[Cite as *Oxford Mining Co., L.L.C. v. Ohio Gathering Co., L.L.C.*, 2020-Ohio-1363.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
BELMONT COUNTY

OXFORD MINING COMPANY, LLC,

Plaintiff-Appellee/
Cross-Appellant,

v.

OHIO GATHERING COMPANY, LLC,

Defendant- Appellant/
Cross-Appellee.

OPINION AND JUDGMENT ENTRY
Case No. 19 BE 0016

Civil Appeal from the
Court of Common Pleas of Belmont County, Ohio
Case No. 17-CV-418

BEFORE:
Carol Ann Robb, Gene Donofrio, David A. D'Apolito, Judges.

JUDGMENT:
Affirmed.

Atty. Thomas R Lucchesi, *Atty Dante A. Marinucci*, *Atty. Anthony B. Ponikvar*, *Atty. Brittany N. Lockyer,* Baker & Hostetler LLP, 127 Public Square, Suite 2000, Cleveland, Ohio 44114 for Plaintiff-Appellee/Cross-Appellant and

Atty. Kevin L. Colosimo, *Atty. Christopher W. Rogers,* Frost Brown Todd LLC, Union Trust Building, 501 Grant Street, Suite 800, Pittsburgh, Pennsylvania 15219 for Defendant-Appellant/ Cross-Appellee

Dated: March 30, 2020

Robb, J.

{¶1} Defendant-Appellant Ohio Gathering Company LLC has filed an appeal from the decision of the Belmont County Common Pleas Court entering summary judgment on liability (for the claims for declaratory relief and trespass) and thereafter entering judgment on the jury's damage award. Plaintiff-Appellee Oxford Mining Company LLC has filed a cross-appeal from the judgment on damages.

{¶2} The trial court found Oxford Mining had a superior property interest due to its prior coal rights and Ohio Gathering therefore trespassed by building a pipeline in a manner that rendered the coal inaccessible. Ohio Gathering claims that, although it had prior notice of Oxford Mining's general coal rights, it lacked record notice or actual notice of Oxford Mining's right to surface mine. We find there was sufficient record notice and, even if record notice is found to be lacking for certain parcels, Ohio Gathering had actual notice of Oxford Mining's first-in-time strip mining rights. Accordingly, the trial court properly granted summary judgment on liability.

{¶3} As for the trial on damages, Ohio Gathering challenges the court's refusal to provide a jury instruction on mitigation of damages. In the cross-appeal, Oxford Mining contests the trial court's refusal to instruct the jury on punitive damages. These opposing damages arguments are overruled. For the following reasons, the trial court's judgments are affirmed.

STATEMENT OF THE CASE

{¶4} Oxford Mining obtained coal and mining rights for eight parcels in Belmont County and planned to strip and then highwall mine its coal. The coal leases provided the right to strip mine. Instead of recording the full lease, a memorandum of lease was recorded for each lease but did not specifically mention surface or strip mining. For instance, on December 28, 2011, Oxford Mining recorded a memorandum of coal sublease from Marietta Coal Company for parcels E through H, which recited the

sublease was for a term of 10 years to be extended as long as "active mining" was being conducted and thereafter as long as reasonably necessary to complete reclamation. The unrecorded sublease granted Oxford Mining the right to mine by any method including the methods of strip mining and highwall mining.

{¶5} On March 9, 2012, Oxford Mining was granted a coal lease for parcel A from Eagle Creek Farm Properties Inc. and for parcels B, C, and D from K & S Shugert Farms Family Limited Partnership. The memorandum of lease for each property was recorded on March 29, 2012 and disclosed that Oxford had the right to the number 8 coal seam and all overlying seams (plus all limestone) with the right to mine for a term of 15 years for "active mining purposes" and thereafter so long as reasonably necessary to complete reclamation and obtain a release of the reclamation bond. Both unrecorded leases specified the right to mine by strip mining, auger mining, high wall mining, or any other method whether now known or later developed.

{¶6} Oxford Mining had already received the coal for parcels B and C from Marietta Coal Company as evidenced by a memorandum of lease recorded on December 28, 2011 (the same day as the sublease for other parcels). Marietta Coal received coal interests from Consolidated Coal in an assignment of leases recorded in 2002 (effective 1996).

{¶7} On September 9, 2013, a memorandum of lease was recorded showing Consolidated Coal transferred coal under parcels D through H to Oxford Mining. The unrecorded lease transferred the number 8 coal seam to Oxford Mining with the right to mine by any method including surface or highwall mining. The chain of title showed Consolidated Coal received its interests from Seaway Coal Company via a 1974 recorded memorandum of lease which disclosed the right to strip mine.

{¶8} After Oxford Mining recorded these coal rights, Ohio Gathering bought pipeline easements through the same parcels from the following landowners: (1) Eagle Creek Farm (parcel A), executed April 9, 2014, recorded May 12, 2014; (2) K & S Shugert Farms (parcels B through D), executed April 8, 2014, recorded May 12, 2014; and (3) Robert Shugert (parcels E through H), executed March 25, 2014, recorded May 29, 2014. The easements also granted Ohio Gathering the right to change the location of an

installed pipeline "arising from any condition or event beyond its control, such as mining activities."

{¶9} Before purchasing these pipeline easements, Ohio Gathering was informed by Oxford Mining that various proposed routes for the pipeline (named "Coal Run III") would negatively affect its mining operations (as evidenced by emails exchanged in 2012 and 2013). Pipeline construction began on the subject property in July 2014. When Oxford Mining's president saw the pipeline location, he unsuccessfully asked Ohio Gathering to discontinue construction. The pipeline was placed into service in August 2014.

{¶10} In 2017, Oxford Mining recorded a memorandum of lease from Robert Shugert pertaining to parcels E through H which specified that the lease granted the right to remove all coal "by the strip mining method" among other methods. An affidavit attested that this lease was not necessary to mine the coal as Oxford Mining already had rights, including strip mining rights, for these parcels (through instruments from Seaway to Consolidated, Consolidated to Marietta, Marietta to Oxford, and Consolidated to Oxford). Oxford Mining then applied for a mining permit in 2017 which was approved in 2018.

{¶11} On December 14, 2017, Oxford Mining filed a complaint against Ohio Gathering, which was amended on March 14, 2018. The complaint sought a declaratory judgment on the competing property interests, arguing the pipeline deprived Oxford Mining of its right to mine significant areas of the property which "sterilized" the coal and damaged Oxford Mining. The complaint also set forth claims for trespass and nuisance. Both sides filed summary judgment motions.

{¶12} Oxford Mining filed a motion for partial summary judgment asking for a declaratory judgment that its property rights were superior to the rights of Ohio Gathering and a finding of liability on the trespass claim. Arguments were presented on first-in-time recording and Ohio Gathering's knowledge of Oxford Mining's rights. (The motion also requested an order on how to measure damages.)

{¶13} Ohio Gathering's motion for summary judgment argued there was no trespass as the pipeline was constructed pursuant to valid easements and claimed this

was prior to Oxford Mining's perfection of its complete interest and/or receipt of a mining permit.

{¶14} The trial court granted partial summary judgment in favor of Oxford Mining. (1/4/19 J.E.); (1/8/19 J.E.). The court found Oxford Mining was entitled to a declaratory judgment that it had superior rights and there was a trespass on Oxford Mining's coal rights. (The court denied summary judgment on the measure of damages). As to Ohio Gathering's summary judgment motion, the court granted summary judgment against Oxford Mining on its nuisance claim and denied the remainder of the motion. Ohio Gathering's January 7, 2019 motion for reconsideration was denied the next day. (Tr. 17).

{¶15} A four-day jury trial on damages commenced on January 8, 2019. The court granted Ohio Gathering's motion for directed verdict on punitive damages and refused Oxford Mining's request to instruct the jury on punitive damages. (Tr. 812, 820-821). The court also rejected Ohio Gathering's proposed jury instruction on mitigation of damages.

{¶16} The jury returned a verdict for Oxford Mining in the amount of $5,506,717.87. The court entered judgment on the verdict on January 14, 2019 (amended 2/5/19 nunc pro tunc to change "subject to further order" to "Case Closed").

{¶17} On February 11, 2019, Ohio Gathering filed a motion for judgment notwithstanding the verdict or new trial. The motion was timely filed within 28 days (using the date of either judgment). *See* Civ.R. 50(B). In pertinent part, the motion (as related to the verdict) contested the refusal to provide a jury instruction on mitigation of damages. The motion also contained a request for judgment as a matter of law, contesting the prior summary judgment.

{¶18} The court overruled Ohio Gathering's post-judgment motion. (4/4/19 J.E.); (4/11/19 J.E.). Ohio Gathering filed a timely notice of appeal on May 1, 2019, and Oxford Mining filed a timely notice of cross-appeal on May 9, 2019.

