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Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000744-MR

PAL OIL, LLC; NORMAN LEDFORD;
CORNELIUS ARTHUR; ARROWHEAD
ENTERPRISES OF KENTUCKY, INC;
AND MONTIE PARKS — APPELLANTS

APPEAL FROM FAYETTE CIRCUIT COURT
v. HONORABLE ERNESTO SCORSONE, JUDGE
ACTION NO. 07-CI-06229

UNITED AMERICAN ENERGY, LLC — APPELLEE

AND NO. 2011-CA-001120-MR

ARROWHEAD ENTERPRISES OF
KENTUCKY, INC; MONTIE PARKS;
PAL OIL, LLC; NORMAN LEDFORD;
AND CORNELIUS ARTHUR — APPELLANTS

APPEAL FROM FAYETTE CIRCUIT COURT
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UNITED AMERICAN ENERGY, LLC — APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART, VACATING IN PART, AND REMANDING

** ** ** ** **

BEFORE: KELLER AND MOORE, JUDGES; LAMBERT,[1] SENIOR JUDGE.

MOORE, JUDGE: These two consolidated appeals from Fayette Circuit Court involve a plaintiff's judgment awarding damages for fraud and breach of contract. The appellee is United American Energy, LLC (UAE). The appellants are Norman Ledford, Montie Parks, Cornelius Arthur, PAL Oil, LLC (owned by Ledford, Parks, and Arthur), and Arrowhead Enterprises of Kentucky, Inc (owned by Ledford and Arthur).[2] The substance of this matter relates to UAE's purchase of several oil and gas interests from these appellants in 2006 and 2007.

The appellants argue the circuit court's multifaceted judgment is erroneous in several respects. In particular, they argue that the circuit court erred in 1) asserting subject matter jurisdiction in this matter; 2) conducting a bench trial, rather than a jury trial; 3) holding PAL Oil, Arrowhead, Ledford, Parks, and Arthur

[1] Senior Judge Joseph Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute (KRS) 21.580.

[2] Arrowhead and Parks initiated appeal 2011-CA-1120-MR; PAL Oil, Ledford, and Arthur initiated appeal 2011-CA-000744-MR. The issues and arguments presented by these respective appellants are identical.

liable for fraud in relation to their purported sale of an oil and gas lease they never owned (*i.e.*, the "Tyree" lease) to UAE; 4) holding PAL Oil, Ledford, and Arthur liable for breach of contract and indemnity relating to the Tyree lease on the same basis; 5) holding Arrowhead, Ledford, Parks, and Arthur liable for breach of contract and indemnity relating to four other leases[3] which the circuit court determined had "expired" as a matter of law prior to when these appellants purported to sell them to UAE; 6) dismissing their counterclaims against UAE for abandoning the purportedly "expired" leases; 7) holding Arrowhead, Ledford, Parks, and Arthur liable for breach of contract and indemnity relating to their conveyance to UAE of a half-interest, rather than a full interest, in another oil and gas lease known as the "Henderson" lease; 8) ruling on various evidentiary issues; and, 9) awarding UAE excessive damages and prospective attorneys' fees. These overarching issues, as well as several sub-issues included therein, will be addressed in turn below. The facts of this case will be discussed as they become relevant within the context of each issue.

I. THE FAYETTE CIRCUIT COURT AND SECTION 18.5 OF THE 2006 AND 2007 APAs.

Before we address the merits of this case, we will first address the appellants' contentions that the Fayette Circuit Court never had the authority to 1) prohibit the appellants from removing this matter to the United States District Court for the Eastern District of Kentucky; and 2) conduct a bench trial. Both of

[3] These leases, described more fully below, were known as the "Simp Horn," "John and Patsy Marcum," "Mitchell Goff," and "Sally Stewart" leases.

these contentions stem from clauses contained in two contracts that these parties executed herein (*i.e.*, Section 18.5 of the 2006 and 2007 Agreements for the Purchase of Assets (APAs), which will be discussed more fully below). In both of these APAs, Section 18.5 provides:

> Consent to Jurisdiction. The Buyer and the Seller hereby irrevocably submit to the jurisdiction of the United States District Court for the Eastern District for Kentucky in any action or proceeding arising out of or relating to this Agreement, and the Buyer and the Seller hereby irrevocably agree that all claims in respect of such action or proceeding may be heard and determined in such federal court. The Buyer and the Seller hereby irrevocably waive, to the fullest extent they may effectively do so, their rights to a trial by jury, and to the defense of an inconvenient forum to the maintenance of such action or proceeding. Any action or proceeding arising out of or relating to this Agreement for which the United States District Court for the Eastern District of Kentucky does not have jurisdiction shall be brought in the Circuit Court of Fayette County, Kentucky.

a. Removal to the United States District Court for the Eastern District of Kentucky.

As noted, the appellants' first argument relating to Section 18.5 is that the Fayette Circuit Court erred in prohibiting them from removing this matter to the United States District Court for the Eastern District of Kentucky. The entire substance of their argument is as follows:

> "Defects in subject-matter jurisdiction may be raised by the parties or the court at any time and cannot be waived." Privett v. Clendenin, 52 S.W.3d 530, 532 (Ky. 2001); see Karahalios v. Karahalios, 848 S.W.2d 457, 460 (Ky. App. 1993). In Prudential Resources Corp. v. Plunkett, 583 S.W.2d 97 (Ky. App. 1997), the Court of Appeals affirmed the dismissal of a case based on a forum selection clause because parties' agreements as to

> the forum for disputes arising out of a contract will be given effect, so long as the forum selection clause does not produce an unfair or unreasonable result. Id.; see also Prezocki v. Bullock Garages, Inc., 938 S.W.2d 888, 889 (Ky. 1997).

This brief argument labors under several misapprehensions of Kentucky and federal law.

We will begin with the appellants' reference to "subject matter jurisdiction." When UAE filed this case in Fayette Circuit Court, the Fayette Circuit Court's subject matter jurisdiction over this matter was never at issue. "[S]ubject matter does not mean 'this case' but 'this kind of case.'" *Harrison v. Leach*, 323 S.W.3d 702, 705 (Ky. 2010) (citation omitted). The Fayette Circuit Court, as a court of general jurisdiction, has been vested with subject-matter jurisdiction over exactly the type of case UAE brought to it—contract disputes and suits in equity. Ky. Const. §§ 109 & 112(5); Kentucky Revised Statute (KRS) 23A.010; *Peter v. Gibson*, 336 S.W.3d 2, 5 (Ky. 2010). The Fayette Circuit Court "acquired jurisdiction of the subject matter [of UAE's claims] when the petition [or, as in this case, the complaint] was filed and summons issued[.]" *Hudson v. Manning*, 250 Ky. 760, 63 S.W.2d 943, 945 (1933). Consequently, there is no merit in the argument that the circuit court was not vested with subject matter jurisdiction.

Giving the appellants the benefit of the doubt, however, we will assume that they meant to assert that the Fayette Circuit Court should have dismissed this matter, in light of the forum selection clause, on the ground of

improper venue. Certainly, both of the cases cited by the appellants—*Plunkett* and *Prezocki*, *supra*—stand for the proposition that when a litigant properly asserts an enforceable forum selection clause, the court should enforce it and dismiss the matter without prejudice.

The litigants in *Plunkett* and *Prezocki* sought to enforce their respective forum selection clauses prior to filing their answers in those matters. *Plunkett*, 583 S.W.2d at 99; *Prezocki*, 938 S.W.2d at 888. The defense of improper venue is among the irrevocably waivable defenses identified in CR[4] 12.02(b)-(e). And, failure to raise any of those defenses (1) in a pre-answer motion to dismiss the original complaint, (2) in an answer to that complaint, or (3) in a matter-of-course amendment to that answer results in an irrevocable waiver. *See* CR 12.08(1).

Here, the appellants waited over two years after UAE initiated this matter before asserting the forum selection clause of Section 18.5. They did not do so through a pre-answer motion, an answer to the original complaint, or through a matter-of-course amendment to that answer.

Aside from the rule of waiver stated in the Civil Rules, the general law of waiver in Kentucky also supports that the trial court correctly determined that this matter should not have been dismissed on the basis of the forum selection clause. "Our law is clear that a 'waiver' is a voluntary and intentional surrender or relinquishment of a known right, or an election to forego an advantage which the

[4] Kentucky Rule of Civil Procedure.

party, at his option, might have demanded or insisted upon." *Weinberg v. Gharai*, 338 S.W.3d 307, 314 (Ky. App. 2011) (citing *Barker v. Stearns Coal & Lumber Co.*, 291 Ky. 184, 163 S.W.2d 466, 470 (1942)). Unequivocally, the appellants knew from the onset of this litigation that they had the option, if it applied, to transfer this matter to the United States District Court for the Eastern District of Kentucky. Yet, as mentioned, they made no attempt to exercise this option or inform the circuit court of their intent to do so for over two years. They then sought to enforce the forum selection clause after the Fayette Circuit Court had already granted partial summary judgment against them on a number of UAE's claims for indemnity—claims that the appellants vigorously litigated.

In a footnote of their brief, the appellants assert that they could not have asserted the forum selection clause until two years into this litigation because "UAE answered damages interrogatories and produced documents (in February 2010) indicating that damages exceeded the federal jurisdiction minimum." Stated differently, the appellants claim that they simply could not have known that the United States District Court for the Eastern District of Kentucky could have assumed diversity jurisdiction of this case until February, 2010, when UAE attached a specific dollar figure to their claims.

Federal courts, particularly the United States District Court for the Eastern District of Kentucky, encourage the practice of parties conducting federal jurisdictional discovery in state courts; for an excellent summary of this practice, *see May v. Wal-Mart Stores, Inc.*, 751 F. Supp. 2d 946 (E.D. Ky. 2010).

Nevertheless, 28 U.S.C.[5] § 1446 only permits litigants to remove a civil action based upon diversity of citizenship from a state court to a federal court within "1 year after commencement of the action, unless the district court finds that the plaintiff has acted in bad faith in order to prevent a defendant from removing the action." 28 U.S.C.A. § 1446(c)(1). Consequently, the appellants' argument that the Fayette Circuit Court somehow erred in failing to enforce their forum selection clause is without merit, given that they waited for more than a year to enforce the forum selection clause.

b. Conducting a bench trial, rather than a jury trial

As noted, Section 18.5 of the 2006 and 2007 Agreement also provides: "[UAE] and [appellants] hereby irrevocably waive, to the fullest extent they may effectively do so, their rights to a trial by jury[.]" In its complaint and subsequent amended complaints, UAE nevertheless asked for a trial by jury in this matter. In each of their answers, the appellants responded by stating that "[t]he parties have irrevocably waived their rights to a trial by jury under section 18.5 of the 2006 and 2007 Agreements, and as such, [UAE's] jury demand should be stricken." Prior to trial, UAE withdrew its jury demand. Thereafter, this matter was adjudicated by means of a bench trial, rather than a jury trial.

In contravention of the very contractual clause they repeatedly attempted to enforce, the appellants now argue that it was error for the circuit court to conduct a bench trial, rather than a jury trial. They point to nothing in the record

[5] United States Code.

demonstrating that they ever made any request for a jury trial before the circuit court and, as noted above, the record in this matter flatly contradicts that they ever desired a jury trial. Instead, their argument is based upon the following portion of CR 38.04: "A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties." In short, the appellants argue that the circuit court erred in conducting a bench trial because, as they now assert, they never consented to allowing UAE to withdraw its request for a jury trial.

As to where this argument was preserved for our review, the appellants have appended to their reply brief an affidavit of one of their attorneys. In this affidavit, the affiant represents that he was present at an unrecorded pretrial conference in this action on November 18, 2010; he recalled there being a discussion about the issue of whether the trial of this case would be by jury or bench trial; he recalled that the appellants did request a jury trial and argued that they had not consented to UAE's request to have a bench trial; and, he recalled that the appellants' arguments were overruled. In its own brief, however, UAE represents that the appellants did not raise this argument below. UAE argues, therefore, that it would be inappropriate for this Court to consider the merits of the appellants' argument.

The issue thus becomes one of proper preservation of error. As a general matter, "[t]he Court of Appeals is without authority to review issues not raised in or decided by the trial court." *Regional Jail Authority v. Tackett*, 770 S.W.2d 225, 228 (Ky. 1989) (citing *Matthews v. Ward*, 350 S.W.2d 500 (Ky.

1961); *Combs v. Knott Co. Fiscal Court*, 283 Ky. 456, 141 S.W.2d 859 (1940); *Tipton v. Brown*, 273 Ky. 496, 117 S.W.2d 217 (1938)). We determine which issues were raised in or decided by the trial court by reviewing the record of the trial court's proceedings. Thus, "[i]t goes without saying that errors to be considered for appellate review must be precisely preserved and identified in the lower court." *Skaggs v. Assad, By and Through Assad*, 712 S.W.2d 947, 950 (Ky. 1986) (citing *Combs v. Knott County Fiscal Court*, 141 S.W.2d 859 (Ky. 1940); CR 76.12(4)(c)(iv)).

Here, the appellants point to no authority, and we have found none, supporting that the affidavit of a litigant's counsel by itself is sufficient to preserve any purported error that is not apparent from the face of the record. Nothing prevented the appellants' counsel from preserving their objection to the trial court's purported error on the record following the unrecorded pretrial conference. And, to the extent that the appellants are attempting to argue that the record demonstrates error in this regard simply because it contains no written consent from them to *not* have a jury trial, we disagree. Nothing in CR 38.04 dictates *how* both parties may consent to withdrawing a demand for trial by jury. And, this Court will not presume that the appellants refused their consent, especially where the appellants made no demand for a jury trial themselves, actively opposed UAE's demand for a jury trial, and made no attempt to preserve any objection to UAE withdrawing its demand for a jury trial. Consequently, we find the trial court committed no error in conducting a bench trial.

