel cannot remain silent and then rely upon the claim that the argument was improper." *Rodgers v. Cheshire*, 421 S.W.2d 599, 602 (Ky. 1967). *See also Greathouse v. Mitchell*, 249 S.W.2d 738, 741 (Ky. 1952) ("An objection to the remarks and conduct of counsel must be made at the time and a ruling had thereon, else they cannot be considered on appeal.").

NRC clearly sat through the entirety of opposing counsel's closing argument without objection. Such failure operates as a waiver of the argument on appeal.

Further, NRC's claim that the issue should be reviewed for palpable error under CR 61.02 is without merit. In *Carrs Fork Corp. v. Kodak Mining Corp.*, 809 S.W.2d 699, 701 (Ky. 1991), our Supreme Court held that "[i]n applying [CR 61.02], palpable error must result from action taken by the Court rather than from an act or omission by the attorneys or litigants." *See also Burns v. Level*, 957 S.W.2d 218, 222 (Ky. 1997). We are of the opinion that error, if any, was opposing counsel's allegedly prejudicial statements and/or Appellant's failure to object to such in the trial court. Clearly, such acts or omissions do not equate to palpable error.

EVIDENTIARY RULINGS

NRC argues that the trial court erred in prohibiting evidence of ALM's dismissed forfeiture claim. NRC contends that ALM's allegations of forfeiture and termination of the leases prevented NRC from drilling additional wells on the property throughout the pendency of the litigation. Thus, NRC argues that because it was unable to explain to the jury why it had not drilled in two years, the jury failed to understand NRC's counterclaim for breach of contract and, in turn, rejected such.

We agree with the trial court that error, if any, was rendered moot at trial. More than once, the jury was made aware that ALM had previously asserted a forfeiture claim and that such claim had been dismissed. NRC could not have been prejudiced by the ruling as the matter was repeatedly presented to the jury through testimony and remarks of counsel.

We likewise find no merit in NRC's claim that the trial court improperly excluded evidence of NRC's offer to provide ALM with access to NRC's books and records. Kentucky Rules of Evidence (KRE) 408 provides, in relevant part,

> (1)Furnishing or offering or promising to furnish; or
>
> (2)Accepting or offering or promising to accept a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. . . .

The purpose of KRE 408 is to permit settlement negotiations to proceed forthrightly. *Commonwealth of Kentucky, Cabinet for Health & Family Serv. v. Chauvin*, 316 S.W.3d 279, 303 (Ky. 2010) (Scott, J., concurring).

As the trial court pointed out in its order, NRC's offer to provide ALM access to, and copies of its books and records was contained in a letter to the Board of Directors of ALM that contained language of settlement. In fact, it appeared that the entirety of that letter was written for that purpose. Clearly, NRC's offer was a statement made in compromise negotiations and was properly excluded under KRE 408.

INSTRUCTIONS

NRC raises several challenges with respect to Interrogatory No. 6, the fraud instruction, which stated as follows:

> State whether the jury is satisfied by clear and convincing evidence as to each of the following:

(1) That the monthly royalty statements provided to the Plaintiff, Asher Land & Mineral, LTD., and about which you have heard evidence, misrepresented the amount of royalties owed by (a) reporting incorrect volumes of natural gas produced from the wells about which you have heard evidence, (b) reporting inaccurate sales prices for natural gas produced from the wells about which you have heard evidence and removed from the property of the Plaintiff, OR (c) reducing the gross sales figures by improper expenses;

(2) That the Defendant, Nami Resources Company, LLC, intended for the Plaintiff to rely upon the truth of the misrepresentations described in paragraph (1) above in accepting the royalty payments;

(3) That the Plaintiff did reasonably rely on the misrepresentations described in paragraph (1) above as being true in accepting the royalty payments;

(4) That the Defendant, in making the misrepresentations described in paragraph (1) above, either (a) knew that they were not true, OR (b) acted with reckless disregard for whether they were or were not true;

AND

(5) That the Plaintiff, Asher Land & Mineral, LTD suffered injury as [a] direct result of the misrepresentations described in paragraph (1) above by accepting understated royalty amounts.