SUMMARY JUDGMENT ASSIGNMENTS

{¶19} Ohio Gathering sets forth three assignments of error on whether Oxford Mining was entitled to summary judgment on property rights and trespass. The general argument on summary judgment is contained in the first assignment of error which provides:

"The Trial Court Erred in Its January 4, 2019 and January 8, 2019 Judgment Entries by Granting Partial Summary Judgment in Favor of Plaintiff-Appellee, Oxford Mining Company, LLC."

{¶20} The second assignment of error says the court erred by overruling the motion to reconsider the summary judgment motion, and the fourth assignment of error says the court erred in failing to grant the post-judgment motion seeking judgment as a matter of law. Although listed as separate assignments of error (corresponding to the judgment entry denying each motion), Ohio Gathering does not argue the assignments of error separately but combines the arguments with those falling under the first assignment of error.

{¶21} Ohio Gathering focuses on the declaratory judgment on superior property rights. As for the trespass claim, Ohio Gathering's brief states its liability depends on the arguments sets forth on the declaration of property rights because without a superior property interest, Oxford Mining could not prove trespass. For instance, it is said the trespass claim "depended entirely upon a finding of Oxford's superior surface interest" so that if Oxford Mining was not entitled to summary judgment on the declaratory judgment, then it was not entitled to judgment on trespass and the "trespass claims hinges on its claim of superior surface mining rights * * * which is a question of title that turns on a determination of record title." (Apt. Br 18, 23).

{¶22} Initially, Ohio Gathering's brief acknowledges that a coal owner with the right to strip mine has rights superior to a person who thereafter acquires a surface easement (from the landowner) with notice of the coal rights. (Apt. Br. 13-14). Ohio Gathering states the trial court erred in ruling Oxford Mining had superior rights because no recorded instrument expressly stated that Oxford Mining had strip mining or surface rights before Ohio Gathering recorded its pipeline easements and there was no evidence Ohio Gathering had actual notice of Oxford Mining's right to surface mine.

{¶23} In sum, Ohio Gathering states it had no actual or constructive/record notice of a superior property interest before it paid value to the landowners for the pipeline easement, citing *Fox v. Walton*, 3rd Dist. Wyandot No. 16-88-8 (Dec. 5, 1989) ("Notice of a superior interest in land, to be operative, must be given before the grantee has paid value for the property"). Oxford Mining counters that the purpose of the memorandum of

coal lease is to provide constructive notice of the existence of the encumbrance, not to provide specific details of it and the recorded disclosure of the existence of the coal lease invoked a duty to inquire into the contents of the lease before purchasing the easement in order to claim bona fide purchaser status.

{¶24} Pursuant to R.C. 5301.25(A), all instruments for the conveyance or encumbrance of lands shall be recorded in the office of the county recorder. "Until so recorded or filed for record, they are fraudulent insofar as they relate to a subsequent bona fide purchaser having, at the time of purchase, no knowledge of the existence of that former deed, land contract, or instrument." R.C. 5301.25(A). In general, where an encumbrance has been recorded, a subsequent purchaser is charged with constructive notice. *See Tiller v. Hinton*, 19 Ohio St.3d 66, 68, 482 N.E.2d 946 (1985). A bona fide purchaser is defined as a person who pays valuable consideration for legal title to real estate in good faith and without knowledge or notice of another person's equitable interest in the property. *Ford v. Baska*, 2017-Ohio-4424, 93 N.E.3d 195, ¶ 11 (7th Dist.).

> The principal purpose of the recording statute is to protect a bona fide purchaser, who does not have actual notice at the time of his purchase, against legal claims under unrecorded conveyances and encumbrances. Constructive notice is in legal effect the equivalent of actual notice. Under the recording laws, all persons dealing with the land in question are chargeable with constructive notice of properly recorded instruments in the chain of title. Statements and references contained in instruments in his chain of title bind the owner and he is charged with knowledge he would have obtained from reasonable inquiry. Knowledge sufficient to put a person on inquiry which would disclose unrecorded facts is sometimes called constructive notice but is treated as actual notice. Actual notice may be inferred from the fact that means of knowledge is available.

Id. at ¶ 13 (omitting internal citations), quoting *Ferguson v. Zimmerman*, 2d Dist. Montgomery No. 9426 (Jan. 16, 1986) (finding purchaser could have inquired into will after discovering caption in recorded certificate of transfer), citing *Arnoff v. Williams*, 94

Ohio St. 145, 149, 113 N.E. 661 (1916) (deed's reference to agreements put the grantees upon inquiry and charged them with knowledge of the provisions in the agreements).

{¶25} Before proceeding, we address Oxford Mining's waiver argument. Oxford Mining contends Ohio Gathering waived the notice argument by failing to plead the affirmative defense of bona fide purchaser in its answer. *See* Civ.R. 8(C) (affirmative defense must be set forth affirmatively in the answer). Ohio Gathering replies by stating Oxford Mining waived the claim of waiver by failing to raise below the precise way Ohio Gathering allegedly waived the notice argument. That is, Oxford Mining asked the trial court to find waiver due to Ohio Gathering's failure to specify the issue in the summary judgment proceedings, without mentioning a failure to sufficiently raise it in the answer.

{¶26} Ohio Gathering notes that it raised the argument about the lack of record notice of strip mining rights in: an opposition to a preliminary injunction; at oral argument on summary judgment; in a motion for reconsideration of summary judgment; and in the post-judgment motion. We note that these are not the proceedings for meeting a summary judgment burden. *See* Civ.R. 56 (C) (discussing service of the responsive arguments in opposition to a summary judgment request), (E) ("the party's response * * * must set forth specific facts showing that there is a genuine issue for trial"). *See also Vahila v. Hall*, 77 Ohio St.3d 421, 429-430, 674 N.E.2d 1164 (1997), citing *Dresher v. Burt*, 75 Ohio St.3d 280, 295, 662 N.E.2d 264 (1996) (discussing the movant's burden and the non-movant's reciprocal burden). The evidence used to satisfy the summary judgment burdens is discussed below.

{¶27} As for the contents of the answer, although it did not specifically use the phrase "bona fide purchaser," Ohio Gathering denied knowledge of Oxford Mining's coal rights when it obtained its property rights and set forth as an affirmative defense that it acted under a valid pipeline right-of way. Thereafter, *Oxford Mining* raised the issue of notice in its own summary judgment motion while explaining how it had superior property rights and pointing out that an instrument evidencing an encumbrance must be recorded or it is fraudulent against any subsequent bona fide purchaser without notice of the existence of the encumbrance.

{¶28} An unpled affirmative defense can be "tried" with consent in the course of the summary judgment motion practice. *See, e.g.*, *Church at Warren v. Warzala*, 11th

Dist. Trumbull No. 2016-T-0073, 2017-Ohio-6947, ¶ 19. "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings."). Civ.R. 15(B). "Implied consent is established where it appears 'the parties understood the evidence was aimed at the unpleaded issue.'" *Church at Warren*, 11th Dist. No. 2016-T-0073 at ¶ 19, quoting *State ex rel. Evans v. Bainbridge Twp. Trustees*, 5 Ohio St.3d 41, 448 N.E.2d 1159 (1983), paragraph two of the syllabus.

{¶29} Oxford Mining's complaint said the parties had competing interests, alleged Ohio Gathering knew of Oxford Mining's coal rights when it obtained its property rights, and asked for a declaratory judgment establishing the parties' respective rights to the land and obligations to each other. Oxford Mining thereafter invited the trial court to consider whether Ohio Gathering had constructive notice through the recorded lease memoranda and proceeded as if this was the issue for the court in considering its own summary judgment motion. Along these lines, even if bona fide purchaser is an affirmative defense, a plaintiff's case involving an unrecorded instrument may require the plaintiff to prove statutory elements to show its instrument is not fraudulent under R.C. 5301.25. As Ohio Gathering points out, if there was no record notice, *the plaintiff* seeking to enforce an unrecorded restriction was required to "provide clear and convincing evidence that [the purchaser] had actual knowledge at the time of purchase that the restrictions applied to its land." *Emrick v. Multicon Builders, Inc.*, 57 Ohio St.3d 107, 110, 566 N.E.2d 1189 (1991). For the foregoing reasons, we do not find the appellate arguments on notice are barred by waiver.

Record Notice

{¶30} As for record notice providing constructive notice, Ohio Gathering argues that regardless of the fact that the unrecorded leases allowed strip mining, no memorandum of lease recorded by Oxford Mining specifically mentioned surface mining. Ohio Gathering urges that record notice deals only with recorded instruments and encompasses no duty to ask to see unrecorded instruments. Oxford Mining suggests the reference in a memorandum of lease to active mining purposes and reclamation gave notice of surface rights and the potential for strip mining. Ohio Gathering notes that language on active mining and reclamation is not specific to strip mining. *See, e.g.*, Ohio

Adm.Code 1501:13-9-13 (C) ("For underground mining, reclamation efforts, including, but not limited to, backfilling, grading, topsoil replacement and revegetation of all areas affected by surface operations * * *).