Having addressed these introductory procedural issues, we will now address the myriad facts, causes of action, and claims of error involved in this matter. And, every fact, cause of action, and claim of error involved in this matter relates, in some way, to UAE's claim against the appellants for fraud and breach of contract regarding the Tyree mineral estate. Accordingly, this is where we will begin our analysis.

II. THE TYREE MINERAL ESTATE

a. "Mineral leases" and "the abandoned well process" theory.

According to Ledford, Parks, and Arthur, who have some experience in the oil and gas industry but no legal education, the word "lease" can mean three different things when used in the context of mineral estates. First, it could be oil and gas industry parlance to describe the location of a mineral estate in which oil and gas rights lie, rather than any kind of actual contract. Second, it could be an agreement with a mineral owner, written or otherwise, conveying another person or entity the right to search for, produce, sell, and keep profits from the sale of oil or other minerals underlying specific real property. Third, it could mean permission from the Division of Oil and Gas Conservation in Kentucky's Department for Natural Resources—rather than from the owner of a mineral estate—to produce oil out of a specific abandoned well located upon another person's mineral estate, sell that oil, and keep the industry standard of 87.5% of the resulting profits.

As to whether the term "lease" could be used to simply describe the location of a mineral estate in which oil and gas rights lie (the first of the above three definitions), the record in this matter reveals no dispute.

Also, the second of the above definitions is a fair reflection of Kentucky law. As stated by the former Court of Appeals in *Williams' Adm'r v. Union Bank & Trust Co*., 283 Ky. 644, 143 S.W.2d 297, 300 (1940),

> [i]t has long been the law of this State that minerals in place are real estate and such minerals may be severed into distinct estates separate from the surface[.] . . . [T]he usual oil and gas lease does not convey the absolute title to these minerals, but only gives the lessee the right to explore for them and he does not acquire title to the oil and gas unless it is taken from the ground.

(Internal citations omitted.) One of the many other cases to the same effect is *Ralston v. Thacker*, 932 S.W.2d 384, 387 (Ky. App. 1996):

> At the outset, we note that an oil and gas lease is an interest in real property. The law applicable to oil and gas leases is that applicable to land. An oil and gas lease is an interest in real estate generally termed a "chattel real" and is an estate less than a freehold or fee-simple interest. The execution of an oil and gas lease grants to the lessee only the right to explore for oil and gas. Of course, the parties may insert into a lease any provision desired.

(Internal citations omitted.)

Their third definition of "mineral lease," however, appears to have caused the six years of litigation in this matter. That said, it is necessary to trace the genesis of this definition before we discuss its validity.

Ledford, Parks, and Arthur incorporated PAL Oil for the purpose of acquiring, packaging, and selling oil and gas interests. They frequently conducted their own title searches to locate mineral estate owners for the purpose of securing mineral lease agreements with mineral estate owners (the kind of mineral leases described in the *second* of the above three definitions). Sometime in the spring of 2005, Ledford, Parks, and Arthur became interested in the oil underlying property in Estill County owned by Roy and Ines Lindsey. Two oil wells, which Ledford, Parks, and Arthur believed had been abandoned, were also located upon this property. After checking the Estill County property records and conducting their own title search, Ledford, Parks and Arthur concluded that some previous owners in the Lindseys' chain of title—namely, Thorton William Tyree and Mary A. Tyree—had granted an oil and gas lease in the mineral estate underlying the Lindseys' property on January 17, 1915, and that the Lindseys owned only a surface estate as a consequence.

Ledford, Parks, and Arthur could not determine the identity of the current owner of the underlying mineral estate—a mineral estate which, thereafter, they referred to as the "Thorton Tyree lease," the "T.W. Tyree lease," and, alternatively, the "Tyree lease" (*see, e.g.*, the *first* of Ledford's, Parks', and Arthur's above three definitions of "lease"). Nevertheless, Ledford, Parks, and Arthur remained interested in finding some way to explore for oil on this property.

For a solution, Ledford testified that they turned to their longstanding attorney, Jim Combs:[6]

> Ledford: I asked Jim Combs, you know, how else can I go about this? I'd like to acquire, you know, some of these wells on [the Lindseys'] property. And Jim was the first one to send me the abandoned well clause and that's when I got a hold of Mr. Rick Bender and he went through the process with me.

The "abandoned well clause" Ledford referred to in his testimony is Kentucky Revised Statute (KRS) 353.730, entitled "Investigation of abandoned wells – Application – Report – Bond." In its entirety, it reads:

> (1) Any person may investigate an abandoned well upon receipt of approval from the department. The person shall submit to the department:
>
> > (a) An application requesting approval to investigate and stating the planned methods for the investigation. In all cases where there has been a complete severance of the ownership of the oil and gas from the ownership of the surface to be disturbed, the application shall include a plan to prevent erosion and sedimentation;
> >
> > (b) A twenty-five dollar ($25) fee; and
> >
> > (c) A certification by the applicant that he has the authority to enter the property upon which the well is located and to conduct the investigation.
>
> (2) The department shall review all applications for investigation. If the department approves the request for

[6] For the sake of clarity, we note that two individuals in this opinion have the last name, "Combs": Marvin Combs, who is or was an employee of the Kentucky Department of Natural Resources, Division of Oil and Gas Conservation, and Jim Combs, who represented the appellants as their attorney.

> investigation, the applicant shall be allowed to produce the well without a permit as required by KRS 353.570, and the applicant shall submit a report of investigation to the department on forms provided by the department. In order to produce the well for more than sixty (60) days, the applicant must obtain a bond as required by KRS 353.590(5) or (9). Notwithstanding the provisions of KRS 353.590(2), no fee shall be required for any such well.

At the trial of this matter, Ledford, Parks, and Arthur testified that this statute described "the abandoned well process," which they understood authorized the Division of Oil and Gas Conservation in Kentucky's Department for Natural Resources to grant anyone "permission" to 1) investigate and test specific abandoned wells located upon a mineral estate owned by an unknown individual, without the consent of the unknown owner or his representative, in order to determine whether those abandoned wells were capable of producing oil; 2) produce an unlimited quantity of oil out of those abandoned wells in the event that oil was discovered; and 3) keep the industry standard of 87.5% (or 7/8ths) of any proceeds realized from the sale of that oil.

Ledford also testified that another "advantage" of this "abandoned well process" is that, when utilized, it discouraged other third parties from attempting to secure a mineral lease with the owner of the subject property:

> Counsel: Is there some value to having two well permits on a tract of land, even though you don't have the lease?
>
> Ledford: Well, one, it's extremely unlikely anybody else is going to go out there and try to pump any wells once you've taken over.

> Counsel: How important is that?
>
> Ledford: It's extremely important.
>
> Counsel: Why?
>
> Ledford: Well, it's like, I was talking about that well number 58 that was offset from this lease. Now, if you pump a whole bunch of wells around that number 58 well, you can virtually kill that well. It won't make hardly anything. But like I said, it could make 15 to 20 barrels by itself, while over here you may have to pump twenty wells to get twenty barrels. So you know, you want to keep somebody else from pulling oil away from that good well.
>
> Counsel: My question is a little different. Is it important or not to have a physical presence on, for instance, the Tyree lease property? On two wells, could you, um, keep someone else from getting in and getting the lease while you're trying to get it?
>
> Ledford: Certainly.

To prevent confusion, we pause here to state that Ledford's, Parks', and Arthur's understanding of KRS 353.730 is a gross misinterpretation of the actual law. Nothing in KRS 353 *et seq*., provides the Division with the authority to allow individuals to produce oil from a mineral estate without first securing the consent of the mineral estate's owner or, if that mineral estate owner is unknown, a court-appointed trustee[7] of the mineral estate. The face of KRS 353.730 actually contradicts the notion that the Division has that sort of authority. For example, KRS 353.730(2) requires an applicant to obtain a bond "as required by KRS 353.590(5) or (9)" in order to produce any tested well for more than 60 days; KRS

[7] *See, e.g.*, KRS 353.464.

353.590(5) and (9) only permit an "operator" to obtain such a bond; and, the word "operator," in this context, is statutorily defined in KRS 353.510(17) to mean

> any owner of the right to develop, operate, and produce oil and gas from a pool and to appropriate the oil and gas produced therefrom, either for himself or for himself and others; in the event that there is no oil and gas lease in existence with respect to the tract in question, the owner of the oil and gas rights therein shall be considered as "operator" to the extent of seven-eighths (7/8) of the oil and gas in that portion of the pool underlying the tract owned by such owner, and as "royalty owner" as to one-eighth (1/8) interest in such oil and gas; and in the event the oil is owned separately from the gas, the owner of the right to develop, operate, and produce the substance being produced or sought to be produced from the pool shall be considered as "operator" as to such pool[.]

Another contradiction of Ledford's, Parks', and Arthur's understanding also appears in KRS 353.730(1)(c), which requires an applicant for the testing permit described in that statute to certify, *before* the Division will even issue him a testing permit, that "he has the authority to enter the property upon which the well is located *and* to conduct the investigation."[8] (Emphasis added.) In

[8] The owner of a surface estate certainly has the authority to allow third parties to enter his property, but Ledford, Parks, and Arthur apparently believed that the owner of a surface estate may also authorize third parties to investigate an abandoned well and, thus, explore for oil in an underlying mineral estate. However, a mere surface owner is incapable of granting anyone the right to explore an underlying mineral estate for oil or gas (and, by extension, the right to investigate an abandoned well per KRS 353.730(1)(c)) because a mere surface owner holds no such right in the underlying mineral estate. *See, e.g., Central Kentucky Natural Gas Co. v. Smallwood*, 252 S.W.2d 866, 868 (Ky. 1952) (*reversed on other grounds by Texas American Energy Corp. v. Citizens Fidelity Bank & Trust Co.*, 736 S.W.2d 25 (Ky. 1987); *see also Grynberg v. City of Northglenn*, 739 P.2d 230, 234 (Colo. 1987):

> Where, as here, the surface estate has been severed from the mineral estate, "it is clear from the decided cases that the mineral owner, rather than the surface owner, is the one who has the right to conduct geological and geophysical operations." The recognition of the exclusivity of the right of the mineral owner to consent to exploration is based upon the central importance of information concerning mineral deposits to the value of the mineral estate.

short, KRS 353.730 does not authorize the Division to grant any person an ownership interest in another person's oil. Rather, it simply grants a person who has *already* secured the consent of the owner of the mineral estate, or his representative or court-appointed trustee, permission to engage in the *activities* of testing an oil well and producing oil—activities that the Division is obligated by statute to regulate through issuing permits. *See, e.g.,* KRS 353.570(1).

This hits the heart of the problem: Ledford's, Parks', and Arthur's interpretation of KRS 353.730 (the *third* of their above-stated definitions of "lease") fails to distinguish between permission from the Commonwealth to engage in a regulated activity on the one hand, and, on the other hand, an oil and gas lease under Kentucky law. A mineral lease relating to oil and gas grants to the lessee the right to explore for oil and gas on a specific mineral estate. *Ralston*, 932 S.W.2d at 387; *Union Bank & Trust Co*., 143 S.W.2d at 300. This right to explore is exclusive. *Central Kentucky Natural Gas Co. v. Smallwood*, 252 S.W.2d 866, 868 (Ky. 1952) (*reversed on other grounds by Texas American Energy Corp. v. Citizens Fidelity Bank & Trust Co.*, 736 S.W.2d 25 (Ky. 1987)). And, according to MERRIAM–WEBSTER'S COLLEGIATE DICTIONARY 441 (11th ed.2003), "explore" means:

> 1 a: to investigate, study, or analyze : look into . . . b: to become familiar with by testing or experimenting . . . 2: to travel over (new territory) for adventure and discovery 3: to examine esp. for diagnostic purposes . . . to make or conduct a systematic search < ~ for oil>

(Internal citations omitted.)

True to this definition, the statutes controlling the activity of exploring for oil describe some examples of how one might *explore* for oil. For instance, a person or entity that has secured the right to *explore* for oil on a given mineral estate (*see again*, "operator" as defined in KRS 353.510(17)) might drill a new oil well or deepen or reopen an existing oil well, provided he obtains a permit from the Commonwealth to engage in that regulated activity. *See* KRS 353.570(1). The same person or entity might also exercise the same right to *explore* for oil by investigating, studying, and analyzing (*see* WEBSTER'S, *supra*) any abandoned oil wells he discovers on his oil and gas lease, provided that he follows KRS 353.730 which, as noted, is entitled "*Investigation* of abandoned wells..." (Emphasis added.)

To summarize: 1) the right to explore a mineral estate for oil is only granted by the owner of the mineral estate, his representative, or a court-appointed trustee; 2) drilling a new oil well, deepening or reopening existing oil wells, and investigating abandoned wells are simply means and methods of effectuating the right to explore a mineral estate for oil; and 3) these means and methods, in turn, are activities regulated by the Commonwealth of Kentucky and cannot be employed without first securing its permission through the Division of Oil and Gas Conservation. In that sense, exploring an abandoned well on someone else's mineral estate in Kentucky is much the same as driving someone else's automobile: If you want to do it, you need among other things 1) permission from the owner or the owner's representative, and 2) a license or permit from the state.

If Ledford's, Parks', and Arthur's interpretation of the law regarding the testing of abandoned wells was also the law regarding driving someone else's car, it would allow anyone with a drivers' license to steal another person's car.

How, then, did Ledford, Parks, and Arthur come to their conclusion regarding the meaning of KRS 353.730?