NRC first argues a finding of materiality is required for actionable fraud and that "the jury was not instructed in Interrogatory No. 6, nor given any opportunity, to determine whether the representations alleged fraudulent were material." However, NRC did not raise an objection to the instructions until it filed its pretrial motions.

CR 51 provides, in relevant part:

. . . .

> (2) After considering any tendered instructions and motions to instruct and before the commencement of the argument, the court shall show the parties the written instructions it will give the jury, allowing them an opportunity to make objections out of the hearing of the jury. Thereafter, and before argument to the jury, the written instructions shall be given.
>
> (3) No party may assign as error the giving or the failure to give an instruction unless he has fairly and adequately presented his position by an offered instruction or by motion, or unless he makes objection before the court instructs the jury, stating specifically the matter to which he objects and the ground or grounds of his objection.

If a party is unsatisfied with an instruction, it must object prior to its submission to the jury. *Harris v. Thompson*, 497 S.W.2d 422, 431 (Ky. 1973). Thus, a party cannot preserve an alleged error with respect to a jury instruction in a post-trial motion.

Neither the trial court's draft nor final instruction contained a materiality element. Certainly, NRC did submit a proposed instruction that mentioned materiality. However, at the instruction conference, NRC raised no objection to the trial court's proposed instruction. Accordingly, we agree with the trial court that NRC's proposed instruction did not sufficiently call the trial court's attention to any alleged error, particularly in light of NRC's failure to object to the instruction when it was the subject of review during the instructions conference. *See Sand Hill Energy, Inc. v. Smith*, 142 S.W.3d 153, 163 (Ky. 2004).

NRC also argues that Interrogatory No. 6 erroneously informed the jury that NRC misrepresented the royalties owed if it "reported incorrect volumes of natural gas produced from the wells" or "reduced the gross sales figures by improper expenses." NRC contends that the instruction was contrary to the trial court's November 2011 order ruling that NRC's deductions for gathering, compression, dehydration, and transportation were proper, and thus resulted in the jury awarding excessive damages for proper conduct. We disagree.

We agree with the trial court that NRC has misconstrued the language of Interrogatory No. 6. The clear focus of paragraph (1) was whether NRC misrepresented the amount of royalties owed to ALM. The instruction then limited the jury to deciding whether or not NRC did so under three set methods. Paragraph (1)(a) did not direct the jury to find against NRC merely if it reported incorrect volumes of natural gas.

We reach the same conclusion with regard to paragraph (1)(c). Furthermore, we disagree with NRC that the jury should have been instructed that deductions for gathering, compression, treatment and transportation were proper, and the failure to do so left the jury free to conclude that the proper deductions were actually improper misrepresentations. The central issue at trial was whether NRC's deductions reflected reasonable expenses actually incurred. Simply because the trial court had previously ruled that NRC was permitted to deduct costs for the items mentioned was not determinative as to whether the gross sales figures were reduced by improper expenses. Further, NRC's counsel, who made repeated

references to the trial court's ruling, was free to reiterate that point to the jury during closing arguments. The jury is presumed to follow any instructions given to it. *Owens v. Commonwealth*, 329 S.W.3d 307, 315 (Ky. 2011). We do not find any improper language in Interrogatory No. 6.

Next, NRC argues that the trial court should have provided special instructions on reliance by informing the jury that the deductions for severance taxes (which the trial court had previously ruled were improper) could not also justify a finding of fraud, given that NRC had communicated to ALM in the monthly royalty statements that payment for severance taxes had been deducted. NRC contends that as a matter of law, ALM could not have relied upon any "misrepresentation" about severance taxes because it was fully aware of the deductions being taken. Similarly, NRC argues that the jury should have been instructed that ALM was not entitled to rely on the monthly royalty statements after ALM challenged them for being incorrect. NRC points out that ALM sued NRC in 2006 but the trial court nevertheless allowed the jury to consider damages in the years thereafter.