{¶31} To negate the effect of the recorded memoranda that do not mention strip mining, Ohio Gathering relies on R.C. 5301.251. This statute allows a memorandum of lease to be recorded in lieu of recording the lease if it is executed and acknowledged in accordance with R.C. 5301.01, and the memorandum must contain certain elements[1] which are uncontested here. The statute's second paragraph provides: "A memorandum of lease that is entitled to be so recorded also may set forth any other provisions contained in the lease, or the substance of those provisions, and *shall be constructive notice of only that information contained in the memorandum*." (Emphasis added). R.C. 5301.251.

{¶32} First, as to parcels E through H, Oxford Mining's ownership of the coal was recorded in 2013. For a specific statement in the chain of title allowing strip mining, Oxford Mining points to the 1974 recorded memorandum of lease from Seaway Coal to Consolidated Coal, *which specifically refers to strip mining*. Ohio Gathering claims this recorded memorandum did not provide record notice of *Oxford Mining's* right to strip mine because Oxford Mining obtained its right to strip mine through a 2011 sublease and the recorded memorandum of sublease recorded did not specifically mention strip mining (as did the actual unrecorded sublease). Ohio Gathering notes a sublease may not necessarily pass along all rights (as it can be used to grant less coal rights than owned or grant a shorter time).

{¶33} Regardless, the Seaway Coal to Consolidated Coal recorded instrument specifically granted strip mining rights, was in the chain of title for these parcels, and provided record notice that the property was encumbered by strip mining rights. These expressly recorded rights included coal mining "by the process of stripping" and reclamation (leaving the lessor the right to auger the listed cover). An exhibit attached to

[1] *See* R.C. 5301.251 (the name and address of the lessor and lessee; a reference to the lease with the date of execution; a description of the legal premises with such certainty as to identify the property; the date of commencement; the term of the lease; and renewal or extension rights), citing R.C. 5301.011 ("a recorded lease of any interest in real property shall contain a reference by volume and page to the record of the deed or other recorded instrument under which the grantor claims title, but the omission of such reference shall not affect the validity of the same").

the recorded memorandum granted as to the relevant tracts: "all the coal of the #9 vein or seam to a modified 105' cover line in, upon and underlying the premises * * * together with the right to mine the #8 and #9 coal by the strip mining method." Furthermore, the exhibit to the recorded memorandum disclosed that the lessor explicitly waived any right to damages or compensation from the mining. The conveyance was subject to *existing* rights of occupancy as to any dwelling or structure. (The lessee also received the right to use any part of the premises for other reasonably necessary purposes; this was specified to be an enlargement, not a limitation, on the lessee's incidental rights.)

{¶34} This Seaway lease was discovered and reported by Ohio Gathering's agent in March 2014 upon conducting the limited title work (ownership reports) ordered by Ohio Gathering before it purchased a right-of-way through these parcels. The title examiner did not trace this chain of title, noted no research was conducted with regards to the state of the coal, and opined the coal was "likely owned by a major coal company." Constructive notice of some right to strip mine the properties subject to the 1974 lease existed due to the recorded instruments.

{¶35} Record notice of strip mining rights is not eliminated because a right to strip some elevations on a parcel remained with the surface owner. *See Wayne Bldg. & Loan Co. of Wooster v. Yarborough*, 11 Ohio St.2d 195, 203, 228 N.E.2d 841 (1967) (notice of a prior interest does not require "knowledge or notice of * * * the extent of the interest, but merely that there is such an interest."). Nor is record notice of conveyed strip mining rights eliminated by a claim that a later recorded memorandum does not conclusively establish on its face that this particular plaintiff received all the outstanding rights. *See id.* ("For notice of an outstanding equitable interest to exist, it is not necessary that a person have knowledge or notice of the identity of its owner * * * but merely that there is such an interest").

{¶36} As to the other parcels (A through D), Oxford Mining points to coal leases the current landowners granted to Oxford Mining in 2012. These leases specifically granted the right to strip mine the properties, but they were unrecorded. Ohio Gathering purchased the right-of-way from and was in privity with the landowners who were parties to those coal leases. Since the recorded memorandum of lease for each parcel does not refer to the surface or mention strip mining, Ohio Gathering states the recordation cannot

provide constructive notice of the right to strip mine under the plain language of R.C. 5301.251 ("memorandum of lease * * * shall be constructive notice of only that information contained in the memorandum").

{¶37} Ohio Gathering cites a case where the Eighth District applied this provision and held a buyer was a bona fide purchaser and had no notice of a right of first refusal in a lease, where a short-form memorandum of lease was recorded which did not mention the right and where the buyer obtained an unexecuted copy of the lease from the seller prior to the sale but this copy of the lease did not contain the right of first refusal clause that was in the executed copy. *Hawley v. Ritley*, 8th Dist. Cuyahoga No. 42273 (Sep. 3, 1981). The appellate court said that to allow constructive notice of the lease contents by mere "incorporation by reference would effectively nullify the second full paragraph of R.C. § 5301.251 and destroy the legislature's restriction on constructive notice embodied in the statute." *Id.* The court also observed the purchaser "did all that was reasonably expected of him to learn whether any defects existed" and "took sufficient steps to determine what was in the lease both by reviewing the short form memorandum and by obtaining a copy of what was warranted by plaintiff to be the existing lease" (but was the wrong copy). *Id.*

{¶38} In response, Oxford Mining points to the holding: "even if a lease is unrecorded, a grantee need not know its specific terms in order 'to be bound thereby so long as he knows of its existence.'" *Four Howards Ltd. v. J & F Wenz Rd. Invest. LLC*, 179 Ohio App.3d 399, 2008-Ohio-6174, 902 N.E.2d 63, ¶ 62 (6th Dist.) (buyer knew there was a lease but did not ask to see it and was therefore unaware of a first right of refusal), quoting *Schwieterman v. Feltz*, 2d Dist. Montgomery No. 9964 (Dec. 22, 1986) (lease mentioned in deed gave notice of existence of lease, and buyer had opportunity to ask to see lease), citing *Riley v. Rochester*, 105 Ohio St. 258, 136 N.E. 919 (1922) (to be entitled to bona fide purchaser protection, the party with newly recorded lease must have "no knowledge of the existence" of the unrecorded lease regardless of whether they knew it was still valid or binding). This group of cases did not involve a memorandum of lease or address the disputed paragraph in R.C. 5301.251.

{¶39} In arguing that record notice of coal rights is insufficient to give record notice of strip mining rights, Ohio Gathering relies on the Supreme Court's *Skivolocki* case for

the assertion that a coal owner does not have an implied right to strip mine. For instance: "A deed which severs a mineral estate from a surface estate, and which grants or reserves the right to use the surface incident to mining coal, in language peculiarly applicable to deep-mining techniques, whether drafted before or after the advent of strip mining, does not grant or reserve to the mineral owner the right to remove coal by strip-mining methods." *Graham v. Drydock Coal Co.*, 76 Ohio St.3d 311, 667 N.E.2d 949 (1996), syllabus, expanding and clarifying *Skivolocki v. E. Ohio Gas Co.*, 38 Ohio St.2d 244, 313 N.E.2d 374 (1974). It was further stated, "the right to strip-mine for coal is not implicit in the ownership of a severed mineral estate, and that a deed severing the estates, conveying the right to use the surface incident to coal mining, using language peculiarly applicable to deep mining, does not grant the right to strip-mine." *Graham*, 76 Ohio St.3d at 315, citing *Skivolocki*, 38 Ohio St.2d 244 at syllabus (a mineral owner has the right to use the surface, but this does not include strip mining in a 1901 deed where strip mining was unknown and the deed had deep mining language).

{¶40} However, as Oxford Mining points out, the Court has retreated from these holdings where there is no language peculiar to deep mining in the instrument, especially where strip mining was known in the area at the time of the instrument. *Snyder v. Ohio Dept. of Nat. Resources*, 140 Ohio St.3d 322, 2014-Ohio-3942, 18 N.E.3d 416, ¶ 19. And, even the prior cases acknowledged that a mineral estate carries with it the right to use as much of the surface as may be reasonably necessary to reach and remove the minerals. *Skivolocki*, 38 Ohio St.2d at 249, fn. 1. Here, the leases were recent, long after strip mining became a common occurrence and long after the Supreme Court cases reviewed supra on the topic.

{¶41} We find the record notice was sufficient notice of certain surface rights due to the specific notice of coal rights. The landowners had recently granted Oxford Mining coal leases which specifically granted surface mining rights. In 2004, the Supreme Court found the language (in a 1944 deed reservation of mineral rights in neighboring Jefferson County) providing "reasonable surface right privileges" included the right to strip mine (limited to a reasonable amount of stripping). Even before and without such language, coal rights included the right to reasonable use of the surface to reach the coal. The right to strip mine here was not limited. The leases granted in and after 2011 were recent

(relative to the 2014 right-of-ways), were not expired, and were entered long after strip mining became common and long after the Supreme Court cases reviewed supra on the topic.