As mentioned above, Ledford testified that their attorney, Jim Combs, was the first to recommend that Ledford, Parks, and Arthur utilize KRS 353.730 as a means of "acquiring wells" on the Lindseys' property. Combs testified that at or about this time, he was working for the appellants on a "more or less continual basis." As he recalled it in his own testimony, he thought the appellants learned about the "abandoned well process" from the Division of Oil and Gas Conservation.

According to Ledford, he, Parks, and Arthur then sought further clarification of the procedures for invoking this statute from Rick Bender, who was at the time the Director of the Division of Oil and Gas Conservation.[9] According to Ledford's recollection of a conversation he purports to have had with Bender, Bender first explained the steps necessary for the Division to consider any given oil well "abandoned," per KRS 353.730:

> Ledford: One, you have to send out a certified letter to the last known, uh, operator of that lease, notify them that

[9] Nothing in the record before us, other than Ledford's testimony, documents or verifies Ledford's purported conversation with Bender or the substance of that purported conversation. However, no party objected to Ledford's testimony or disputed that this conversation took place, and, in any event, Ledford's testimony is illustrative of his state of mind at this point in time.

> you consider that property as having been abandoned, and you have to send it certified and, uh, and then if that comes back, you know, address unknown or something, that, you send that, you also provide the state that to show you tried to find the last known operator, and give him a chance to go back out and, uh, start the lease if they wanted.[10]

Regarding the procedure to be followed in the event that the identity of the owner of the mineral estate connected to the abandoned wells could not be ascertained, Ledford further testified:

> Ledford: [Rick Bender] said advertise, uh, in two local newspapers for three weeks, uh, and put in there that you'd like to know if anybody is or knows who the mineral owners are for the T.W. Tyree lease. And, you know, see if you can, if they come forward, then you can sign a lease with them. But at least you've tried to find out who it was.[11]
>
> . . .

[10] Ledford's testimony somewhat approximates KRS 353.590(22), which provides:

> If the requirements of this section with respect to proper plugging upon abandonment and submission of all required records on all well or wells have not been complied with within the time limits set by the department, by administrative regulation, or by this chapter, the department shall cause a notice of noncompliance to be served upon the operator by certified mail, addressed to the permanent address shown on the application for a permit.
>
> (a) The notice shall specify in what respects the operator has failed to comply with this chapter or the administrative regulations of the department.
>
> (b) If the operator has not reached an agreement with the department or has not complied with the requirements set forth by it within forty-five (45) days after mailing of the notice, the bond shall be forfeited to the department.

[11] This part of Ledford's testimony is essentially an abridged misinterpretation of KRS 353.464, 353.466, 353.468, and 353.470, which describe the procedures under which certain individuals may petition a circuit court to place a mineral estate belonging to an unknown individual into a trust, appoint a trustee, and authorize a trustee to convey a mineral lease on that estate to a third party. If the owner of the T.W. Tyree mineral estate was unknown, these would have been the proper procedures for Ledford, Parks, and Arthur to have utilized to secure the right to explore it for oil (through investigating its abandoned wells or otherwise). It is undisputed that they did not follow these statutes.

> Once you got, after the certified letter business, you have, you can't go on the property until you get a surface agreement.[12]

As Ledford understood it, an applicant for a well testing permit could thereafter submit a surface agreement (an agreement with the owner of the surface property above the mineral estate allowing entry onto the surface property) and proof of an attempt to find the mineral estate owners (by advertising in the classified section of two local newspapers for three weeks) to the Division; the Division would then issue a permit to test a specific abandoned well and produce oil from that well for a period of 60 days (pursuant to KRS 353.730(2)); and, if the permittee chose to continue producing oil beyond 60 days, the Division would require the permittee to place that particular well under his bond (also pursuant to KRS 353.730(2)), and then allow the permittee to continue producing that well and selling oil from that well indefinitely. As to the profits realized from the sale of any oil produced, Ledford testified that the unknown owner would receive a 1/8th share, and the permittee would be allowed to keep the remaining 7/8ths.[13] Ledford further explained that the unknown owner's 1/8th share

[12] In the event that ownership of a mineral estate has been severed from the ownership of the overlying surface estate, there are several statutes requiring a well operator, prior to producing oil on a mineral lease, to first secure the consent of the owner of the surface estate or at least notify the surface estate owner of his intent. *See, e.g.*, KRS 353.5901 and KRS 353.595.

[13] Ledford determined that the producer of the oil well, in this context, would be entitled to 7/8ths of the sale proceeds of the oil based upon what he believed was standard industry practice. Inasmuch as an operator with a valid lease with a mineral owner or trustee typically does receive 7/8ths of any proceeds, his determination is not without support. *See, e.g.*,KRS 353.510(17).

> would be held in a suspense account until or when any mineral owner could come before [the oil purchasing company] and say, I, look, you know, I'm owed past royalties on that property. And they, all they'd need at that time is to prove they are a legitimate mineral owner, what their ownership is, and then that [oil purchasing company] would, uh, pay them their prorated back, you know, royalty. Now, as Montie [Parks] had said, after seven years, uh, it's our understanding that that suspense, uh, money is turned over to the state. But you still could go to the state and get that money by proving you're a mineral owner.[14]

With this in mind, we now turn to how Ledford, Parks, and Arthur *applied* what they understood about the "abandoned well process."

They began by obtaining a surface agreement with Roy and Ines Lindsey, which the Lindseys executed on April 4, 2005. The relevant part of this surface agreement, which Parks drafted, provides:

> Dear Ms. Lindsey,
>
> As per our discussion by phone, I would like to have an agreement with you as a surface owner to open up and operate a lease known as the Thorton or William Tyree #0650068. Upon our agreement, you will allow me access to all wells on lease property for development and production. I, Montie Parks, upon agreement will clear surface property of debris, will maintain and improve roads. I will ditch waterways and maintain surface property in a workmanlike condition for duration of lease. You, or your assigns will not be held responsible for any personal injuries or litigation evolving from

[14] Here, Ledford's testimony both implicates and misinterprets KRS 353.468 (5) and (6), KRS 353.470 and KRS 353.472, which provide that if a circuit court appoints a trustee for the mineral estate of an unknown owner, and the trustee executes a mineral lease in favor of a third party, the trustee shall hold and collect the proceeds of the lease for the benefit of the unknown mineral owner, the unknown mineral owner may petition the circuit court (not the oil purchasing company) for the past and future proceeds from the trustee's lease, and *the owner of the surface estate overlying the mineral estate* will be entitled to any proceeds accruing from the mineral lease if the identity of the mineral estate owner remains unknown for a period of seven years.

> either surface maintenance or lease operations for duration of lease operations. This agreement will remain in force to any assigns of PAL Oil Company.

Ledford, Parks, and Arthur would later testify that they meant for the word "lease," as used in this surface agreement, to carry the meaning of the first of their three above-referenced definitions (*i.e.*, "the location of a mineral estate in which oil and gas rights lie, and not an actual contract with the mineral owner.") But, the Lindseys would later testify that at the time they executed this agreement they understood the word "lease," as used in this surface agreement, to mean that Ledford, Parks, and Arthur had already secured an agreement with a mineral owner conveying an interest in the minerals underlying their property—the *second* of the three above-referenced definitions.

After securing this surface agreement, Ledford then sent the following letter to the Division of Oil and Gas, in care of Rick Bender. This letter is dated April 9, 2005, and provides in relevant part:

> Ref: T.W. Tyree lease
>
> Dear Mr. Bender,
>
> I have a company, PAL Oil Co LLC, . . . and would like to apply to test two wells on a lease here in Estill County, Ky. The lease is the T.W. Tyree, Ashland Oil # 1252 or KYS 0650023. We have tried to locate any mineral owners for this lease and have been unable to do so at this point. This lease was abandoned by Trinity Oil Group LLC, and has been out of production for at least ten or twelve years that we know of. I am placing an ad in the two local papers to try and find any mineral heirs that can show ownership on this lease. I will run this ad for three weeks and then send proof of ad to your

> department or try and sign any heirs that may come forward.
>
> I have gotten permission from surface owner [sic] to enter property, included, and have agreed to open and fix roads, clear property or drain any low lying areas.
>
> The two wells we would like to test are numbered #40 and #42, the best I can tell from map [sic]. I have included a check for these wells, and would provide any information we get from cleaning out wells and putting into production for test period.

Ledford, Parks, and Arthur later testified that in their opinion it was evident from this letter that they were using the word "lease" to simply mean "the location of a mineral estate in which oil and gas rights lie, and not an actual contract with the mineral owner" (again, the first of their above-stated definitions).

On April 12, 2005, Ledford faxed requests to two newspapers in the Estill County area to run the following advertisement:[15]

> Seeking any information about the mineral heirs to the oil lease in Estill County known as the T.W. Tyree. Please submit information or proof of ownership to 606-[redacted] or 606-[redacted].

On May 4, 2005, Deana Wilmoth of the Division of Oil and Gas Conservation responded to Ledford's April 9, 2005 letter. She advised that the Division was processing PAL Oil's "request to test two wells on the T.W. Tyree lease," and instructed PAL Oil to "please complete the enclosed testing permit applications for those wells."

[15] It is unknown whether the Lindseys were aware of this advertisement. At this time, they resided in Sneedsville, Tennessee.

The record also contains two Division of Oil and Gas Conservation testing permit applications that Ledford completed and Parks notarized regarding wells 41[16] and 42 on the T.W. Tyree mineral estate, dated May 12, 2005. Both applications represent that the mineral estate owner is "unknown," and that there has been "a complete severance of the ownership of the oil and gas from the ownership of the surface area to be disturbed by this investigation." Additionally, both applications indicate that PAL Oil's right to enter the property upon which these wells were located derived solely from a "letter of permission from surface owner."

About this time, Montie Parks' wife, Linda, called Ines Lindsey on behalf of PAL Oil and informed her that PAL Oil "may not be getting the lease" relating to the Tyree mineral estate. Also about this time, Shelby Oil and Gas Exploration, LLC, one of PAL Oil's rivals, informed the Lindseys that the appellants did not have any lease agreement with respect to the Tyree mineral estate and that it believed the Lindseys were the actual Tyree mineral estate owners. On May 13, 2005, Shelby Oil and Gas entered into a mineral lease agreement with the Lindseys regarding the Tyree mineral estate. Ines Lindsey testified that she did not notify the appellants about this lease or inform the appellants that she and her husband were rescinding the April 4, 2005 surface agreement.

[16] As noted in his April 9, 2005 letter, Ledford had initially requested a permit for well 40. The record does not explain why Ledford eventually applied for a permit for well 41 instead.

Parks and Ledford both testified that they were aware of the Lindsey-Shelby lease while they were applying for abandoned well testing permits with the Division. The appellants could not recall whether they informed the Division of the Lindseys' claim of ownership—their "abandoned well process" theory apparently would have required them to do so[17]—but Ledford and Parks testified that they believed the Shelby-Lindsey lease was ineffective because the Lindseys had acknowledged that they were merely surface owners by signing the surface agreement,[18] and neither the Lindseys, nor their predecessors in title, had ever received gas or oil royalties from the Tyree mineral estate.[19]

On June 1, 2005, Marvin Combs of the Division of Oil and Gas Conservation wrote two letters to PAL Oil. These letters related, respectively, to two wells on the T.W. Tyree mineral estate and described different permit numbers relating to these two wells ("N13458," which related to "Tyree Well 41, Estill County," and "N13457," which related to "Tyree Well 42, Estill County"). In relevant part, both letters provided:

[17] Incidentally, the record does contain a May 12, 2005 letter from Ledford to the Division discussing the claim of Jerry and Jesse Neal (two of the Lindseys' neighbors) to the Tyree mineral estate and representing to the Division that the Neals' claim was invalid. These neighbors also signed a lease with Shelby Oil and Gas relating to the Tyree mineral estate (which is also mentioned in Ledford's letter), but it is unknown what Shelby represented to the Neals to convince them that they held an ownership interest in the Tyree mineral estate. In any event, nothing in this record demonstrates that Shelby attempted to exercise any rights to the Tyree mineral estate under this or any other lease. Moreover, the record contains nothing indicating that the Division ever responded to Ledford's letter.

[18] Ines Lindsey testified that when she signed the surface agreement with the appellants, she believed that she and her family held no rights in the Tyree mineral estate. It is unknown what Shelby Oil and Gas represented to them in order to convince them otherwise.

[19] Ines Lindsey further testified that her family had owned the surface of the Tyree property "for a long time," and that she had lived there between 1945 and 1961 prior to moving to Tennessee.

> Dear Sir or Madam:
>
> The Department has reviewed your request to test the above-referenced wells as per KRS 353.730 and hereby finds the subject well to be abandoned by way of existing violations and bond forfeiture on the previous operator(s). Therefore, the Department approves your request to investigate this well for a period of sixty (60) days from the date of this letter.
>
> Prior to or at the end of this period, you are required to file with the Department a report of your investigation. Enclosed with this letter is the form to be used for your report.
>
> If you elect to keep this well in production, the well will be placed under your bond and you shall become the bonded operator responsible for plugging of the well.

Marvin Combs' use of the word "operator" in this letter raises a question about whether the Division actually did understand the word "lease," as Ledford had used it in his April 9, 2005 request letter, to mean the location of a mineral estate in which oil and gas rights lie (as Ledford, Parks, and Arthur testified they intended it to mean), rather than that Ledford, Parks, and Arthur had secured an agreement with the Tyree mineral estate owner conveying the right to explore for oil in that property (see again, their second definition). Nevertheless, by following what they testified they understood about the law, Ledford, Parks, and Arthur were indeed able to secure the Division's permission, per KRS 353.730, to investigate two abandoned wells on the T.W. Tyree mineral estate without securing the consent of the unknown mineral owner, his representative, or his court-appointed trustee.