Kentucky adheres to a "bare bones" approach to jury instructions. *Meyers v. Chapman Printing Co., Inc.*, 840 S.W.2d 814, 824 (Ky. 1992). "'Bare bones' instructions are proper if they correctly advise the jury about 'what it must believe from the evidence in order to return a verdict in favor of the party who bears the burden of proof' on that issue." *Olfice, Inc. v. Wilkey*, 173 S.W.3d 226,

229 (Ky. 2005) (quoting *Meyers*, 840 S.W.2d at 824). "Bare bones" instructions are

"merely a framework for applicable legal principles. It becomes the role of counsel, then, to flesh out during closing argument the legal nuances that are not included within the language of the instruction." *Id.* at 230.

We agree with the rationale espoused by the trial court herein:

> It was not the Court's role, but counsel's, to bring to the jury's attention prior to deliberations the argument that severance taxes were expressly identified on each royalty statement, and that accordingly, there could have been no fraudulent misrepresentation. Moreover, as discussed above in the context of the motion for judgment notwithstanding the verdict, there was sufficient evidence to permit the fraud case to go to the jury. Once beyond the directed verdict stage, it was similarly counsel's role to make to the jury the argument that ALM could prove no justifiable reliance after it questioned the accuracy of the statements. It is not the place of the Court to take a position in the instructions as to the weight of the evidence, or the ultimate strength or weakness of a claim or defense; nor is its place to focus the jury's attention on particular evidence. To reiterate the succinct language of the Supreme Court, "if counsel felt that the jury was too thick to get the point all he had to do was to explain it in his summation."

Accordingly, we conclude that the trial court did not err in refusing to give special instructions on reliance.

Finally, NRC argues that the trial court failed to properly instruct the jury on the parties' contractual obligations with respect to NRC's counterclaim for breach of contract. Specifically, Interrogatory No. 10 stated as follows:

State whether the jury is satisfied from the evidence:

(1) That the defendant, Nami Resources Company, LLC, tendered to the Plaintiff, Asher Land & Mineral, Ltd, one or more proposed drilling plans containing a description of the location of proposed wells on the leased premises;

(2) That the Plaintiff rejected or prohibited the proposed drilling plan(s);

AND

(3) As to one or more of the following:

a. The drilling plan would not have rendered a material portion of the coal reserves on the leased premises unmineable;

b. The affected coal reserves, if any, could not have been practicably mined at the time of the tender of the drilling plan(s);

OR

c. That the Plaintiff failed to, within thirty (30) days after it received the drilling plan(s), provide sufficient documentation and evidence to the Defendant by which an unbiased party knowledgeable in coal mining could reasonably conclude that mineable coal reserves underlay the leased premises.

NRC now argues that Interrogatory No. 10 caused confusion because it required a factual determination as to whether NRC proposed one or two drilling plans, an issue it claims was not in dispute, and also required a finding "as to one of the following" rather than "one or more of the following." NRC contends that the jury confirmed its confusion when it sent a note to the trial court asking two

questions: (1) "On Interrogatory No. 10, we do not fully understand the questions?" and (2) "What is the difference between a plot and a plan?"[5]

As the trial court pointed out, NRC did not object to the above instruction or the term "drilling plan." In fact, during the instructions conference, NRC's counsel apparently commended the trial court for getting the instruction correct. As such, although NRC did submit a proposed instruction, we agree with the trial court that it did not bring the particular point to the trial court's attention, especially in light of the discussion at the subsequent instructions conference. Clearly, NRC has waived any error in the instruction's language.