{¶42} A memorandum of coal lease was recorded as to each lease before Ohio Gathering acquired its pipeline easements. Through these recorded memoranda of leases, Ohio Gathering had record notice that the landowner had recently granted Oxford Mining the right to actively mine coal and engage in surface reclamation on the subject properties. The situation (where the recorded memorandum of coal lease does not specify the right to strip mine but the unrecorded lease does so specify) is not akin to a case where an unrecorded lease specified a right of first refusal for a future sale (which is more an additional contract than a lease term).

{¶43} Even if there was not record notice of the right to strip mine for some parcels, record notice of the existence of the recent coal leases provided constructive notice to a subsequent purchaser of a surface easement that a future pipeline may interfere with the coal company's rights to obtain its coal. Ohio Gathering had record notice of pre-existing coal rights that could be affected if a pipeline was located over or near a seam. Record notice of the existing encumbrance was enough to make Oxford Mining's surface interest superior to a later-acquired pipeline right-of-way.

{¶44} Alternatively, even if the record notice must specifically refer to strip mining due to R.C. 5301.251 and the record notice here was insufficient for some parcels, we alternatively conclude there was actual notice.

Actual Notice

{¶45} Ohio Gathering recognizes that one cannot claim to be a bona fide purchaser if he had actual notice of the rights in the unrecorded instrument before purchasing the pipeline easements. Initially, we dispose of Ohio Gathering's argument that Oxford Mining did not raise actual notice as an alternative to record notice. To the contrary, Oxford Mining's summary judgment motion set forth the law and facts on the topic; it recited that an unrecorded instrument is not fraudulent against a subsequent bona fide purchaser who had notice and cited case law and quotations from the attached exhibits establishing the many forms of notice Oxford Mining provided to Ohio Gathering prior to the pipeline easement purchases. The topic was clearly at issue below.

{¶46} Ohio Gathering admits it had actual notice that Oxford Mining had coal rights under the proposed pipeline routes but claims it did not have actual notice that these rights included strip mining until July 2014 (after it acquired the easements and began construction of the pipeline on the property at issue), when a July communication from Oxford Mining said the line posed a "major reserve block for one of our high wall miners." Assuming arguendo that notice of strip mining rights (rather than merely general coal and mining rights) was required, Oxford Mining states a reasonable person could only find that Ohio Gathering gained actual notice of its strip mining rights before the May 2014 recording of the pipeline easements, pointing to the following evidence:

{¶47} -In September 2012, Oxford Mining provided a map to Ohio Gathering to disclose the properties covered by its current mining leases, which showed the Eagle Creek Farm and K & S Shugert properties as "Oxford Controlled Areas."

{¶48} -In June 2013, Ohio Gathering's agent sent a map of a pipeline route stating he "marked with red marker the route around your mining operations. Please let me know if our route will work?" Oxford Mining replied, "We have problems with the location of the line as shown. We are currently permitting a major operation on this reserve that runs essentially from US Route 40 on the south end, to the north side of Buttermilk Road on the north end."

{¶49} -In October 2013, Ohio Gathering asked Oxford Mining to review a route "to make sure it's doable for you." Oxford Mining responded, "the blue line is going to be a significant issue" and later added, "We do have problems here. This cuts across coal we will be mining on our Shugert North area." Oxford Mining asked to meet to discuss a new route to minimize the cost to Ohio Gathering.

{¶50} -In November 2013, Ohio Gathering sent a new route (now going through the Tribett/R.Shugert parcels). Oxford Mining responded, "This location poses a major threat to our mining operation in that area. Oxford has the rights to the #8 seam and mining rights via Marietta and Consolidated coal" and asked to meet to discuss alternative routes.

{¶51} -Another map was sent by Ohio Gathering, and Oxford Mining responded, "The proposed line location(s) will encumber our coal holdings. * * * We have major

operations planned in this area and encumbering our reserve holdings will result in significant financial impacts to Oxford."

{¶52} -When Ohio Gathering opined the route was out of the mining area, Oxford responded that its anticipated permit boundary changed (since the first map) due to additional leases (e.g., the Consolidated Coal lease was recorded September 2013).

{¶53} -A landowner who signed a pipeline easement on March 25, 2013 (recorded May 29, 2014) testified at deposition that he informed Ohio Gathering's land agent "through the whole process, that there was a lease on this for mining to Oxford." (R.Shugert Depo. at 48).

{¶54} -The records of Ohio Gathering's agent showed meetings occurred before Ohio Gathering had the pipeline easements for the purpose of finding a pipeline route to avoid Oxford Mining's coal interests. Oxford Mining's president confirmed a meeting where they discussed the area where they were planning to mine coal.

{¶55} -The senior land manager for Ohio Gathering testified at deposition that Oxford Mining was not a surface owner, but he did not distinguish between surface mining rights and other coal mining leases but was more concerned with mining permits. He acknowledged Ohio Gathering was informed that Oxford Mining had an issue with the pipeline route before the easements were purchased.

{¶56} -After the pipeline construction began, Oxford Mining sent an email explaining the impediment the pipeline posed for high wall mining with a map estimating "Strip tons lost" and "HWM lost." Ohio Gathering did not express surprise and later stated its understanding that it could move the pipeline to reclaimed land as the mining progressed.

{¶57} Ohio Gathering does not dispute that it had actual notice that Oxford Mining's coal mining rights would be impacted by the pipeline; this was established by direct evidence. All coal mining affects the surface in some way. Ohio Gathering emphasizes the lack of language regarding strip mining in the emails. However, the coal company need not write the explicit type of mining in an email for the pipeline company to have actual notice that the coal rights included the right to surface mine.

{¶58} Ohio Gathering emphasizes the Supreme Court's holding: "A 'should have known' or 'could have known' test is not an appropriate consideration under an actual

notice standard." *Emrick*, 57 Ohio St.3d at 111. However, that case involved the duty to inquire about an unrecorded restriction based on prior knowledge (gained a nearly decade before) of a restriction in a different county, which is distinguishable from the situation of verbal notices and recorded lease memoranda. *See id.* (the discovery of recorded restrictions in one county is not clear and convincing evidence of actual knowledge of an unrecorded restriction in a different county ten years later). Moreover, the Court recognized that actual notice can be inferred and remanded for application of the actual notice test (after finding a lack of record or constructive notice). *Id.* at 110.

{¶59} Subsequently, in discussing the burden of inquiry in a real estate purchase, the Supreme Court adopted the following position on actual notice not proved by direct evidence but inferred from circumstances:

> if the party obtains knowledge or information of facts tending to show the existence of a prior right in conflict with the interest which he is seeking to obtain, and which are sufficient to put a reasonably prudent man upon inquiry, then it may be a legitimate, and perhaps even necessary, inference that he acquired the further information which constitutes actual notice. *** Finally, if it appears that the party has knowledge or information of facts sufficient to put a prudent man upon inquiry, and that he wholly neglects to make an inquiry, or having begun it fails to prosecute it in a reasonable manner, then, also, the inference of actual notice is necessary and absolute.

G/GM Real Estate Corp. v. Susse Chalet Motor Lodge of Ohio, Inc., 61 Ohio St.3d 375, 380, 575 N.E.2d 141 (1991), quoting *Cambridge Production Credit Assn. v. Patrick*, 140 Ohio St. 521, 532-533, 45 N.E.2d 751 (1942), quoting 2 Pomeroy's Equity Jurisprudence, Section 597, 619 (5th Ed.).

{¶60} Accordingly, a purchaser cannot refuse to inquire when the reasonableness of making inquiry is naturally suggested by known circumstances. *G/GM Real Estate*, 61 Ohio St.3d at 380 (refusing to allow purchaser to rescind based on recorded memorandum of lease, which was missing statutory elements, where purchaser failed to view the lease); *Cambridge Production Credit*, 140 Ohio St. at 532-533 (finding actual

notice as a matter of law where there was knowledge of the existence of a mortgage but no inquiry was made into its specifics).

{¶61} This is in line with the cases, mentioned earlier, explaining that notice of the existence of an encumbrance can bind a subsequent purchaser even if he does not know the specific terms. *See Riley v. Rochester*, 105 Ohio St. 258, 136 N.E. 919 (1922) (to be entitled to bona fide purchaser protection, the party with newly recorded lease must have "no knowledge of the existence" of the unrecorded lease regardless of whether they knew it was still valid or binding); *Four Howards Ltd. v. J & F Wenz Rd. Invest. LLC*, 179 Ohio App.3d 399, 2008-Ohio-6174, 902 N.E.2d 63, ¶ 62 (6th Dist.) (even if a lease is unrecorded, a grantee need not know its specific terms in order to be bound by it if he knows of its existence; buyer knew there was a lease but did not ask to see it and was therefore unaware of a first right of refusal); *Schwieterman v. Feltz*, 2d Dist. Montgomery No. 9964 (Dec. 22, 1986) (the deed gave notice of the existence of the lease, and the buyer had the opportunity to ask to see the lease). *See also Hawley v. Ritley*, 8th Dist. Cuyahoga No. 42273 (Sep. 3, 1981) (finding the purchaser "did all that was reasonably expected of him to learn whether any defects existed" and "took sufficient steps to determine what was in the lease both by reviewing the short form memorandum and by obtaining a copy of" what was believed to be the existing lease but was not).