Subsequently, Ledford, Parks, and Arthur informed the Division that they were electing to keep wells 41 and 42 on the T.W. Tyree mineral estate in production. On March 6, 2006, the Division sent PAL Oil two letters—one regarding well 41 and another regarding well 42—each providing in relevant part:

> Dear Sir
>
> As requested by you after testing, the above listed well has been transferred to you and placed under your Blanket Cash bond. The previous operator, TRINITY GROUP LLC, is hereby relieved of all plugging responsibility with respect to this well.
>
> Sincerely,
>
> James P. Gallagher
> Division of Oil and Gas Conservation

Ledford, Parks, and Arthur testified that they believed, thereafter, that PAL Oil had acquired the variety of "lease" in the T.W. Tyree mineral estate described by their third definition (*e.g.*, an "abandoned well interest"). But, Ledford, Parks, and Arthur had incorporated PAL Oil for the purpose of acquiring, packaging, and *selling* oil and gas interests. Thus, having "acquired" their "abandoned well interest" in wells 41 and 42 in the Tyree mineral estate, Ledford, Parks and Arthur then packaged it with approximately twenty leases they had already acquired in Southeastern Kentucky and proceeded to search for a buyer.

b. UAE buys what PAL Oil is selling.

Some evidence suggests that Ledford, Parks and Arthur created a marketing prospectus for PAL Oil stating that it had the "T.W. Tyree lease," and

that it was "for sale now." No evidence demonstrates that United American Energy, LLC (UAE), ever received this marketing prospectus or relied upon it.

Ledford also sent a letter to Ryan Klinghoffer (a corporate officer at Madison Capital Management, the parent company of UAE) on April 19, 2006, stating that PAL Oil had "spent weeks in the court houses proving [its] validation of [its] leases, and even [UAE's] attorney here in Lexington, has agreed that we could close on this deal as early as Friday, if you would let him draw up documents[.]" But, Klinghoffer never testified in this matter; no evidence demonstrates that he or any other officer at Madison Capital or UAE ever received this letter or relied upon it; and Brian Gordon, who ultimately authorized UAE's purchase of these leases from PAL Oil on April 28, 2006, testified that this transaction rapidly progressed simply due to "business purposes."

The record does demonstrate, however, that Ledford faxed UAE's attorney, Chris Van Bever, several documents, accompanied by a cover page bearing Arrowhead's letterhead, entitled "lease data" on or about April 13, 2006. Among these documents was a copy of the original oil and gas lease conveyed by Thorton William Tyree and Mary A. Tyree on January 17, 1915, referenced above. Ledford also faxed Van Bever additional documentation on April 18, 2006, along with a cover page bearing Arrowhead's letterhead, stating "Dear Chris, here is the T.W. Tyree information." Included with this later fax were: 1) an executed copy of the Lindseys' surface agreement; 2) the two above-referenced March 6, 2006 letters from the Division to PAL Oil; 3) a copy of an April 9, 2005 check for $50

from PAL Oil (signed by Ledford) to the Kentucky State Treasurer, stating on its memo line "Div. Oil & Gas, test 2 wells TW TYREE lease application"; 4) copies of the classified sections of two Estill County newspapers containing PAL Oil's advertisements relating to the T.W. Tyree mineral heirs; 5) copies of the Division's June 1, 2005 letters to PAL Oil; and 6) a copy of a one-page "division order" relating to the oil produced from "the T.W. Tyree Lease."

This division order, which is the last of the documents Ledford faxed to Van Bever on April 18, 2006, warrants further explanation because it would play a significant role in UAE's claim against the appellants for fraud—a claim based in part upon UAE's allegation that the appellants forged this division order in an effort to intentionally misrepresent that they held an actual mineral lease (see, again, the *second* of Ledford's, Parks', and Arthur's definitions for that phrase) in the T.W. Tyree mineral estate.

As an aside, a "division order" is

> [a] sales contract for the purchase of oil or gas, directing the purchaser to pay for the value of the products in the proportions set out in the contract. The purchaser usu[ally] asks the lessee to provide complete abstracts of title, which the purchaser uses to obtain a title examination and a title opinion. The purchaser then prepares the division order, usu[ally] requiring it to be executed by the operator, the royalty owners, and anyone else with an interest in production. Once the division order is executed and returned to the purchaser, payments begin for the products removed.

BLACK'S LAW DICTIONARY 494 (7th ed. 1999). The typical division order might, therefore, imply that the oil purchaser who issued it has agreed that an oil producer has a valid ownership interest in the oil being produced.

Here, the division order that Ledford transmitted to Van Bever provided that it had been issued by South Kentucky Purchasing Company (an oil purchasing company) to PAL Oil on March 27, 2006. "YOUR COPY" was stamped onto the upper right-hand corner. In relevant part below that, the order recites:

> We, the undersigned and each of us, hereby certify and warrant that we are the legal owners in the proportions set out below of all the oil produced from the T.W. TYREE Lease located in the County of Estill, State of Kentucky described as follows:[20]
>
> You are hereby authorized to receive all or any part of said oil for purchase on the terms hereinafter stated and, until further notice, to credit the purchase price thereof as follows:
>
> | CREDIT TO | DIVISION OF INTEREST |
> |---|---|
> | Unidentified Owners-Suspense | RI .125000 |
> | PAL Oil Company, Inc. | WI .875000 |
> | | 1.000000 |
>
> Well # 41-Permit N13458
> Well # 42-Permit N13457

[20] As it appears in this opinion, there is blank space under this section. "WI" and "RI", appearing further on in this division order, respectively stand for "Working Interest" and "Royalty Interest" which, in oil and gas industry parlance, equate to ownership interests in oil being produced. *See, e.g.*, BLACK'S LAW DICTIONARY, *supra*, at 1330 and 1600.

INDEMNIFICATION AGREEMENT

> The undersigned, PAL OIL COMPANY, INC., hereby agrees to indemnify South Kentucky Purchasing Company, Inc., its successors and assigns, against any and all claims or causes of action which may arise out of said payment. The undersigned agrees to pay upon demand all expenses (including but not limited to court costs and attorney fees) incurred by South Kentucky Purchasing Company, Inc., in the defense of any claim arising out of said payment.

Ledford later testified that PAL Oil did not execute this division order because PAL Oil never actually produced any oil from wells 41 or 42. As to whether South Kentucky Purchasing Company actually *issued* this division order (and therefore agreed that PAL Oil had a legitimate ownership interest in the oil produced from wells 41 and 42), the only evidence presented at trial in this regard came from Ledford's testimony.[21] He testified that he could not remember whether he drafted it or whether South Kentucky Purchasing issued it. Ledford further testified:

> Ledford: I had talked to [South Kentucky Purchasing] about this, about the well abandonment clause and how you could get wells into your name and that would be why you would have a well with permit numbers on here, is through the, in, South Kentucky Purchasing then would buy, uh, if any oil was produced, from these two wells and these two wells only. They could purchase it from them.
>
> UAE's Counsel: Okay, I'm showing you up on the big screen a copy of the fax which you sent to Chris Van

[21] No representative of South Kentucky Purchasing Company testified in this matter, and Parks and Arthur both testified that they had no personal knowledge of how this division order came to exist.

> Bever, which your attorney said was never issued,[22] but as I understand you're saying you may have drawn it up, South Kentucky Purchasing may have drawn it up, is that correct?
>
> Ledford: That's right. You need to read, like, down there that's, on the, most other division orders that you'll look down on, you won't find that indemnification clause. The reason I'm saying it's on here is because they're, they're buying from those two wells only, and they put an indemnification clause on there.
>
> . . .
>
> UAE's Counsel: So, what information did you provide South Kentucky Purchasing to issue you this division order?
>
> Ledford: The same thing I would've provided with the state.
>
> UAE's Counsel: For the two wells, two permitted wells?
>
> Ledford: That's correct.

In short, it is impossible to determine from the state of this record whether Ledford created this division order, or whether South Kentucky Purchasing believed in the veracity of the "abandoned well process" and actually issued it.

Ledford testified that he and the other appellants received their understanding about the "abandoned well process," at least initially, from their longstanding attorney, Jim Combs:

[22] In their brief, UAE points out that prior to the trial of this matter, the appellants' attorney stated in opening arguments that this division order was not actually issued by South Kentucky Purchasing Company and that Ledford had created it to simply demonstrate how the profits from oil produced from wells 41 and 42 would be divided. However, statements made by counsel in opening arguments are not evidence. *Wheeler v. Com*., 121 S.W.3d 173, 180 (Ky. 2003).

> Ledford: I asked Jim Combs, you know, how else can I go about this? I'd like to acquire, you know, some of these wells on [the Lindseys'] property. And Jim was the first one to send me the abandoned well clause[.]

At the trial of this matter, Combs testified that he is an attorney who has practiced in Kentucky since 1967, primarily in the field of mineral law. He testified that he was working for Ledford, Parks, and Arthur "on more or less a continual basis" from January to April of 2005, during the time of these events. He testified that he never offered Ledford, Parks, and Arthur any legal advice with respect to the procedures under Kentucky law for locating mineral estate owners or securing mineral leases on property owned by unknown mineral heirs. He also testified that he had no personal knowledge of the substance of any conversation Ledford, Parks, and Arthur may have had with the Division of Oil and Gas Conservation regarding the "abandoned well process."

Nevertheless, before UAE and PAL Oil entered into an agreement, the record in this matter reflects that Combs endorsed and fully adopted Ledford's, Parks', and Arthur's understanding about the "abandoned well process." Indeed, Combs testified that he represented it as the law of Kentucky to both Van Bever and Klinghoffer when he acted as the attorney for PAL Oil and the other appellants prior to and at the April 28, 2006 closing of this transaction:

> Counsel: Okay, now, do you recall there being discussions over whether PAL Oil had an actual written lease on what's called the Tyree lease?
>
> Combs: No, they didn't have it.

Counsel: Yes. Was that discussed with Chris Van Bever that they did not have a written lease contract?

Combs: Yes, yes.

Counsel: Tell me about those discussions.

Combs: When we, when we met with Chris Van Bever, the two wells on, on what's called the Tyree lease or the Tyree tract of land, there was only—there were only two wells that were involved. And what—what we explained to Mr. Van Bever was that all PAL Oil had was rights that had been given to them by the state pursuant to a statute which allows a person to go in and investigate an abandoned well. And on, and on the Tyree property, uh, what, uh, PAL Oil had done was gone to Frankfort and, and had been advised of what the procedure was, uh, to follow the statute to investigate a, uh, an abandoned well. The prior operator of, of the lease and the wells, the operator that had those wells bonded was a company called Trinity Group. And Trinity Group had, had, had simply walked away. And so pursuant to the statute and under the direction of the Division of Oil and Gas, PAL Oil went to, followed the statutory procedure of getting an agreement from the surface owner, that was the Lindseys, and getting, had to pay a $25 fee under the statute, too. And then they could go on the, they would, they would be given a permit which was for the purpose of investigating the wells to see if they could be productive. And when, when they did that, the, and reported back to the state about what they had found, they were given a permit and, and, and allowed to put these two wells under a, under a bond, a bond which was to pay for the plugging, if and when that finally would occur. So that's what, that what rights PAL Oil had. They did not have the lease. Mr. Ledford was not able to, to track the train of [sic], chain of title from, from the original T.W. Tyree lease down into whoever the owner might be today. He didn't, he couldn't figure that out. And so when we met with Mr. Van Bever, he was, that was explained to him, and then he contacted the state. I, I think the day before we closed, he e-mailed the state and, and had them check on these two wells to make sure

> that, that there was in fact permits issued to PAL Oil which PAL Oil could then transfer over to UAE when this transaction was consummated. And, and then, you know, he followed up on that the next week with some additional e-mails to the Division of Oil & Gas to, to make sure that that happened. And so when the, when the transaction was closed, the wells were transferred over to, those two wells were transferred over to UAE. And, I think UA put, UAE then would have put them under a bond and, and so they would have taken over the responsibility of, of, of those wells by that decision.
>
> . . .
>
> What I just told you about the procedure was explained to Chris Van Bever and to Ryan Klinghoffer who I think was there in the room with us at least part of the time. And then sometimes it may have been over the phone. I'm not sure. There was a phone conference at one time. We went over that several times. Of course, [Van Bever] was making his investigation, like I explained to you, with the state to see if, if PAL Oil did in fact have just these two wells. So he was doing that, I guess, as part of his due diligence requirements.

Furthermore, Combs testified that PAL Oil's "abandoned well" rights included the right to sell any oil it produced in the course of its investigation and keep an 87.5% working interest in the proceeds, stating that "They have to sell the oil they produced when they, uh, investigate the well. They can't just… You have to do something with it. You can't just leave it in the tank."

Likewise, Ledford, Parks, and Arthur testified that the substance of the "abandoned well process," as summarized above, was squarely presented to Van Bever and Klinghoffer several times prior to and at the April 28, 2006 closing. Their testimony is not contradicted by any other testimony of record because

Klinghoffer did not testify at all, and Van Bever could not recall the substance of any specific conversations he had with any of the appellants at or about that time.