Furthermore, we are of the opinion that the trial court did not err by refusing to answer the second question. As the trial court noted, the question presented by the jury did not ask what was meant by a "drilling plan," which would have been a question of general definition. Rather, the jury asked what the difference was between a plot and a plan, which was a far more specific question. The trial court properly concluded that to answer the question would have invaded the province of the jury in determining whether the plots provided by NRC constituted a drilling plan. As the trial court observed, "[t]he question submitted by the jury [did] not indicate confusion about what the instructions required the jury to do; rather, it

[5] In its brief, NRC cites only the first question as evidence that the instruction was confusing. In fact, however, the first question was withdrawn on the jury's own initiative shortly after being tendered to the bailiff and prior to the jury returning to the courtroom to address the questions. It was never discussed with counsel or addressed by the trial court. Thus, only the second question was discussed with counsel and the jury in open court.

indicat[ed] that the jury was performing its duty, attempting to determine whether NRC tendered a "drilling plan."

ALM'S CROSS-APPEAL

In its cross-appeal, ALM first argues that NRC's post-judgment motions were time-barred and thus all of its arguments in this Court predicated upon those motions are waived. Specifically, ALM argues that the tenth day after entry of the trial court's final judgment was April 6, 2012, which was Good Friday, but NRC did not file or serve its motions until April 9, 2012, in violation of CR 50.02, CR 59.05 and CR 59.02.[6] ALM contends that the trial court erred in ruling that Good Friday was a legal holiday which enlarged the time for NRC to timely file its motions until the following Monday. We disagree.

Pursuant to CR 6.01, when the last day of "any period of time" set by the Kentucky Rules of Civil Procedure falls on a Saturday, Sunday, or a "legal holiday," the time period does not expire until the end of the next day which is not a Saturday, Sunday, or "legal holiday." CR 6.01 does not define "legal holiday." However, KRS 2.110 provides, in relevant part:

> (1) The first day of January (New Year's Day), the third Monday of January (Birthday of Martin Luther King, Jr.), the nineteenth day of January (Robert E. Lee Day), the thirtieth day of January (Franklin D. Roosevelt Day), the twelfth day of February (Lincoln's Birthday), the third Monday in February

[6] CR 59.05 provides that not later than ten days after entry of the judgment, a party may *move* to have the verdict and judgment set aside. However, the requirement for timeliness of a motion for new trial under CR 59.02, and to alter, amend, or vacate a judgment under CR 59.05, is only that they be *served* not later than ten days from the entry of the final judgment. *See Huddleston v. Murley*, 757 S.W.2d 216 (Ky. App. 1988).

> (Washington's Birthday), the last Monday in May (Memorial Day), the third day of June (Confederate Memorial Day, and Jefferson Davis Day), the fourth day of July (Independence Day), the first Monday in September (Labor Day), the second Monday in October (Columbus Day), the eleventh day of November (Veterans Day), the twenty-fifth day of December (Christmas Day) of each year, and all days appointed by the President of the United States or by the Governor as days of thanksgiving, are holidays, on which all the public offices of this Commonwealth may be closed.

In addition, KRS 2.190 states that "the Tuesday after the first Monday in November in Presidential election years shall be a state holiday on which all state offices, all schools and all state universities and colleges shall be closed. Any employee who is required to work on said state holiday shall receive compensatory pay or time off." Finally, KRS 18A.190(1) provides that "[s]tate offices shall be closed and state employees shall be given a holiday on the following days":

> (a) The first day of January plus one (1) extra day;
> (b) The third Monday in January;
> (c) Good Friday, one-half (1/2) day;
> (d) The last Monday in May;
> (e) The fourth day of July;
> (f) The first Monday in September;
> (g) The eleventh day of November;
> (h) Presidential Election Day as required under KRS 2.190;
> (i) The fourth Thursday in November plus one (1) extra day; and
> (j) The twenty-fifth day of December plus one (1) extra day.