{¶62} As to the parcels with some strip or auger rights remaining in the surface owner, Ohio Gathering's title agent reported the existence of the coal lease on these parcels for which the recorded memorandum of lease specifically allowed strip mining. The identity of the owner was not essential, and Oxford Mining informed Ohio Gathering it acquired rights and was drawing up the permit for the mining operations. "For notice of an outstanding equitable interest to exist, it is not necessary that a person have knowledge or notice of the identity of its owner * * * but merely that there is such an interest." *Wayne Bldg. & Loan Co. of Wooster v. Yarborough*, 11 Ohio St.2d 195, 203, 228 N.E.2d 841 (1967)

{¶63} As for the rights not acquired until 2017, this subsequent acquisition by Oxford Mining involved elevated spots of land on the parcels where the cover about the specified seam was 105 feet or more. They already had the general surface mining rights up to those elevated spots. Notice of a property's geological features and the depth of

seams is not required to have notice that a coal company has strip mining rights in coal (with no restrictions where the cover clause is inapplicable). Importantly, a lack of information on the extent of coal sterilization that could be caused does not eliminate knowledge of pre-existing coal rights which included strip mining. "For notice of an outstanding equitable interest to exist, it is not necessary that a person have knowledge or notice of * * * the extent of the interest, but merely that there is such an interest." *Wayne Bldg. & Loan*, 11 Ohio St.2d at 203. *See also Riley v. Rochester*, 105 Ohio St. 258, 136 N.E. 919 (1922) (if purchaser had "knowledge of the existence" of the unrecorded lease, it is irrelevant whether they knew if it was still valid or binding).

{¶64} As to all parcels, the coal company warned that the proposed pipeline would significantly impact its mining operation and encumber its coal reserves, explaining that the mining plan changed once it acquired additional rights to parcels E through H from Consolidated Coal in 2013. Ohio Gathering specifically voiced its attempts to route and re-route *around the mining operation as a whole*, indicating awareness that the plan involved strip mining. Ohio Gathering does not point to evidence it offered claiming its employees and agents thought Oxford Mining was only speaking of a right to deep mine. Their representative testified that he did not distinguish between types of coal mining when deciding whether to compensate for coal loss. He disbelieved Oxford Mining had a bona fide intent to mine the property even though a mining permit had not yet been filed with ODNR. Suspecting Oxford Mining lacked an imminent intent to mine does not mean Ohio Gathering lacked actual notice of surface rights.

{¶65} Considering the specific content within the many warnings provided by Oxford Mining outlined above, Ohio Gathering's responses and repeated re-rerouting, the recorded coal lease memoranda and the prior chain of title for some parcels, the notations by title workers, the lack of summary judgment evidence rebutting the inference of knowledge, and the totality of the circumstances in this case, we conclude: a reasonable person could not find Ohio Gathering lacked actual notice that Oxford possessed some pre-existing strip mining rights in the property affected by the pipeline. The arguments specified in Appellant's brief on summary judgment are hereby overruled.

Reply Brief

{¶66} In the reply brief, Ohio Gathering adds an argument that was not made in its initial brief. The reply quotes from the Supreme Court's *Snyder* case:

> neither the owner of the surface interest nor the owner of the mineral interest has full ownership. Each has rights that are subject to the rights of the other. Thus, the owner of the surface cannot reasonably claim that no minerals can be mined, just as the owner of the mineral interest cannot reasonably expect to have unfettered access to the minerals. * * * Tension between the owner of the surface interest, who seeks to maximum the value of the surface, and the owner of the mineral interest, who seeks to maximize the value of the minerals, is inevitable. "The broad principle by which these tensions are to be resolved is that each owner must have due regard for the rights of the other in making use of the estate in question."

Snyder, 140 Ohio St.3d 322 at ¶ 13-14.[2]

{¶67} Relying on these observations, Ohio Gathering's reply brief sets forth an abbreviated contention that there is no superior property right for the declaratory judgment and a gas company's use of a surface easement is not trespass on a first-in-time coal lease regardless of whether there was notice of the coal company's right to strip mine. Ohio Gathering compares itself to a surface owner and says a surface owner would have the right to use the surface even where the coal company has the right to surface mine and therefore a company to whom the surface owner later grants a surface easement

[2] The *Snyder* case was a mere footnote in the appellant's brief to say the *Skivolocki* case, which the brief heavily reviewed, was still good law. In *Skivolocki*, the Supreme Court found a gas company's "right-of-way unlawfully impinges upon [the coal owner's] rights, as described in the 1901 deed, to use the surface incident to deep mining operations" and allowed the recovery of damages by the coal owner who sued the gas company for taking its coal by limiting its ability to mine due to construction of a pipeline on an easement granted by the surface owner after the coal severance. *Skivolocki v. E. Ohio Gas Co.*, 38 Ohio St.2d 244, 252, 313 N.E.2d 374 (1974). Even though that coal severance deed did not allow strip mining as it contained language peculiar to deep mining and was executed before strip mining was locally common, the Court still allowed damages for the pipeline's interference with the type of mining permitted under the deed. *Id.* The Pennsylvania Supreme Court held that blocking surface access to coal by building a dam and reservoir was trespass for deprivation of surface access. *Cochran Coal Co. v. Municipal Mgt. Co*., 380 Pa. 397, 110 A.2d 345 (1955) (trespass also from water leaks; also specifically found it was not a takings case).

should have the right to construct a commercial structure without fear of a coal sterilization claim. (9/17/19 Reply Brief at 1-2).

{¶68} In *Snyder*, the Supreme Court was interpreting what constituted "reasonable surface right privileges" as such language was used in a mineral reservation. As a reasonable amount of strip mining was permitted by that deed and the case was remanded to determine reasonableness under the circumstances, there would be a correlating implication that an unreasonable amount of surface use so as to cause massive coal sterilization would be unreasonable and subject to damage recovery.[3] Here, the coal company had a specific right to strip mine.

{¶69} The right to strip mine certain elevations of coal from parcels E-H was granted in the 1974 coal lease (and the right to strip mine was specified in the memorandum recorded in lieu of the lease). The surface owners of parcels A-D, in return for a royalty, granted the following via 2013 leases: the coal owner had the right to mine all the coal by strip, auger, highwall, or any method together with surface use without additional charge; the surface owners had the right to receive six months' notice before the stripping so they could remove timber or crops within the mining permit boundary, which items could be removed by the coal company if the surface owner failed to do so; the surface owner waived the 50 foot property line barrier (if an adjacent landowner signed a waiver or either party owned adjacent land) with damages to be paid to adjacent landowners; and the coal owner promised to complete reclamation with due diligence. The right to strip mine was not limited to a reasonable use of the surface.

{¶70} However, it would be inappropriate to delve into the argument raised in the reply brief that was not briefed in the appellant's brief. The initial brief filed by Ohio Gathering argued summary judgment should not have been granted as it had no notice (record or actual) of Oxford's Mining surface mining rights. The mention of trespass was

[3] The trial court denied the coal company's request for an injunction after the pipeline company argued damages would be sufficient. There was reference to a local decision on pipeline construction over a coal seam which found the coal company had the pre-existing and priority right to mine without supporting the surface, the pipeline unlawfully interfered with the right to mine, and the coal company was not liable to the gas company who must protect its lines during mining. *The Ohio Valley Coal Co. v. The East Ohio Gas Co.*, Belmont C.P. No. 91-CIV-210 (Feb. 12, 1992). Also, this district upheld the enjoining of landfill construction which would sterilize underlying coal. *Consolidated Land Co. v. Capstone Holding Co.*, 7th Dist. Belmont No. 02-BA-22, 2002-Ohio-7378 (limiting liability for surface damage to land with deed prohibiting surface access to coal and requiring surface use compensation).

in connection with and conditioned upon these arguments on notice. There was no contention that even if it had constructive and/or actual notice, there could be no trespass, declaratory judgment, or damages for coal sterilization.

{¶71} Ohio Gathering concluded that Oxford Mining did not have a superior interest *due to the lack of record or actual notice* and claimed it was the party with a superior property interest *due to said lack of notice* (with no mention of coexisting rights). *See* 7/3/19 Brief at 1 ("This claim of superior rights, in turn, is premised upon Oxford's claim that it obtained rights to surface mine coal from the Property before Ohio Gathering acquired its Pipeline Easements and that Ohio Gathering had constructive and/or actual notice of Oxford's rights"); 18 (discussing trespass elements in the section claiming there was no constructive notice from the recorded memorandum of lease), 23 (stating the trespass claims hinges on Oxford's claim of superior surface mining rights "which is a question of title that turns on a determination of record title"), 32-33 (where the conclusion section summarized the arguments by saying the judgment was reversible due to the issues with record and actual notice). Throughout the initial brief, Ohio Gathering structured its contentions about who had a superior surface interest entirely around whether there was record or actual notice of the content of the leases.