The failure to call Klinghoffer as a witness is highly relevant in this matter for a number of reasons. Whether Klinghoffer understood the appellants' "abandoned well process" theory the way the appellants intended is debatable. The record contains an April 25, 2006 investment proposal generated by Klinghoffer and submitted to UAE's parent company, Madison Capital, which listed the T.W. Tyree lease as one of the approximately 20 leases that the appellants were offering for sale in this transaction. Brian Gordon, the officer of UAE who authorized UAE to purchase the leases from the appellants and executed this agreement on UAE's behalf, testified at the trial of this matter that Klinghoffer's investment proposal was the only document he relied upon or reviewed in deciding whether UAE should consummate this transaction. Gordon testified to having no knowledge of how or why Klinghoffer concluded that the Tyree lease was to be a part of this transaction. Moreover, the record in this matter does not disclose whether Klinghoffer reviewed any of the materials contained in Ledford's April 13 or 18, 2006 faxes to Van Bever, *i.e.*, the division order, the copy of the original Tyree lease, *etc*.

As to Van Bever, he was tasked not only with representing UAE's interests in this transaction, but also with drafting the agreement for the purchase and sale of assets ("2006 APA") between UAE and the appellants. He testified that he was ultimately responsible for memorializing what assets were to be

included in this transaction. Schedule 2.1(d) of the 2006 APA provides that UAE would purchase personal property from PAL Oil located on the "T.W. Tyree Lease," including "4 pump units," "650 feet tubing," "640 feet rods," "2 100 bbl tanks," and "1 separator" from PAL Oil. Schedule 2.1(b) of the 2006 APA provides that PAL Oil would transfer its two permits to "Tyree Well[s]" 41 and 42 to UAE. But, Schedule 2.1(a), entitled "Leases to be Assigned by PAL Oil Company, LLC," *omits any reference to any assignment of a T.W. Tyree lease*. At the trial of this matter, the appellants questioned Van Bever about his omission:

> Counsel: This was the schedule that was attached to the PAL Oil '06 agreement. So if there was a Tyree lease that they had, that they were selling to your client, this would've been the place the lease would've shown up properly, correct?
>
> Van Bever: It would be the place it would've shown up.
>
> Counsel: Okay. And I asked you in your deposition if you had come to realize you had made a mistake in this asset purchase agreement when you were preparing for your deposition, and your answer was no, you did not think you had made a mistake.
>
> Van Bever: Right.
>
> Counsel: You still think that?
>
> Van Bever: I think that, um, I did make a mistake, that it appears to me that there's enough documentation out here now to lead someone to the conclusion that it may have just been omitted.
>
> Counsel: Well, you never saw a written Tyree lease with PAL Oil?
>
> Van Bever: No.

Counsel: And they never told you they had one, did they?

Van Bever: I don't recall.

The appellants' counsel also questioned Van Bever about KRS 353.730 and the "abandoned well process":

Counsel: You're familiar with that process of taking over abandoned wells?

Van Bever: Yes.

Counsel: And that statute [KRS 353.730] does allow any person to apply to, uh, test an abandoned well?

Van Bever: It does say "any person."

Counsel: Yes. *It doesn't restrict itself to anyone holding a leasehold interest, does it?*

Van Bever: *There's no restriction. Any person*.

Counsel: And it does say further that if you intend to produce the well, you have to place a bond for the well, correct?

Van Bever: Yes.

Counsel: Did you come to any conclusions that these methods for obtaining these two well permits by PAL Oil in wells 41 and 42 on the Tyree mineral estate was inappropriate in any way?

Van Bever: Could you restate the question?

Counsel: Yeah, sure. Did you come to the conclusion that the method that PAL Oil had used in getting the permits on wells 41 and 42 through the use of this statute was done inappropriately in any way?

Van Bever: I don't recall I came to that conclusion.

> Counsel: Ms. Deana Wilmoth told you they do own those two wells, didn't she? Per the state?
>
> Van Bever: According to the email, yes.
>
> (Emphasis added.)

Regarding the reference to Deana Wilmoth, she is with the Division of Oil and Gas Conservation. She wrote the letter to PAL Oil on May 4, 2005, regarding PAL Oil's request to test wells 41 and 42 on the Tyree mineral estate. As Combs and Van Bever both testified, Wilmoth also corresponded with Van Bever via email on April 27, 2006 regarding the "ownership" of these two wells. In relevant part, Van Bever wrote:

> Ms. Wilmoth, thank you for looking into this. Given what you found, is it certain that PAL Oil does own the wells associated with Permit N13458 (Tyree Well 41) and Permit N13457 (Tyree Well 42) although they didn't show up on the listing?
>
> In response, Wilmoth wrote: "Yes, they do own those."

Thus, Van Bever testified that he had no recollection of the appellants and their attorney explaining "the abandoned well process" to him prior to the closing of this transaction. He further testified that he had made a mistake in omitting an assignment of a Tyree leasehold interest from the 2006 APA because it appeared to him, four years after he drafted the 2006 APA and allowed UAE to execute it, "that there's enough documentation out here *now* to lead *someone* to the conclusion that it may have just been omitted." (Emphasis added.)

But*, nothing demonstrates Van Bever understood that the appellants were offering to sell UAE a mineral lease from the owner of the Tyree mineral estate, rather than their purported "abandoned well interest."* Van Bever previously testified that he made no mistake in omitting the Tyree lease from the 2006 APA. He did not remember the appellants telling him they had a lease agreement respecting the Tyree mineral estate and had no memory of ever seeing such a lease. He agreed with the appellants' incorrect interpretation of KRS 353.730 and their "abandoned well process" theory when questioned at trial. Van Bever drafted the 2006 APA to omit any reference to a Tyree leasehold interest being assigned in that transaction. He drafted the 2006 APA to only include wells 41 and 42 on the Tyree mineral estate and personal property associated with those wells. Furthermore, he allowed UAE to execute the 2006 APA one day after a representative of the Division of Oil and Gas Conservation told him in an email that PAL Oil "own[ed]" wells 41 and 42 on the Tyree mineral estate.

c. The Lindseys, their attorney, and Chesapeake Appalachia all claim interests in the Tyree mineral estate.

The 2006 APA that PAL Oil executed required PAL Oil to inform UAE of any known claims of third parties affecting any interest PAL Oil was conveying to UAE; it was also personally guaranteed by Ledford and Arthur (but not Parks). The record does not demonstrate that Combs or any of the appellants ever informed UAE of the May 13, 2005 Lindsey-Shelby lease, mentioned previously. For their part, Combs, Parks, and Ledford each testified that they

believed the Lindsey-Shelby lease was invalid and that the two wells the Commonwealth had "given" to PAL Oil through the "abandoned well process" constituted an ownership interest in the Tyree mineral estate that was entirely distinct from a mineral lease given by the owner of a mineral estate. As Parks would summarize in his own testimony,

> Parks: We, we, we were only talking about two wells. We was, we were never talking about a lease. We're not talking a lease. We're talking two wells.
>
> Counsel: As I understand your testimony before, though, that you had a full 87.5% working interest—
>
> Parks: In those two wells. In those two wells.

In any event, because UAE did not have experience in the oil and gas industry, it entered into an agreement with Arrowhead (Ledford's and Arthur's company). Under this agreement, Arrowhead would operate and manage the oil assets UAE had purchased from the appellants in exchange for $4,000 per week. This agreement remained in effect from April, 2006, to June, 2007.

On or about August 18, 2006, Parks received a letter from an attorney in Estill County named Michael Dean:

> Dear Mr. Parks:
>
> Please be advised that I represent Roy Lindsey. According to Mr. Lindsey, you claim to hold a gas lease on his property. However, the document he showed me, which you claim to be a lease, does not give you any rights in the property.[23]

[23] The "document" Dean's letter refers to is the April 4, 2005 PAL Oil-Lindsey surface agreement.

> If you do have a lease or other documentation giving you rights in this property, I would appreciate you providing me with a copy. In the meantime, you are notified to stay off the property and refrain from claiming any interest in it until this matter is resolved. Thank you for your cooperation in this matter.

(Emphasis added.)

Parks testified that he probably had a conversation about this letter with Ledford.[24] Parks also forwarded Dean's letter to Combs and asked Combs to handle it.

On August 23, 2006, Combs telephoned Dean. At the trial of this matter, Combs recited and reaffirmed his notes of the conversation he had with Dean. In relevant part, Combs' notes state:

> I told [Michael Dean]:
>
> a) Montie Parks Letter refered [sic] to me
>
> b) PAL Oil acquired the ~~right to~~ Tyree lease with its abandoned wells by a process given to them by the Division of Oil & Gas.
> Tyree made original lease.
> Tyree's successors could not be found after putting ads in newspapers and otherwise trying to locate/identify them without success.
> Division of Oil & Gas allowed PAL to bond the wells so PAL could clean them out, produce oil & sell it and take over the obligations to plug them—thus relieving the D of O & G from plugging expense.
> PAL went to Roy Lindsey and acquired written permission to go ~~no~~ on the Tyree lease.

[24] The record does not disclose whether Arthur knew anything about Dean's letter, but Arthur has a third-grade-level education and is illiterate. As Arthur, Parks, and Ledford testified, he was mostly engaged in the operational aspects of oil exploration and unfamiliar with the business side of either PAL Oil or Arrowhead.

> If and when oil is produced & sold the refinery will escrow 1/8 for Tyree or his successors.
>
> c) Questions:
> Is Lindsey the owner of the O & G or just the surface.
> Provide chain of title to O & G. Then Lindsey get [sic] the 1/8 royalty.

Combs' notes also contain the following statement: "Not discussed: Is he revoking his written authority?" According to Combs' recollection of their telephone conversation, Dean stated that he had been unaware, prior to writing his letter to Parks, that the Lindseys had executed the April 4, 2005 surface agreement. The record also does not demonstrate that the Lindseys made any further effort to assert the invalidity of the surface agreement until approximately September, 2007.

On its own motion, the trial court asked Combs why he, rather than UAE, had communicated with Dean:

> The Court: Okay, but why did you get stuck with it? Because isn't this a problem that UAE should have been dealing with?
>
> Combs: Yes, I told, uh, Mike Dean that, that, uh, UAE, uh, was the one out there doing whatever it was because of the assignments that had been made to UAE. It didn't have anything to do with PAL Oil anymore.

Combs further testified:

> I also told [Dean], now, if your people, the Lindseys, claim to own the oil and gas on this property, then provide us with some starting point so we can establish a chain of title to, to, uh, verify that, and then we would lease it from them and, you know, they'd get a royalty like anybody else. Um, after this telephone conversation I never heard back from Michael Dean.

UAE was never informed of Dean's letter or his conversation with Combs. For his part, Combs testified that he just assumed Dean would have contacted UAE on his own after speaking with him over the telephone.

Contrary to what Combs assumed, however, Dean did not contact UAE; at least, not immediately. Instead, on November 6, 2006, Dean organized and became the managing member of "Big Sinking Energy, LLC," an entity that, like PAL Oil, was in the business of acquiring oil and gas leases.[25] And, on November 30, 2006, the Lindseys (Dean's clients) executed a document (drafted by Dean) purporting to grant Big Sinking Energy (Dean's company) the exclusive right to explore for oil on the Tyree mineral estate, *see, e.g.*, the second of the appellants' above definitions of "lease".[26]

Ledford, Parks, and Combs became apprised of the Big Sinking-Lindsey lease sometime in either December of 2006 or January of 2007. Ledford testified that he sent a copy of this lease along with a letter to Van Bever and UAE's general manager in the area, Nick Reel,[27] on or about January 20, 2007. A letter bearing a date of January 20, 2007, from Ledford to Combs (and copied to

[25] Dean would, hereafter, assume a number of roles in this matter aside from being the Lindseys' attorney and managing member of Big Sinking Energy, LLC. Dean was also called to testify as a witness in this matter (discussed further below), and UAE represents in its brief that Dean is currently acting as the attorney for Arthur's wife in the collections phase of this litigation.

[26] At this point, it is unknown whether Shelby Oil and Gas and the Lindseys believed that their May 13, 2005 oil and gas lease relating to the Tyree mineral estate was valid. The record also does not demonstrate whether Big Sinking Energy made any attempts to explore for oil on the Tyree mineral estate.

[27] Reel was employed by UAE in this capacity from December, 2006, until about December, 2007.

Van Bever and Reel) was also entered into evidence in this matter.[28] In relevant part, it provides:

> Ref: T.W. Tyree Lease
>
> Dear Jim,
>
> It never surprises me at what local attorneys will do. That is why I have advised UAE, LLC, never to use local attys. Mr. Dean knows this lease is no good,[29] yet he takes a lease on this property. It can only mean bad news down the road. I felt it important to let you and Mr. Van Bever, of UAE know about this.

This letter reflects that Ledford attempted to inform UAE about the Lindseys' claim of right to the Tyree mineral estate; it reflects Ledford's belief that the Lindseys' claim was invalid; and, it reflects his belief that the Lindseys' claim could "mean bad news."[30] It does not reference the Lindseys' prior cease-and-desist letter of August 18, 2006.

It is also unknown what Ledford meant when he used the phrase "bad news" in his January 20, 2007 letter, given that he and the other appellants testified that they believed their "abandoned well interest" they had "assigned" to UAE

[28] At trial, UAE did not object to admitting this letter into evidence or contest Ledford's testimony that he had sent this letter and the Big Sinking-Lindsey lease to Van Bever and Reel at this time.

[29] Ledford believed that the Big Sinking-Lindsey lease was "no good" for the same reason that he believed the "Shelby-Lindsey" lease was invalid, *i.e.*, he believed that the Lindseys were merely surface owners.