Citing *Wilkins v. Kentucky Retirement Systems Board of Trustees*, 276 S.W.3d 812 (Ky. 2009), ALM argues that only those "public holidays" specifically

enumerated in KRS 2.110(1) can constitute a "legal holiday" within the meaning of CR 6.01. Thus, because Good Friday is listed in KRS 18A.190 rather than KRS 2.110, ALM maintains that it cannot be deemed to be a legal holiday and, as such, the filing deadline should not have been enlarged under CR 6.01. We find this argument to be completely without merit.

Our Supreme Court in *Wilkins* explicitly stated that its opinion "ask[ed] and answer[ed] one question: When the deadline for filing a legal document falls on a "legal holiday" [Columbus Day] as designated by KRS 2.110, but the courthouse remains open that day, does the petitioner still get the extra day to file under KRS 446.030?" *Id.* at 813. We agree with the trial court herein that *Wilkins* did not limit "legal holidays" to only those set forth in KRS 2.110. In fact, *Wilkins* makes no reference at all to KRS 18A.190 or KRS 2.190, because the holiday at issue therein, Columbus Day, is listed in KRS 2.110. Accordingly, the language of *Wilkins* cannot be read to limit the existence of "legal holidays" in the Commonwealth to those enumerated in KRS 2.110.[7] Good Friday is designated by the General Assembly as a "holiday" in KRS 18A.190(1)(c), and is therefore a "legal holiday" for the purpose of time computation under CR 6.01.

Furthermore, the same computation of time rules applicable to legal holidays apply to days on which the courthouse is closed. KRS 446.030 provides:

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[7] We would note that the Kentucky Attorney General in *In re: Thomas Stone/Russell Primary School* , Ky. Op. Atty. Gen. 01-ORD-94 (2001) stated that "[b]oth KRS 2.110 and KRS 18A.190 give statutory recognition to specifically identified *legal holidays* on which public offices may be closed." (Emphasis added).

> (1) (a) In computing any period of time prescribed or allowed by order of court, or by any applicable statute or regulation, the day of the act, event or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, a Sunday, a legal holiday, or a day on which the public office in which a document is required to be filed is actually and legally closed, in which event the period runs until the end of the next day which is not one (1) of the days just mentioned. When the period of time prescribed or allowed is less than seven (7) days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation.
>
> (b) When a statute, regulation, or order of court requires an act to be done either a certain time before an event or a certain time before the day on which an event occurs, the day of the event shall be excluded in computing the time. If the day thereby computed on which or by which the act is required to be done falls on a Saturday, Sunday, legal holiday, or a day on which the public office in which the act is required to be completed is actually and legally closed, the act may be done on the next day which is none of the days just mentioned.

In addition to being a legal holiday, Good Friday is a day that the Bell Circuit Court Clerk's office was legally closed. Thus, KRS 446.030 also extended the deadline to the following Monday.

We likewise find no merit in ALM's argument that even if NRC was unable to file its post-judgment motions on Good Friday due to the courthouse being closed, its failure to serve them on ALM on that day renders them untimely. Kentucky law is clear that a litigant is not required to serve documents on legal holidays. *See Gish v. Brown*, 338 S.W.2d 383 (Ky. 1960). NRC had no obligation

to serve its post-judgment motions until the Monday after Good Friday. It did so and, as such, the trial court properly found the motions were timely served.

ALM next argues that the trial court erred in denying its motion to amend Count IV of its fifth complaint to assert a claim for trespass regarding Well # 35. Specifically, in Count IV, ALM alleged that NRC drilled a natural gas well (# 35) that was soon thereafter realized to be in violation of the spacing requirements imposed by KRS 353.610(2). As a result, the site encroached upon the adjacent parcel of land, referred to as the "Carlson Tract." The placement of the well too close to the Carlson Tract was due to an alleged erroneous survey conducted on behalf of NRC, and subsequently approved by ALM. Nevertheless, once the error was discovered, ALM maintained that Well # 35 infringed upon the Carlson Tract and NRC was confiscating gas from underneath that parcel. Thus, ALM asserted in Count IV that it had exclusive right to exercise dominion and control over the gas underneath the Carlson Tract and the NRC's interference with that right constituted conversion. NRC defended that under the common law rule of capture, ALM could not prove conversion.