{¶72} The appellant's brief shall include "an argument containing the contentions of the appellant with respect to each assignment of error presented for review and the reasons in support of the contentions, with citations to the authorities, statutes, and parts of the record on which appellant relies. App.R. 16(A)(7). A reply brief is permitted in order to reply to arguments set forth in the appellee's brief.[4] App.R. 16(C). A reply brief is not the proper place for raising substantive arguments not raised in the appellant's brief. *Shutway v. Chesapeake Expl. LLC*, 7th Dist. Belmont No. 18 BE 0030, 2019-Ohio-1233, ¶ 77.

{¶73} "[W]e do not permit reply briefs to rectify omissions in an appellate brief; this is especially so in a civil case." *Wells Fargo Bank, N.A. v. Jarvis*, 7th Dist. Columbiana

[4] We note: the filing containing the reply brief also contains the response to Oxford Mining's cross-appeal; Ohio Gathering set forth the reply portion of its brief in a separate section from the response portion; Oxford's cross-appeal only raised punitive damages; and Ohio Gathering's response said there are no punitive damages if there is no trespass and then referred to the initial brief.

No. 08 CO 30, 2009-Ohio-3055, ¶ 36. *See also State v. Clark*, 38 Ohio St.3d 252, 258, 527 N.E.2d 844 (1988) (even in a criminal case, the Supreme Court found the appellate court did not err in refusing to address an issue raised only in the reply brief which claimed to clarify an assignment of error but actually raised an entirely new assignment of error). And, we do not root out and address contentions raised in the summary judgment proceedings if those contentions are not maintained as arguments in the appellant's initial brief. See *Jarvis*, 7th Dist. No. 08 CO 30 at ¶ 34-35 (if appellate courts were to address errors and substantive arguments first raised in the appellant's reply, then the appellee would be better off not filing a brief at all and would be punished for pointing out that certain topics are no longer at issue due to the appellant's failure to raise them on appeal). As a reply brief is not the proper place for assigning a new error or raising a new reason for reversing a judgment, we cannot address the reply brief argument that a coal company with strip mining rights does not have a superior right over a later pipeline easement holder who had record or actual notice of the coal mining rights before purchasing the easement.

REFUSAL OF MITIGATION INSTRUCTION

{¶74} Moving from the summary judgment to the trial on damages, Ohio Gathering's third assignment of error provides:

"The Trial Court Erred in Its January 14, 2019 Judgment Entered Upon the Jury's Verdict, Amended on February 5, 2019 *Nunc Pro Tunc*."

{¶75} The argument under this assignment of error deals with Ohio Gathering's request for a jury instruction on mitigation of damages, which the court refused over objection. (Tr. 1101-1102, 1107-1108). The court also denied Ohio Gathering's post-trial motion contesting the refusal to give the requested instruction. (4/4/19 JE); (4/11/19 J.E.). (The denial of the post-judgment motion is generally encompassed in the fourth assignment of error, which is not argued separately.) The following jury instruction was proposed by Ohio Gathering:

> Ohio Gathering claims Oxford failed to mitigate its damages. If Ohio Gathering proves by the greater weight of the evidence that Oxford did not use reasonable diligence or make reasonable efforts under the facts and circumstances in evidence to avoid potential coal loss or lessen its damages

> caused by Ohio Gathering's pipeline, you should not allow damages that could have been avoided by reasonable efforts to avoid loss. Oxford however, is not required to take measures that would involve undue risk, burden, or humiliation.

Proposed Jury Instructions at 6 (1/7/19), citing Ohio Jury Instructions, CV 207.25.

{¶76} "The general rule is that an injured party has a duty to mitigate and may not recover for damages that could reasonably have been avoided." *Chicago Title Ins. Co. v. Huntington Natl. Bank*, 87 Ohio St.3d 270, 276, 719 N.E.2d 955 (1999). Failure to mitigate damages can be an affirmative defense in various types of civil cases, and the burden is on the defendant to prove the other party did not use reasonable efforts to mitigate his damages. *State ex rel. Stacy v. Batavia Local School Dist. Bd. of Edn.*, 105 Ohio St.3d 476, 2005-Ohio-2974, 829 N.E.2d 298, ¶ 46 (contract case); *Frenchtown Square Partnership v. Lemstone Inc.*, 99 Ohio St.3d 254, 2003-Ohio-3648, 791 N.E.2d 417, ¶ 9-11, 21 (commercial lease case; noting mitigation was historically inapplicable in property law but finding leases have a dual nature); *Johnson v. University Hosps. of Cleveland*, 44 Ohio St.3d 49, 57, 540 N.E.2d 1370 (1989) (tort case).

{¶77} A determination as to which jury instructions are proper is a matter left to the sound discretion of the trial court, and thus, the trial court's formulation of instructions is upheld absent an abuse of discretion. *State v. Wolons*, 44 Ohio St.3d 64, 68, 541 N.E.2d 443 (1989); *State v. Guster*, 66 Ohio St.2d 266, 271, 421 N.E.2d 157 (1981). In evaluating whether the court acted unreasonably, unconscionably, or arbitrarily as required in an abuse of discretion review, we consider the jury instructions as a whole. *State v. Jalowiec*, 91 Ohio St.3d 220, 231, 744 N.E.2d 163 (2001). "A jury instruction should clearly *and concisely* state the principles of law necessary to enable the jury to evaluate the case." (Emphasis original). *B & B Contractors & Developers Inc. v. Olsavsky Jaminet Architects Inc.*, 2012-Ohio-5981, 984 N.E.2d 419, ¶ 102 (7th Dist.), citing *Cleveland Electric Illuminating Co. v. Astorhurst Land Co.*, 18 Ohio St.3d 268, 272, 480 N.E.2d 794 (1985).

{¶78} Ohio Gathering states, "Oxford had several opportunities to take reasonable steps to reduce its alleged damages, including the ability to remove coal around and underneath the Pipeline." Ohio Gathering points to testimony expressing a "belief that

you can highwall mine under the pipeline if given the opportunity." (Tr. 310). Ohio Gathering complains the lack of a mitigation instruction was especially prejudicial due to Oxford's "unrealistic" claim on costs; there was testimony that selling the coal at $37.95 a ton Oxford Mining's costs would have been $17.29 per ton leaving a profit of $20.66 per ton. (Tr. 605).

{¶79} As for any suggestion that the desired mining area should have been relocated, Oxford Mining responds that it would be wholly unreasonable to find a duty to mitigate requires the changing of a mining plan to accommodate the pipeline after it was laid so as to acquiesce to leaving some coal in place and mining elsewhere. This was the whole theory of damages. "[T]he obligation to mitigate does not require the party to incur extraordinary expense and risk." *Chicago Title*, 87 Ohio St.3d at 276. *Nor does it require a party to forgo a right to the very item at issue in the suit*.

{¶80} On a similar note, Oxford Mining states Ohio Gathering's mitigation argument on the ability to mine coal near the pipeline was actually an argument about the extent of inaccessible coal (i.e., the extent of damages), which amount each party tried to prove through offering expert testimony on mining near the pipeline. Oxford Mining presented testimony explaining why mining could not occur on the subject property under parts of the pipeline: stripping occurs first to expose the side of a hill for highwall mining; the land was previously mined; and the slopes of uncompacted mine spoils would be dangerous to strip and approach near the pipeline. (Tr. 220, 241-243, 666). The weight of the testimony on costs or the amount of unmineable coal were credibility issues.

{¶81} Oxford Mining also emphasizes that to the extent the proposed mitigation instruction related to the amount of mineable coal affected, the instruction would have been redundant to other instructions the court provided to the jury. It is within the sound discretion of a trial court to refuse proposed jury instructions which are redundant or immaterial to the case. *Bostic v. Connor*, 37 Ohio St.3d 144, 148, 524 N.E.2d 881 (1988). Furthermore, the appellant must demonstrate prejudice ensued as a result of a refusal to provide a jury instruction. *B & B Contractors*, 2012-Ohio-5981 at ¶ 103. The court instructed the jury: they were to decide if Oxford Mining was entitled to damages to compensate it for the lost value of coal it cannot mine due to the location of the pipeline; they should award the amount of revenue Oxford Mining would have received from the

sale of the coal it cannot mine due to the pipeline minus the costs it would have incurred in connection with the mining and the sale of the coal; and for the revenue figure, they should calculate the amount of money Oxford Mining would have received from the sale of coal it cannot mine. (Jury Instructions at 5).