[30] Van Bever offered no testimony relating to this letter. As to whether it might have led Nick Reel to believe that PAL Oil had conveyed a mineral lease to UAE as part of the 2006 APA rather than an "abandoned well interest," Reel would later testify that Ledford had explained the "abandoned well process" to him in December, 2006, and that Ledford had always maintained that PAL Oil had only transferred two wells on the Tyree mineral estate to UAE, rather than a lease.

simply had nothing to do with any kind of mineral lease. However, in either December of 2006 or January of 2007, Ledford discovered Chesapeake Appalachia, LLC, an Oklahoma limited liability company, which purported to own either the Tyree mineral estate itself or an oil and gas lease relating to that property. Ledford also contacted its representative, Dan Striper. Among the several faxes and letters Ledford sent to Striper around this time (using Arrowhead letterhead) is a January 31, 2007 letter Ledford mailed to "Chesapeake Energy[31] c/o Mr. Striper." In relevant part, it states:

> Ref: Mineral interests on 4 leases in Estill County, Ky
>
> Dear Mr. Striper,
>
> I am sending bill of sale for the leases that we discussed on the phone. I have decided that I would be interested in all four lease mineral interests and not just the T.W. Tyree Lease.

At the trial of this matter, Ledford was asked about this letter. In part, he testified:

> Counsel: What were you trying to buy from them?
>
> Ledford: Either, if they would sell the minerals, I would like to have bought the minerals to any leases they had in Estill County. If not, I would like to at least get leases from them, from, uh, that I could put together and put in packages and sell to UAE.

[31] In a deposition, Ledford testified that he was unaware of any entity named "Chesapeake Appalachia" until December, 2007. Ledford's letters and faxes to Striper clearly demonstrate that he was corresponding with Chesapeake as early as December of 2006. However, Ledford's letters and faxes to Chesapeake, which refer to Chesapeake by name, refer to it as "Chesapeake *Energy*," rather than "Chesapeake Appalachia." At the trial of this matter, Ledford would testify that he always knew this entity and referred to it as "Chesapeake Energy," and that he did not understand until after the deposition that the two were one and the same.

> Counsel: Okay. Now at this point, you, uh, had you come to the determination that you think Chesapeake Energy owns the mineral estate on T.W. Tyree?
>
> Ledford: Oh, Mr. Striper said he thought they did, but I didn't have, you know, that's part of the information I wanted him to send and let me know if they had it or not.

Ledford further testified that he would have sold the mineral estate to UAE if he had purchased it from Chesapeake. If Chesapeake only held a mineral lease in the property, Ledford testified that he would have purchased an assignment of the lease and reassigned it to UAE "for free" because:

> Ledford: Well one, I would have, they had purchased those two wells from us. I wanted to sell more package leases to them. So to have tried to hold them up and make them pay for it would have shot me in the foot from trying to sell them anything else. And I would have done that out of normal courtesy. It's like I said, I signed this other thing,[32] didn't ask for any money.

The appellants did not purchase anything relating to the Tyree mineral estate from Chesapeake, although the record in this matter does not explain why. The appellants also did not inform UAE that they had contacted Chesapeake, or that they had attempted to locate the party holding rights to the Tyree mineral estate, or that Chesapeake claimed to hold rights in the Tyree mineral estate. And, as Ledford's testimony indicates, he and the appellants were in the process of brokering a second deal with UAE for the purchase of additional leases around this time.

[32] "This other thing" described by Ledford is the September 27, 2007 amended assignment to the 2006 APA, discussed more fully below.

On February 27, 2007, PAL Oil and Arrowhead entered into a second asset purchase agreement whereby UAE paid the appellants an additional $1,715,000 (the "2007 APA"). As before, Combs represented the appellants in this transaction and at its closing. Afterward, the appellants continued to produce the oil and gas leases for UAE under their master service agreement, but their business relationship concluded in June, 2007, after UAE declined to buy a third package of leases from the appellants.

During the term of their master service agreement with UAE, the appellants never produced oil from anywhere on the Tyree mineral estate, let alone from wells 41 and 42. It was not until after the master service agreement ended that UAE began operations in that location. And, when UAE did begin its operations there, it started to rework oil wells, build roads, and prepare the *entire* Tyree mineral estate for oil production. Indeed, of the several UAE and Madison Capital employees and attorneys who would later become witnesses in this matter, all of them—except for Nick Reel and Chris Van Bever—would testify that UAE, at that time, believed that it had acquired a lease from the appellants with respect to the *entire* Tyree mineral estate.[33] The record does not reflect, however, that their belief was based upon any representation made directly from the appellants.

[33] Other UAE employees and attorneys who would testify in this matter included Brian Gordon (mentioned previously); James Ashcraft and Sharma Daniels (two UAE title abstractors); Roopesh Aggarwal (a Vice President of Madison Capital); Bobby Short (a Vice President of UAE); and John Rhorer (an attorney for UAE and a member of the same law firm as Van Bever). Incidentally, nothing in the record demonstrates that these individuals were exposed to the appellants' explanation of the "abandoned well process."

Shortly after UAE began its activities on the Tyree mineral estate, a few of its employees were confronted by Roy Lindsey, who told them that PAL Oil had not sold UAE a valid lease. Michael Dean followed up Roy Lindsey's confrontation by composing a letter to UAE, in care of Nick Reel, on behalf of both the Lindseys (his clients) and Big Sinking Energy (his company). His letter, dated September 20, 2007, provides:

> Dear Mr. Reel,
>
> It has come to my attention that your company is trespassing on land owned by Roy and Ines Lindsey and upon an oil lease owned by Big Sinking Energy, LLC. We have been advised that your company is reworking old wells with plans to begin producing oil from the property. Please be advised that these activities constitute a trespass on the Lindsey and Big Sinking property and should cease immediately. While the owners may be willing to negotiate a lease/sublease with your company, you should contact me immediately to discuss same. If I do not hear from you within ten days, we will prepare to file suit against your company.

John Rhorer, UAE's subsequent attorney,[34] apparently received Dean's letter on September 20, 2007. Rhorer then composed and faxed his own letter to Jim Combs that same day. In relevant part, Rhorer's letter to Combs provides:

> Re: T.W. Tyree Lease
> PAL Oil Co., LLC Sale to United American Energy, LLC.
>
> Dear Jim:

[34] Rhorer and Van Bever were both partners at the same law firm.

> It has come to our attention that in the Agreement for Purchase and Sale of Assets dated April 28, 2006 between PAL Oil Co., LLC ("PAL Oil") and United American Energy, LLC ("UAE"), a Lease that was intended to be transferred from PAL Oil to UAE was not, in fact, included in the Schedule to the Purchase Agreement or the Assignment and Assumption of Leases.
>
> I am referring to the T.W. Tyree Lease, dated January 17, 1915. The reason we believe that the Tyree Lease was to have been transferred is that in the Bill of Sale, several pieces of personal property located on the Tyree Leasehold were sold. Further, PAL Oil and UAE filed a Well Transfer Agreement with the Division of Oil and Gas in Frankfort in which Well Nos. 41 and 42 located on the Tyree Leasehold were transferred to UAE.
>
> We believe it was the intent of the parties to include the Tyree Lease in the sale and, pursuant to Section 2.2 of the Purchase Agreement, UAE is requesting that PAL Oil execute the attached Amended Assignment and Assumption of Leases in order to effectuate the transfer of the Tyree Lease to UAE.
>
> The "Amended Assignment and Assumption of Leases," which

Rhorer faxed along with his letter to Combs, provided in relevant part:

> This Amended Assignment and Assumption of Leases, Permits, Division Orders and Associated Contracts and Agreements (the "Amendment") is entered into this _____ day of September, 2007.
>
> WHEREAS, pursuant to an Agreement for Purchase and Sale of Assets, dated as of April 28, 2006 (the "Purchase Agreement"), PAL Oil Co., LLC, a Kentucky limited liability company (the "Assignor"), did agree to transfer, assign, convey and grant to United American Energy, LLC, a Delaware limited liability company (the "Assignee"), certain Leases and related licenses and permits; and

WHEREAS, to effectuate said assignment, Assignor and Assignee did enter into an Assignment and Assumption of Leases, Permits, Division Orders and Associated Contracts and Agreements (the "Assignment"), which Assignment was recorded in the records of the Estill County Clerk's Office at Lease Book 13, Page 387; and

WHEREAS, it was the intention of the Assignor and Assignee pursuant to the Purchase Agreement to assign a Lease known as the Tyree Lease, originally entered into on January 17, 1915 by and between Thornton (T.W.) Tyree and Mary Alice Tyree, as Lessors and George B. Williams and C.R. Dulin, as lessees and recorded in the records of the Estill County Clerk's Office at Deed Book 33, Page 252, together with all rights and other instruments related thereto, including, without limitation, a letter agreement dated April 4, 2005 between Roy Lindsey and Assignee (collectively the "Tyree Lease") but said Tyree Lease was inadvertently omitted from the schedule of leases which were assigned by Assignor to Assignee; and

WHEREAS, Assignor and Assignee desire to amend the Assignment so as to include the Tyree Lease as one of the Leases assigned thereby; and

WHEREFORE, for the original consideration set forth in the Purchase Agreement and in order to carry out and effectuate the intent of Assignor and Assignee, Assignor and Assignee do hereby agree to amend the Assignment (and to the extent necessary, the Purchase Agreement), so as to add and include the Tyree Lease as one of the Assigned Leases (as defined in the Assignment), and Assignor does hereby assign unto Assignee all of Assignor's right, title and interest in and to the Tyree Lease, subject to each of the terms and conditions of the Purchase Agreement and the Assignment Agreement.

IN WITNESS WHEREOF, the Assignor and Assignee have executed this Amended Assignment and Assumption of Leases, Permits, Division Orders and Associated Contracts and Agreements as of the date and year first above written.

ASSIGNOR:

By: _____

Its: _____

Combs testified that he never spoke with Rhorer about this amended assignment or advised Ledford about it. Instead, he "just put it on the fax machine and sent it on to [Ledford] because [Ledford] was the one that had to deal with it ultimately." When Combs faxed Rhorer's amended assignment to Ledford, Combs simply wrote on the cover page of his transmission, "Do you agree with this?"

Somewhat to the contrary, however, Ledford testified that Combs had actually called him and that they had spoken about the amended assignment prior to when Ledford ultimately executed it. Parks testified that he and Ledford had Combs "look it over." Ledford further testified:

> Ledford: Well, at the time when this was sent out, I, you know, Jim Combs called me and told me about it and, uh, the first thing I did was just drive up there. I hadn't been up to where the T.W. Tyree had been, oh, I don't know, for well over a year, and uh, when I got up there, quite frankly I was shocked, uh, from what I had seen, what UAE had done on the Lindseys' surface.
>
> Counsel: What had they done?
>
> Ledford: They, it virtually looked like a golf course. They had gone through it and, trees, roads, everything, they just cleared it. Uh, and I thought, you know, this, this isn't good. And, so I wanted to, I realized at that point, and I had talked to Jim about it, we need to get that surface agreement into that original transaction so that,

> you know, I wouldn't be held liable for what was going on up there.[35]
>
> Counsel: Are you talking about a conversation going on after John Rhorer sent you the fax?
>
> Ledford: Yeah, after the fax, before I had signed it. . . . I had assumed that they had had more wells bonded at that time and gone through the same process I had gone through. So, the way I saw it, they wanted to call it a lease, that was fine with me, and I would give them what I felt was like a quitclaim.
>
> Counsel: Was it your intention to assign and have them assume the obligations of the surface agreement with the Lindseys?
>
> Ledford: Yes.

Parks testified to similar effect. When Ledford executed the amended assignment in his capacity as PAL Oil's president on September 26, 2007, he faxed it to Rhorer with a cover page bearing the following handwritten statement:

> Dear Mr. Rhorer,
>
> *Mr. Combs* wanted me to fax what I had signed in regard to Tyree Lease. I hope this helps. You should have original by tomorrow.

(Emphasis added.)

At trial, Ledford testified that he did not understand the amended assignment was asking him to represent that PAL Oil had assigned UAE an oil and gas lease from the owner of the Tyree mineral estate. Ledford testified that he thought the purpose of the amended assignment was to assign UAE PAL Oil's

[35] The PAL Oil-Lindsey surface agreement had been inadvertently omitted from the 2006 PAL Oil-UAE APA.

surface agreement with the Lindseys, which had been inadvertently omitted from the 2006 APA. Ledford testified that he thought the amended assignment was using the word "lease" to mean that PAL Oil was "quitclaiming" any other part of its abandoned well interest to UAE that it had mistakenly omitted from the 2006 APA. However, Ledford also testified that he executed the amended assignment and faxed it back to Rhorer without asking Rhorer for an explanation.

Upon receiving Ledford's executed amended assignment, Rhorer included it with a letter he composed to Dean and the Lindseys on September 27, 2007:

> Re: Tyree Lease
>
> Dear Mr. Dean:
>
> I represent United American Energy, LLC ("UAE") and have been asked to respond to your September 20, 2007 letter to Mr. Charles Reel.
>
> UAE is the assignee of PAL Oil Co., LLC ("PAL Oil") of the T.W. Tyree Lease ("Tyree Lease") pursuant to an assignment dated April 28, 2006 as amended by an amended assignment dated as of the same date.[36]
>
> In the same transaction in which the Tryee [sic] Lease was assigned by PAL Oil to UAE, UAE acquired items of personalty relating to the Tyree Lease, including pump units, tubing and tanks, which personalty was located on the Tyree Lease leasehold. In addition to the Tyree Lease and the aforementioned personalty, PAL Oil also transferred well numbers 41 and 42 located on the Tyree

[36] The first page of the amended assignment Ledford executed and faxed to Rhorer bears a date of "_____ day of September, 2007." Its second page, which bears a notary seal, recites that Ledford executed it on September 25, 2007. Upon receiving this document, Rhorer crossed out "_____ day of September, 2007" on the first page and wrote in "28th day of April, 2006." However, Rhorer did not change the date on the second page.