By order entered on December 15, 2011, the trial court granted summary judgment in NRC's favor on ALM's conversion claim. Therein, the trial court noted,

> Under common law, ALM cannot establish either legal title to the specific gas allegedly drained from the Carlson tract, or the right to possess that gas. . . . The Court agrees with ALM that Kentucky's conservation legislation has modified the rule of capture, or at least its

> application. . . . KRS 353.500 declares it the policy of the Commonwealth to, inter alia, "protect correlative rights of land and mineral owners," and the statutory scheme clearly recognizes the need to govern the production of oil and gas from common pools[.] The well-spacing requirements are obviously part of this legislative policy, and limit the rule of capture accordingly. . . . However, the question crucial to this matter is not whether the rule of capture has been modified or limited by Kentucky's conservation legislation, but how it has been modified or limited. ALM has presented no law to the Court, and the Court finds none, that would supply that deficiency that ALM faces under common law: lack of ownership, or some immediate possessory interest. While indeed Chapter 353 has limited a person's ability to drill for and extract gas from a common pool without stint, . . . none of its provisions can be read to so alter the common law position as to give ALM legal title to the allegedly confiscated gas or a right to posses it. (Citations omitted).

ALM thereafter moved for leave to amend its fifth complaint essentially seeking to re-label its conversion claim to a trespass claim. The trial court denied the amendment, stating that "ALM has unduly delayed requesting leave to assert its [trespass] claim and allowing an amendment at this advanced stage of the litigation would prejudice Defendant NRC."

CR 15.01 provides that leave to amend "shall be freely given when justice so requires." Further, Kentucky law "favors the right of litigants to have their rights disposed of on the merits rather than technicalities" and therefore courts have broad discretion in permitting amendments or other reasonable changes in pleadings. *Kentucky Home Mutual Life Insurance Co. v. Hardin*, 277 Ky. 565, 126 S.W.2d 427, 431 (1938). As such, the decision to grant or deny leave

to amend is ultimately left to the discretion of the trial court, which will not be disturbed absent an abuse of that discretion. *Kenney v. Hangar Prosthetics & Orthotics, Inc.*, 269 S.W.3d 866, 869-70 (Ky. App. 2007).

Although ALM asserts that delay by itself is an insufficient reason to deny a motion to amend, the trial court herein cited not only ALM's lengthy delay in asserting its trespass theory, but also the prejudice NRC would have suffered as a result of allowing ALM to assert a new theory of liability at such a late date. It is significant to remember that the motion to amend came after five years of litigation, five complaints, fourteen months after the final deadline to amend the pleadings, six months after ALM announced it was ready for trial and only two months prior to the start of the trial itself. Ironically, ALM asserts that NRC could not have been prejudiced by a late amendment as it had notice of the claim "from day one." Such position, however, clearly ignores the fact that ALM also had notice of the same and could have asserted a trespass claim at any point during the prior five years.

Contrary to ALM's argument, this is not an instance where ALM mislabeled a claim and then had it dismissed on a technicality. ALM advanced the theory of conversion. When its claim premised on that theory was dismissed it then sought to advance a different theory (trespass). We simply cannot conclude that under the facts presented herein the trial court abused its broad discretion in denying ALM's motion to amend its complaint at such a late date.

We are of the opinion that the trial court herein should be commended for the job it did in adjudicating this case, which was undoubtedly complicated and drawn out. The trial court's pre- and post-trial orders thoroughly analyzed all of the questions presented herein and we conclude that it reached the proper result.

For the reasons set forth herein, the judgment of the Bell Circuit Court is affirmed.

ALL CONCUR.

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