{¶82} This necessarily entails the bestowing upon the jury the right to make a decision on how much coal could not be mined. If the jury found Oxford Mining could reasonably mine closer to the pipeline, it could reduce the amount of coal lost in the calculation. Oxford Mining asked for over $10.8 million in damages, and the jury returned a verdict for $5.5 million. (Tr. 1123, 1174). The failure to give a proposed instruction is not reversible where it has not "impaired the theory of the case of the party requesting it." *R.T. v. Knobeloch,* 2018-Ohio-1596, 111 N.E.3d 588, ¶ 32 (10th Dist.) (the court did not err in refraining from instructing on mitigation). Contrary to Ohio Gathering's suggestion, it was not deprived of the jury's consideration of the theory that Oxford Mining could mine closer to or under the pipeline.

{¶83} Ohio Gathering also contends the trial abused its discretion in refusing the proposed mitigation instruction because the evidence at trial supported a finding that "Oxford knew or reasonably should have known that a pipeline was going to be constructed but took no action to reduce its own damages." Ohio Gathering notes it provided proposed routes to Oxford Mining who rejected the routes by generally claiming interference with coal mining but without providing a specific mine plan, cooperating, or having complete strip mining rights (of certain elevations) from one of the surface owners. Oxford Mining responds by pointing out that a plaintiff has no duty to mitigate before the harm is suffered. Oxford Mining also notes it contacted Ohio Gathering immediately upon seeing the pipeline being laid in an unanticipated location.

{¶84} "[O]ne injured by the tort of another is not entitled to recover damages for any harm that he could have avoided by the use of reasonable effort or expenditure *after* the commission of the tort." (Emphasis added.) *Johnson,* 44 Ohio St.3d at 57. *See also Home Sav. & Loan Co. of Youngstown v. Evergreen Land Dev.*, 7th Dist. Mahoning No. 12 MA 215, 2016-Ohio-1248, ¶ 76 ("one injured in his person or property by a wrongful act or wrongful omission to act, whether as a result of a tort or a breach of contract, must use reasonable care to avoid loss or to minimize the damages resulting"). This law

speaks of one *already* injured and limits damages which could have been avoided *after* the event. *See id. See also Black's Law Dictionary*, (11thEd.2019) ("The principle inducing a plaintiff, after an injury or breach of contract, to make reasonable efforts to alleviate the effects of the injury or breach.").

{¶85} Mitigation of damages constitutes a "*post-liability* issue." (Emphases original.) *Batavia Local School*, 97 Ohio St.3d 269 at ¶ 25. *See also Boyd v. Cogan,* 4th Dist. Scioto No. 11CA3424, 2012-Ohio-1604, ¶ 11 (in finding mitigation moot where there was no breach, the court explained, "a party must actually be injured before the law imposes a duty to mitigate"). In accordance, the duty to mitigate damages arises *after* "the injured party has knowledge that damages *have been sustained*." (Emphasis added.) *Lake v. Love*, 2017-Ohio-2714, 90 N.E.3d 36, ¶ 27 (12th Dist.). For instance in a contract context, we have stated: "[I]t is illogical that a duty to mitigate can occur before a default, as there are no damages to mitigate at that point." *Evergreen*, 7th Dist. No. 12 MA 215 at ¶ 78.

{¶86} Considering the theories put forth on appeal regarding mitigation of damages, we conclude the trial court did not abuse its discretion in refusing the proposed jury instruction on the duty to mitigate damages. In accordance, the assignments of error encompassing the lack of a mitigation instruction are overruled.

CROSS-APPEAL: PUNITIVE DAMAGES

{¶87} Oxford Mining sets forth the following assignment of error in its cross-appeal:

"The Trial Court Erred In Directing A Verdict Against Oxford On Its Claim For Punitive Damages Where Oxford Presented Ample Evidence of Ohio Gathering's Actual Malice."

{¶88} Punitive damages are not recoverable from a defendant in a tort action unless "[t]he actions or omissions of that defendant demonstrate malice" (or aggravated or egregious fraud). R.C. 2315.21(C)(1),(2) (and only when compensatory damages are recoverable). The tort plaintiff's burden of proof for punitive damages is clear and convincing evidence. R.C. 2315.21(D)(4).[5] Actual malice has been defined as: (1) a

[5] When evaluating case law on punitive damages, we note that the burden was previously preponderance of the evidence until it was heightened legislatively, effective January 5, 1988.

state of mind under by which a person's conduct is characterized by hatred, ill will or a spirit of revenge, or (2) a conscious disregard for the rights and safety of another that has a great probability of causing substantial harm. *Preston v. Murty*, 32 Ohio St.3d 334, 512 N.E.2d 1174 (1987), syllabus. Oxford Mining proceeds under the second definition.

{¶89} Conscious disregard "requires the party to possess knowledge of the harm that might be caused by his behavior." *Id.* at 335. More than mere negligence is required. *Id.* In fact, "it is evident that a reckless actor, who only has knowledge of the mere possibility that his or her actions may result in substantial harm, is not behaving maliciously." *Motorists Mut. Ins. Co. v. Said*, 63 Ohio St.3d 690, 698, 590 N.E.2d 1228 (1992). The requirement of "great probability" of harm means that a possibility or even probability is not enough. *Preston*, 32 Ohio St.3d at 335–336. These elements entail conduct that gives rise to a sense of "outrage" or invokes a need to punish "a mental state so callous in its disregard for the rights and safety of others that society deems it intolerable." *Id.*; *Calmes v. Goodyear Tire & Rubber Co.*, 61 Ohio St.3d 470, 473, 575 N.E.2d 416 (1991).

{¶90} Where conscious disregard is alleged and the other party contests the issue as a matter of law, the trial court is guided by the following law:

> before submitting the issue of punitive damages to the jury, a trial court must review the evidence to determine if reasonable minds can differ as to whether the party was aware his or her act had a great probability of causing substantial harm [and] determine that sufficient evidence is presented revealing that the party consciously disregarded the injured party's rights or safety. If submitted to the jury, the trial court should give an instruction in accordance with the law [on punitive damages].

Preston, 32 Ohio St.3d at 336.

{¶91} Ohio Gathering sought a directed verdict on punitive damages at the close of the plaintiff's case. (Tr. 812). In the same context, they discussed whether the court would instruct the jury on punitive damages. The court suggested its decision would be the same under either label. (Tr. 819). The trial court then labeled its refusal to instruct the jury on punitive damages as a directed verdict and found reasonable minds could only

come to a conclusion adverse to the plaintiff on punitive damages. (Tr. 820-821). Oxford Mining objected to the refusal to instruct the jury on punitive damages. (Tr. 1107).[6]

{¶92} In contesting this decision on appeal, Oxford Mining cites directed verdict law. "When a motion for a directed verdict has been properly made, and the trial court, after construing the evidence most strongly in favor of the party against whom the motion is directed, finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party, the court shall sustain the motion and direct a verdict for the moving party as to that issue." Civ.R. 50(A)(4). Although it is necessary to review and consider the evidence, a motion for directed verdict presents a question of law and is reviewed de novo. *Id.* at ¶ 4.

{¶93} Oxford Mining asks whether there was "any evidence of substantive probative value that favors the position of the nonmoving party." *White v. Leimbach*, 131 Ohio St.3d 21, 2011-Ohio-6238, 959 N.E.2d 1033, ¶ 22. In doing so, Oxford Mining says that although clear and convincing is the burden for an award of punitive damages, it is not relevant to a directed verdict inquiry.

{¶94} Initially, it must be pointed out that a directed verdict motion deals with the sufficiency of the evidence, and such concept takes into account the burden applicable to the claim at issue. *See, e.g., Estate of Cowling v. Estate of Cowling*, 109 Ohio St.3d 276, 2006-Ohio-2418, 847 N.E.2d 405, ¶ 32-33 (2006). For instance, in reviewing whether a party presented sufficient evidence on a constructive trust element to survive a directed verdict motion, the Supreme Court construed the evidence most strongly in favor of that party and found "reasonable minds could only conclude that inequity had been proven by clear and convincing evidence." *Id.* The burden of proof is incorporated into the preliminary legal test in other contexts as well. *See Jackson v. Columbus*, 117 Ohio St.3d 328, 2008-Ohio-1041, 883 N.E.2d 1060, ¶ 11-12 (in the summary judgment

[6] Oxford Mining also asked for "mouth of the mine damages" so certain mining costs would not be deducted from the coal value. *Citing Brady v. Stafford*, 115 Ohio St. 67, 152 N.E. 188 (1926), syllabus ("Where coal is taken from under the land of another, willfully, wrongfully, and intentionally, and without right, the measure of damages to the owner of such coal is the market value of the same at the mouth of the mine, without any deduction for the cost of labor and other expenses incurred in severing and transporting such coal to the mouth of the mine" as distinguished from where coal is taken under a bona fide belief it belonged to the taker). *See also Pan Coal Co. v. Garland Pocahontas Coal Co.*, 97 W.Va. 368, 125 S.E. 226 (1924) (distinguishing the conversion of coal by mining from the sterilization of coal by rendering it unmineable). Oxford Mining does not raise this damages theory on appeal.

context, we view the evidence and reasonable inferences in the light most favorable to the plaintiff to determine whether a reasonable juror could find actual malice "with convincing clarity," the heightened standard applicable to privilege in a defamation suit); *State v. Williams*, 74 Ohio St.3d 569, 660 N.E.2d 724 (1996) (in the criminal context, a motion for a directed verdict of acquittal views the evidence in a light favorable to the state to see if any rational trier of fact could find the essential elements "proven beyond a reasonable doubt").