> Lease leasehold, and a Well Transfer Agreement was recorded with the Commonwealth of Kentucky, Department for Natural Resources, Division of Oil and Gas Conservation (the "Commonwealth"). The Commonwealth now recognizes UAE as the owner and operator of the wells located on the Tyree Leasehold, and accordingly, these wells are now permitted under UAE's cash bond.
>
> In addition to the foregoing, Mr. Roy Lindsey and PAL Oil executed a letter agreement dated April 4, 2005 in which Mr. Lindsey acknowledged PAL Oil's rights under the Tyree Lease and granted PAL Oil, and its assigns, specific rights to enter upon the surface of the Tyree Lease leasehold and develop and operate the oil and gas wells thereon. This letter agreement between Mr. Lindsey and PAL Oil was also assigned by PAL Oil to UAE as part of the assignment of the Tyree Lease.
>
> In accordance with the foregoing transactions and documents, UAE has a valid right to operate oil and gas wells under the Tyree Lease and has the right to enter upon the surface of said leasehold to conduct its operations, which rights it has been openly exercising for several months. Clearly, UAE is not a trespasser on Mr. Lindsey's property but, in fact, has every contractual and legal right to be on that property and operate its wells and produce oil therefrom.
>
> In accordance with its rights, UAE intends to continue its operations on the property and will defend itself against anyone who attempts to interefere with these rights.

About the same time of this letter from Rhorer on behalf of UAE to Dean, UAE was also seeking an expedited title opinion to verify its ownership of a leasehold interest in the Tyree mineral estate. And, on October 12, 2007, UAE received a title opinion from attorney William Kendrick concluding that

Chesapeake Appalachia—rather than PAL Oil or UAE—was the current assignee of the original January 17, 1915 Tyree mineral lease.

d. The *Lindsey* litigation

Shortly after receiving Kendrick's title opinion, UAE contacted Chesapeake Appalachia and explained that it had believed that it had purchased an assignment of the January 17, 1915 Tyree oil and gas lease from PAL Oil. UAE also explained that it had begun producing oil from that property. After some negotiation, UAE secured an assignment of the Tyree lease from Chesapeake, but only after agreeing to pay Chesapeake a royalty interest of 3/16ths, rather than the standard 1/8th.

Over the course of its negotiations with Chesapeake, UAE filed the instant matter against PAL Oil and Arrowhead on December 27, 2007, in Fayette Circuit Court. On or about February 25, 2008, the Lindseys (represented by Dean) filed suit against UAE and PAL Oil in Estill Circuit Court to rescind the PAL Oil-Lindsey surface agreement, ask for a declaration of rights with respect to the Tyree mineral estate, and allege that PAL Oil's and UAE's activities relating to the Tyree mineral estate constituted fraud, slander of title, trespass, and conversion, and warranted punitive damages. Chesapeake also asserted an interest in the Tyree mineral estate and intervened in the Lindseys' declaratory action. Hereafter, we will refer to the Estill Circuit Court action as "the *Lindsey* litigation."[37]

[37] *Roy Lindsey, Ines Lindsey, Sadie Watkins, Charles W. Johnson and Lu Ann Johnson v. United American Energy, LLC, PAL Oil Co., LLC and Chesapeake Appalachia, LLC*, Case No. 07-CI-0035.

Incidentally, one of the defenses asserted by PAL Oil (represented by Combs) in the *Lindsey* litigation was:

> 9) PAL Oil Company, LLC assigned all of its rights in the Thornton William (T.W.) Tyree lease No. 0650068 on April 28, 2006, which was supplemented by amended assignment dated September ____, 2007. ***These assignments included the T.W. Tyree lease recorded in Deed Book 33, Page 252, Estill County*** and the letter agreement dated April 4, 2005 which is Exhibit "1) attached hereto. PAL Oil Company, LLC did not enter upon the property of the Plaintiffs for any purpose after April 28, 2006 the date of the assignment to United American Energy, LLC and therefore committed no trespass on the Plaintiffs' property.

(Emphasis added.)

The "T.W. Tyree lease recorded in Deed Book 33, Page 252, Estill County," is, as this Court has repeatedly observed, the original January 17, 1915 oil and gas lease between Thornton (T.W.) Tyree and Mary Alice Tyree, as Lessors and George B. Williams and C.R. Dulin. In other words, *PAL Oil defended against the Lindseys' claims by representing to the Estill Circuit Court that it had assigned UAE an oil and gas lease granted by the owners of the Tyree mineral estate*. When Combs was questioned about his choice to add this defense to PAL Oil's answer, he testified that he probably should have amended that defense to reflect that PAL Oil had utilized the "abandoned well process" to transfer ownership of wells 41 and 42 to UAE. But, he acknowledged that he never amended the answer.

In any event, the Estill Circuit Court held that the Lindseys, rather than Chesapeake, were the lawful owners of the Tyree mineral estate. This ruling was never appealed because UAE instead chose to settle with the Lindseys and Chesapeake. The relevant terms of their settlement, which the Lindseys, UAE, and Chesapeake entered in August, 2009, provided:[38]

> B. Immediately upon execution of this Agreement, the Agreed Order of Dismissal, the Mineral Deed, the Surface Use Agreement and the Memorandum of Surface Use Agreement, payment shall be made to the Plaintiffs and their counsel Michael Dean in the amount of Two Hundred and Forty-Eight Thousand, Five Hundred Dollars ($248,500.00), to be divided among them at their sole discretion and to be held in trust by Michael Dean until such time as the Agreed Order of Dismissal is entered and the funds are released from the Escrow Account.
>
> C. Simultaneously therewith, the Plaintiffs will quitclaim to Chesapeake all of their right, title and interest in and to all of the minerals in, on and under the Premises on the terms and conditions set forth in the Mineral Deed attached hereto as Exhibit C and made a part hereof by reference.
>
> D. Simultaneously therewith, the Plaintiffs will lease the surface of the Premises to UAE for the purpose of conducting its oil and gas operations on and in the vicinity of the Premises on the terms and conditions set forth in the Surface Use Agreement, attached hereto as Exhibit D and made a part hereof by reference, along with the Memorandum of Surface Use Agreement, attached hereto as Exhibit E and made a part hereof by reference, which shall be recorded in Estill County Clerk.
>
> E. UAE, and/or its assigns under the Chesapeake Lease, will pay the Plaintiffs an overriding royalty in the amount

[38] UAE entered this settlement agreement into evidence. No party argues that it precludes any of the claims UAE asserted against PAL Oil in this matter.

of one thirty-second (1/32) on the production and sale of any oil or constituents thereof produced from the Premises after the Effective Date, said payment to be divided among Plaintiffs at their request and made as follow:

> One forty eighth (1/48) to Roy and Ines Lindsey, one one hundred and ninety second (1/192) to Charles & LuAnn Johnson, and one one hundred and ninety second (1/192) to Sadie Watkins, on or before the 25th day of the second month following the month in which any such oil was produced and sold.

F. The Plaintiffs understand and agree that the Two Hundred and Forty-Eight Thousand, Five Hundred Dollars ($248,500.00) lump sum payment and the one thirty-second (1/32) overriding royalty provided for in paragraphs B and E above, are all the compensation they will ever receive for any injuries or damages related to any claim that was made by them, or that could have been made by them, in the Action. The Plaintiffs and their respective successors and assigns, permanently and irrevocably waive, and agree that they are barred from making any future claims of any kind against Chesapeake, UAE or either of their lessees, successors or assigns arising from or related to any claim of title, trespass or otherwise relating in any way to the claims that they made or could have made in the Action.

For its part, PAL Oil entered into the following agreement with the Lindseys:

> Lindseys and PAL Oil agree to entry of an agreed order of summary judgment in favor of PAL Oil on plaintiffs' fraud claims if the Court does not grant summary judgment. The parties will wait until July 10, 2009 to submit the Agreed order allowing Court time to decide the issue on it's [sic] own. PAL Oil will consent to the settlement between UAE, Chesapeake, and Lindseys subject to the terms discussed with UAE:
> - not an admission of liability by PAL

- UAE drops, with prejudice it's [sic] common law indemnity claims.

Contingent upon consummation of settlement between UAE and Chesapeake and plaintiffs' approval.
Pal agrees to release & not sue Lindsey or their attorney for any claim arising out of the bringing of a claim against PAL.

Lindsey [sic] will do a separate agreed order of dismissal on the other claims against PAL Oil (other than fraud claim as discussed above).

Thereafter, between December, 2009, and January, 2010, all claims asserted in the *Lindsey* litigation were dismissed with prejudice.

e. The Tyree Lease and the instant matter

Following the bench trial in this matter, the circuit court found that the appellants had collectively defrauded UAE through making several misrepresentations designed to induce UAE into believing that they were assigning UAE an oil and gas lease they had acquired from the owner of the Tyree mineral estate. The circuit court determined that PAL Oil had breached the 2006 APA by failing to transfer to UAE the Tyree mineral lease and an enforceable division order free and clear of all adverse claims. The circuit court also held Ledford and Arthur liable for PAL Oil's breach by virtue of their respective personal guarantees of the 2006 APA.

The appellants argue that each of the circuit court's determinations is erroneous. Each of these overarching issues is discussed below, along with the particulars of the appellants' arguments.

1) Fraud by misrepresentation and omission: *United American Energy, LLC v. PAL Oil Company, Ledford, Parks, Arthur, and Arrowhead*

Before we review the substance of the circuit court's determinations respecting fraud by misrepresentation and omission, the appellants raise two procedural arguments.

First, the appellants argue that UAE's various claims of fraud should be dismissed because UAE's descriptions of their purported fraud in its complaint were not sufficiently definite. However, the appellants waived this argument because they never filed a CR[39] 12.05 motion for a more definite statement relating to UAE's fraud claims. There is no there is no suggestion that the appellants suffered surprise or prejudice when evidence was presented which had not been detailed in UAE's complaint. *See Denzik v. Denzik*, 197 S.W.3d 108, 110 (Ky. 2006).

Second, the appellants argue that the trial court was not authorized to hold Arrowhead, Ledford, Parks and Arthur liable for fraud, as it relates to the Tyree mineral estate, because UAE's complaint only asserts that PAL Oil's actions defrauded UAE in this respect. Nevertheless, the evidence produced in this matter demonstrates that Ledford, Parks, and Arthur each played varying roles in assisting PAL Oil in its endeavor to sell UAE its "interest" in the Tyree mineral estate, and Ledford used Arrowhead's letterhead to convey information about the Tyree mineral estate to Van Bever, UAE's attorney. CR 15.02 allows any party, either before or after a judgment, to seek leave from a circuit court to amend their

[39] Kentucky Rule of Civil Procedure.

pleadings to conform to the evidence, and "failure so to amend does not affect the result of the trial of these issues." Here, Arrowhead, Ledford, Parks, and Arthur were joined as parties before the circuit court; the issue of fraud was tried as if it had been raised to impose liability upon each of them. Kentucky precedent supports that it was proper for the circuit court to treat UAE's claims of fraud as though they had been amended to include Arrowhead, Ledford, Parks, and Arthur. *See, e.g., Com., Dep't of Hwys. v. Back*, 391 S.W.2d 707 (Ky. 1965).

Moreover, CR 15.02 does not specify *how* a party must move to amend its pleadings to conform to the evidence. The appellants themselves point out in their briefs that the circuit court simply signed an order and judgment in this matter prepared entirely by UAE. That order and judgment, in turn, contains each of the circuit court's specific findings of fraud against Arrowhead, PAL Oil, Ledford, Parks, and Arthur. The circuit court also denied the appellants' subsequent motion to amend or vacate these findings. We hold that sufficient for the purpose of a CR 15.02 motion.

We now turn to the substance of the circuit court's findings against the appellants with respect to fraud by misrepresentation and omission. In a Kentucky action for fraud by misrepresentation, the party claiming harm must establish six elements of fraud by clear and convincing evidence as follows: a) material representation b) which is false c) known to be false or made recklessly d) made with inducement to be acted upon e) acted in reliance thereon and f) causing injury. *United Parcel Service Co. v. Rickert*, 996 S.W.2d 464, 468 (Ky. 1999); *see*

also Wahba v. Don Corlett Motors, Inc., 573 S.W.2d 357, 359 (Ky. App. 1978).

By contrast, a claim of fraud by omission is based upon a party's failure to disclose to another a fact that the party knows may justifiably induce the other to act or refrain from acting. *See, e.g.*, Restatement (Second) of Torts § 551 (1976) (cited in the context of fraudulent omissions in *Giddings & Lewis, Inc. v. Industrial Risk Insurers*, 348 S.W.3d 729, 747 (Ky. 2011)). In this regard,

> a plaintiff must prove: a) that the defendants had a duty to disclose that fact; b) that defendants failed to disclose that fact; c) that the defendants' failure to disclose the material fact induced the plaintiff to act; and d) that the plaintiff suffered actual damages.

Rivermont Inn, Inc. v. Bass Hotels & Resorts, Inc., 113 S.W.3d 636, 641 (Ky. App. 2003) (internal citations omitted).

In either event,

> such proof may be developed by the character of the testimony, the coherency of the entire case as well as the documents, circumstances and facts presented. *See Trustees of the First Christian Church v. Macht*, 228 Ky. 628, 631, 15 S.W.2d 509, 510 (1929). Fraud may be established by evidence which is wholly circumstantial. *See Grant v. Wrona*, Ky.App., 662 S.W.2d 227, 229 (1983); *Johnson v. Cormney*, Ky.App., 596 S.W.2d 23, 27 (1979). The standard of review of the jury determination can be found in *Lewis v. Bledsoe Surface Mining Co.*, Ky. 798 S.W.2d 459 (1990). The reviewing court must accept the evidence as true, draw all reasonable inferences from it in favor of the claimant, refrain from questioning the credibility of the witnesses of the claimant and refrain from assessing the weight that should be given to any particular item of evidence. *Lewis, supra*, at 461.