{¶95} Next, we discuss the relationship of a request for punitive damages to the topic jury instructions. As stated in the prior assignment of error, an appellate court reviews a trial court's refusal to give a requested jury instruction for abuse of discretion. *State v. Adams*, 144 Ohio St.3d 429, 2015-Ohio-3954, 45 N.E.3d 127, ¶ 240. "Requested jury instructions should ordinarily be given if they are correct statements of law, if they are applicable to the facts in the case, and if reasonable minds might reach the conclusion sought by the requested instruction." *Id.*, citing *Murphy v. Carrollton Mfg. Co.*, 61 Ohio St.3d 585, 591, 575 N.E.2d 828 (1991) (when reviewing the record to determine if there was "sufficient evidence" to support an instruction, the appellate court asks if the record contains evidence from which "reasonable minds" might reach the conclusion sought by the instruction).

{¶96} Reviewing a refusal to give a certain jury instruction also involves an analysis of "reasonable minds" and "sufficient evidence" while applying an abuse of discretion standard. *See Preston*, 32 Ohio St.3d at 336 (explaining how a trial court is to determine if a jury instruction on punitive damages is warranted). *See also State v. Wolons,* 44 Ohio St.3d 64, 68, 541 N.E.2d 443 (1989) ("It is within the sound discretion of the trial court to determine whether the evidence presented at trial is sufficient to require a jury instruction on intoxication" to negate a criminal element, and the appellate court review this decision for an abuse of discretion). An abuse of discretion refers to "more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Wolons,* 44 Ohio St.3d at 68.

{¶97} After the *Preston* decision, the Supreme Court addressed a case where: the defendant moved for a directed verdict on punitive damages at the close of the plaintiff's case; the trial court granted the directed verdict motion, and the appellate court

"rejected appellants' contention that the trial court erred in directing a verdict in favor of appellee on the issue of punitive damages" (due to Supreme Court precedent on alcohol consumption as related to malice). *Cabe v. Lunich*, 70 Ohio St.3d 598, 600, 640 N.E.2d 159 (1994). After overruling its prior alcohol holding, the Supreme Court held in pertinent part: "a trial court *abuses its discretion in failing*, upon the plaintiff's motion, *to instruct the jury* that it may find an award of punitive damages to be appropriate if it finds that the driver acted with actual malice in driving subsequent to having consumed alcohol" (where there was evidence on test refusal after an accident). (Emphasis added.) *Id.* at 603. The Court did not subject the decision to de novo review or mention the directed verdict granted on punitive damages. Applying *Cabe*, the decision on whether to submit punitive damages to the jury was subject to the trial court's sound discretion.

{¶98} Oxford Mining argues Ohio Gathering knew Oxford had property rights on the subject parcels and knew there was a great probability a pipeline would cause Oxford Mining substantial financial harm but consciously disregarded these facts. Oxford Mining points to the following: Ohio Gathering's land manager acknowledged Oxford Mining's 2013 communications on its coal rights and intent to mine; the title work showed Oxford's coal rights; it was a standard business practice to disregard coal rights; they constructed the pipeline without viewing the title documents; Oxford attempted to have Ohio Gathering stop once they noticed pipe being placed; and landowners informed Ohio Gathering's agent that the pipeline may interfere with the planned coal mining. Oxford Mining asks this court to remand for a trial on punitive damages (which would also allow a path for recovering attorney's fees).

{¶99} Ohio Gathering responds that the test is not what a reasonable person should have done. They point to the evidence: the land manager had no experience in title work or coal; there was a backlog of title reports which were not all reviewed before construction began; an answer to a hypothetical question was not relevant to actual malice; Oxford Mining rejected a proposed route based on a property over which it did not yet have full rights; and the intent of Ohio Gathering was based on skepticism of the claim that the pipeline would affect a mining plan due to the lack of a permit and their past dealings with Oxford Mining.

{¶100} Ohio Gathering's representative testified: "the situation with coal and all of these counties is that it's everywhere"; "virtually every inch of land is covered by a coal lease"; "we don't have the resources to go through and dig through all these hundred-year-old leases or new leases and try to determine if they've already mined through there or if they're going to mine through another seam * * *." (Tr. 746-747). In discussing their past history with Oxford Mining, he said Oxford Mining rejected multiple proposals.

{¶101} The first proposal had the pipeline running along a road. Oxford Mining hoped it could mine through the road, but this was never approved by officials. (Tr. 258, 302, 304). Oxford Mining did not provide a copy of the preliminary mine plan because the mining areas "were changing probably monthly at this point" as they were still drilling core samples and identifying the best locations. (Tr. 258-259). In November 2013, when another proposed route was disclosed by Ohio Gathering, Oxford Mining told Ohio Gathering the planned mine "boundary has since changed." (Tr. 285-286). Oxford Mining rejected some routes that included property owned by people from whom they hoped to acquire rights (property not at issue here). (Tr. 288-290, 639-640). At the time, Oxford Mining was internally inquiring whether it had both the coal and the surface rights to certain properties even though Ohio Gathering was instructed that a pipeline could not proceed in those locations. (Tr. 321-322).

{¶102} As to prior dealings on another project, Ohio Gathering said it paid Oxford Mining over a million dollars for coal loss, changed a planned route, and then learned that Sunoco built a pipeline at the same location supposedly overlying Oxford Mining's best coal. (Tr. 790). The land manager at Ohio Gathering said this confirmed suspicions that Oxford Mining had no intent to mine the pertinent holdings near the pipeline but was trying to generate income. Management at Ohio Gathering believed accommodations and payments were dependent on actual intent to mine, and they believed a plan to move the pipeline as mining approached it (instead of pre-paying) would ensure this intent existed. (Tr. 806-807).

{¶103} Notably, after seeing the pipeline construction, Oxford Mining was able to immediately generate a map estimating the coal that would no longer be mineable due to the pipeline's location, but Oxford Mining would not provide such a map earlier when it repeatedly rejected proposed routes. (Tr. 552-553, 555); (Pl.Ex. 100-101). Continuing

to lay the pipeline after being asked to stop in the middle of construction on the subject property showed no more disregard than beginning to construct on the route Oxford Mining already rejected. The parties thereafter discussed moving the pipeline as the coal mining approached its location but then apparently disagreed on the logistics of the mid-mining reclamation Ohio Gathering anticipated Oxford Mining would perform. (Tr. 561-563, 795-796).

{¶104} Upon viewing the plaintiff's evidence, the trial court rationally found that a reasonable mind would not find Ohio Gathering consciously disregarded the injured party's rights or safety or was aware the pipeline location had a great probability of causing substantial harm to Oxford Mining. Holding the belief that Oxford Mining must have a bona fide intent to mine the coal in order to recover (and the belief that Oxford Mining did not have such intent) did not evince malice, even assuming certain suspicions were unfounded or irrelevant. Prior pipelines were constructed by Ohio Gathering over Oxford Mining's coal with payment for coal loss even after a route was changed to accommodate claims of affecting their best coal. Future pipeline relocation was initially considered a viable substitute for pre-construction payment for coal loss. No coal was extracted or touched by the easement holder. There was no evidence Ohio Gathering knew mining could not occur under the pipeline, and there was no indication Ohio Gathering would reject a waiver of the distance regulation.

{¶105} This is not a case of a pipeline being constructed by a stranger to the land. The landowners granted a company rights-of way for a pipeline to transport gas from wells drilled by others. One of the landowners was insisting to Oxford Mining that it had no right to strip mine his key property under the relevant deed. Ohio Gathering moved its proposed route multiple times to attempt to satisfy Oxford Mining, who was reluctant to provide a copy of maps showing the location of the intended mining or the coal. The construction at the location at issue was not extreme and an alternative, non-harmful location was not said to be available through the pertinent properties.

{¶106} Under the totality of the evidence put forth by the plaintiff in this case, the construction of the pipeline does not invoke a sense of outrage to a reasonable member of society, and this particular episode was not "so callous in its disregard for the rights and safety of others that society deems it intolerable." *Preston*, 32 Ohio St.3d at 335-

336; *Calmes*, 61 Ohio St.3d at 473. Accordingly, the trial court reasonably found the requested punitive damages instruction was not warranted. As the trial court did not err in refusing to instruct on punitive damages, the assignment of error presented in Oxford Mining's cross-appeal is overruled.

{¶107} For the foregoing reasons, the trial court's judgment is affirmed.

Donofrio, J., concurs.

D'Apolito, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Belmont County, Ohio, is affirmed. Costs to be taxed against the Appellant.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.