Rickert, 996 S.W.2d at 468.

But, in no event will fraud ever be presumed, or sustained by mere suspicion, strained inference or conjecture. *Hickman Bank & Trust Co. v. Pickard & Mayberry*, 207 Ky. 772, 270 S.W. 30, 32 (1925).

With respect to its findings regarding fraudulent misrepresentations and fraudulent omissions, the circuit court framed the issue in this matter as whether the appellants intentionally misrepresented to UAE that they had and would convey to UAE an assignment of a mineral lease obtained from the Tyree mineral estate owner.

The first set of fraudulent misrepresentations identified by the circuit court consisted of Ledford's April 13 and 19, 2006 fax transmissions from Arrowhead to Van Bever. Inasmuch as this finding incorporated the division order contained in the April 19, 2006 fax, the record reflects that it is equally likely that Ledford or Southern Kentucky Purchasing drafted it. The evidence in this regard is only speculative; it is limited to Ledford's statement that he could not remember whether he drafted it, or if Southern Kentucky Purchasing issued it.

Moreover, Van Bever was the only representative of UAE to testify that he had an opportunity to review the contents of these faxes prior to when UAE entered the 2006 APA. He testified that he had no memory of relying upon these documents in drafting the 2006 PAL Oil-UAE APA.[40] He drafted the 2006 APA to

[40] Van Bever's exact testimony on this point was:

> I don't recall and the reason is this was a significantly, you know, fairly significant sized transaction involving a number of leases, personal property, other things. And, as an attorney putting this deal together, um, I was kind of just running the show, so to speak. I, I don't know that significance gets subscribed to

specifically *omit* any mention of a Tyree lease being assigned as part of that transaction, and included a merger clause.[41] In the context of fraud, Kentucky law prohibits UAE from claiming that it reasonably relied upon any oral representation or supposed omission that conflicts with written a disclaimer to the contrary which UAE earlier specifically acknowledged in writing. *Rivermont Inn, Inc.*, 113 S.W.3d at 640-41.

The second set of misrepresentations cited by the circuit court consisted of the marketing prospectus for PAL Oil stating that it had the "T.W. Tyree lease," and that it was "for sale now." But, as mentioned previously, no evidence demonstrates that UAE ever received this marketing prospectus or relied upon it.

A third misrepresentation cited by the circuit court was Ledford's April 19, 2006 letter to Klinghoffer, stating that Arrowhead had "spent weeks in the court houses proving [its] validation of [its] leases, and even [UAE's] attorney here in Lexington, has agreed that we could close on this deal as early as Friday, if you would let him draw up documents[.]" But, as noted previously, *Klinghoffer never testified in this matter*. Accordingly, there is no record evidence that

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every lease or every detail. So, I can only tell you that, it doesn't come to my mind that it, it, that I recall.

[41] The merger clause in the 2006 PAL Oil-UAE APA provides:

> 18.5 Entire Agreement. This Agreement, together with the instruments and agreements being executed concurrently herewith, constitute the entire agreement between the parties regarding the subject matter hereof and supersedes all prior agreements and understandings, whether written or oral, between the parties.

Klinghoffer actually received or read the letter, relayed the contents of the letter to anyone else at UAE or that he placed any value upon it. The record is simply silent on whether the mere existence of the letter had any impact on the deal. And, Brian Gordon, who ultimately authorized UAE's purchase of assets from PAL Oil on April 28, 2006, testified that this transaction rapidly progressed simply due to "business purposes."

Indeed, only Klinghoffer's self-generated investment proposal to Madison Capital provides any insight into why UAE believed that PAL Oil was selling it a Tyree mineral lease from the Tyree mineral owner. No evidence in this record demonstrates that the appellants ever represented anything to Klinghoffer to that effect.

There being no evidence or testimony that the appellants actually represented to UAE that they owned the actual Tyree mineral lease, the evidence appears uncontradicted that the appellants did indeed make a representation to UAE both prior to and at the closing of the 2006 APA: the appellants conveyed to UAE some kind of right to explore for oil on the Tyree mineral estate under the abandoned well process theory. Although the appellants' testimony was that they believed the alleged abandoned well process gave them some type of interest in the oil wells at issue, the appellants could not have conveyed a lease to UAE because they never had a lease with the Tyree mineral estate owner or his representative. Therefore, rather than conveying UAE the right to explore the Tyree mineral estate for oil, in essence under the law, the appellants conveyed, at best, an invitation for

UAE to be considered an innocent trespasser rather than a bad faith trespasser. *See, e.g., Meece v. Feldman Lumber Co*., 290 S.W.3d 631, 632-3 (Ky. 2009):

> [T]he factors to be considered to show good faith or an honest belief [of a trespasser] would depend upon the circumstances as they existed at the time of action, prospectively, not retrospectively. Factors tending to show good faith are reasonable doubt as to the other person's ownership, and advice of reputable counsel.

(citing *Swiss Oil Corp., et al. v. Hupp*, 253 Ky. 552, 69 S.W.2d 1037, 1041-42 (1934).)

Rather than recognizing "the abandoned well process" as a misrepresentation, however, the trial court appears to have interpreted it as a defense raised by the appellants. In regard to the "abandoned well process," the circuit court's final order states only the following:

> The Court finds [appellants'] testimony to be unpersuasive that [they were] only selling the "right to investigate" two well permits on the Tyree property.
>
> . . .
>
> The Court further finds [appellants'] claim that [they] acquired the two wells on the Tyree Lease through an abandoned well process unpersuasive. Evidence showed that shortly after the parties entered into the 2006 PAL Oil APA, Ledford, through Arrowhead, was in communication with Chesapeake to purchase the Tyree Lease. Thus, [appellants'] premise that they could not locate the mineral owners by running the mineral chain of title lacks credibility in so much as Ledford was communicating with the mineral owner months after the 2006 PAL Oil APA was executed.

The way that Combs and the appellants described it, however, using the "abandoned well process" resulted in an interest in a mineral estate separate and distinct from the interest attained in a lease with the owner of a mineral estate. Thus, aside from what Combs and the appellants testified was an initial burden of demonstrating to the Division that the mineral estate owner's identity was unknown, Combs and the appellants testified that, as they understood it, the "abandoned well interest" simply had nothing to do with a lease obtained from a mineral owner. Moreover, the appellants were indeed able to secure permits from the Division of Oil and Gas Conservation by doing exactly what they did; and, according to their abandoned well process theory, valid or not, it was the permits that gave them the right to explore for oil on the Tyree mineral estate, rather than a lease from the Tyree mineral estate owner.

It is the intention of the misrepresenting or omitting party that constitutes the fraud. Liability for fraud attaches to the appellants only if the evidence clearly and convincingly demonstrates that the appellants either knew that what they were representing to UAE was false, or that they represented it recklessly. *United Parcel Service Co. v. Rickert*, 996 S.W.2d 464, 468 (Ky. 1999). Stated differently, fraud requires a clear and convincing showing of "actual malice." *See, e.g., E. W. Scripps Co. v. Cholmondelay*, 569 S.W.2d 700, 704 (Ky. App. 1978) (defining "actual malice" as "knowledge of falsity or reckless disregard for the truth.").

"Malice can be inferred from the fact of . . . falsity." *Stringer v. Wal-Mart Stores, Inc.*, 151 S.W.3d 781, 799 (Ky. 2004) (citing *Thompson v. Bridges*, 209 Ky. 710, 273 S.W. 529, 531 (1925)). Nevertheless, a finding of malice or bad faith may be negated if the evidence demonstrates that a person who made the material misrepresentation or omission did so as a consequence of reasonably relying upon the advice and guidance of a competent attorney.[42] *See, e.g., Kentucky Farm Bureau Mut. Ins. Co. v. Burton*, 922 S.W.2d 385, 389 (Ky. App. 1996) ("Where malice or want of probable cause is an element of the cause of action, acting on advice of counsel is a good defense."); *Feldman Lumber Co*., 290

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[42] For example, in the realm of *criminal* fraud, the Seventh Circuit has stated:

> Advice of counsel is not a free-standing defense, though a lawyer's fully informed opinion that certain conduct is lawful (followed by conduct strictly in compliance with that opinion) can negate the mental state required for some crimes, including fraud." *United States v. Roti*, 484 F.3d 934, 935 (7th Cir. 2007). In order for this theory to be supported by the evidence, a defendant must establish the following elements:
>
> (1) before taking action, (2) he in good faith sought the advice of an attorney whom he considered competent, (3) for the purpose of securing advice on the lawfulness of his possible future conduct, (4) and made a full and accurate report to his attorney of all material facts which the defendant knew, (5) and acted strictly in accordance with the advice of his attorney who had been given a full report.

U.S. v. Van Allen, 524 F.3d 814, 823 (7th Cir. 2008) (citing *United States v. Al-Shahin*, 474 F.3d 941, 947-8 (7th Cir. 2007). "Advice of counsel" is also a defense used in bankruptcy proceedings to excuse or explain acts which otherwise bear indicia of fraud, assuming that all relevant information was in fact provided to the attorney. *See, e.g., Palmer v. Downey (In re Downey)*, 242 B.R. 5, 15 (Bankr.D.Idaho.1999); *Kaler v. McLaren (In re McLaren)*, 236 B.R. 882, 897 (Bankr. D. N. D.1999); *Butler v. Ingle (In re Ingle)*, 70 B.R. 979, 984 (Bankr.E.D.N.C.1987); *InterFirst Bank Greenville, N.A. v. Morris (In re Morris)*, 58 B.R. 422, (Bankr.N.D.Tex.1986); *Comprehensive Accounting Corp. v. Morgan (In re Cycle Accounting Servs.)*, 43 B.R. 264, 269 n. 7 (Bankr.E.D.Tenn.1984).

S.W.3d at 632-3 (*supra*, in the context of trespass); *Stanhope v. Cincinnati, N.O. & T.P. Ry. Co.*, 210 Ky. 674, 276 S.W. 567, 569-70 (Ky. App. 1925) (malicious prosecution).

During six litigious years, it appears no one questioned whether the "abandoned well process" had any basis in the law; rather, the attorneys in this case either treated it as if it were a valid legal doctrine without further investigation, or simply tried to ignore it. So far as we are aware, the Estill Circuit Court never had an opportunity to address the legalities of "the abandoned well process" in the *Lindsey* litigation because UAE chose to settle it. The Fayette Circuit Court, in its findings of fact and conclusion of law, did not consider Combs' advice to the appellants in its analysis of UAE's claim of fraud, or address the legal veracity of the "abandoned well process" in any of its orders. Indeed, when UAE attempted to question Combs about the legal underpinnings of the "abandoned well process" and contrast them with KRS 353.464 (and the several other unknown mineral heir statutes discussed earlier in this opinion) during the trial of this matter, the Fayette Circuit Court precluded UAE from doing so after sustaining a "relevance" objection from the appellants' counsel.

Moreover, it is evident from the appellants' counsels' "relevance" objection; the testimony their counsel sought to elicit from the appellants (see especially the "advantages" of the abandoned well process discussed by Ledford earlier in this opinion); the arguments posed in the appellants' two briefs submitted in this appeal (discussed further below); and the bare fact that the appellants' own

attorneys never questioned the legal veracity of the "abandoned well process" over the course of approximately *six years* of litigation, that the appellants' past and present attorneys also believed—and continue to believe—that "the abandoned well process" bears legal veracity.

There is a factual issue regarding whether the appellants had the requisite intent necessary to prove fraud because the record provides evidence supporting that the appellants relied upon Combs' advice regarding the "abandoned well process" over the entire course of this matter. Ledford testified that prior to taking any action relating to the Tyree mineral estate, he and the other appellants sought Combs' advice with respect to how they could "acquire" wells on the Tyree property without knowing the identity of the Tyree mineral estate owner. Combs responded to their questions by telling them about "the abandoned well clause." The appellants all regarded Combs as competent, and Combs himself testified that he had approximately forty years of experience in mineral law and was the appellants' longstanding attorney. Prior to selling UAE their "abandoned well interest," the appellants explained what they understood about it to Combs. Combs endorsed "the abandoned well process," represented it to UAE as the law of Kentucky and represented the appellants in the closing of the sale.

Moreover, some evidence supports that the appellants followed Combs' advice or otherwise relied upon Combs in the context of every other instance cited by the circuit court as some form of fraudulent misrepresentation or omission in this matter.

The circuit court pointed to the fact that the appellants omitted telling UAE about Dean's August 18, 2006 cease-and-desist letter and their subsequent communications with Dean. But, Parks and Combs both testified that the appellants were relying upon Combs to do what needed to be done about that matter. And, in handling it, Combs testified that he believed it was acceptable not to inform UAE about his conversation with Dean and to instead assume that Dean would simply contact UAE on his own. This appears to be the impression he left upon the appellants as well.

The circuit court pointed to the fact that the appellants executed the 2007 amended assignment as evidence that they intended to assign an oil and gas lease from the Tyree mineral estate owner to UAE as part of the 2006 APA. Yet, Combs himself testified that when he received the 2007 amended assignment from Rhorer and immediately re-faxed it to the appellants without either reading it or advising his clients about it, he knew that the appellants only believed that they had an "abandoned well interest" in the Tyree mineral estate. And, the cover of Ledford's fax transmission to Rhorer, along with Ledford's and Parks' trial testimony, provides some evidence that the appellants believed that Combs approved of the amendment, and that the amendment therefore reflected what they believed. As noted previously, Ledford's cover letter to his fax transmission to Rhorer provided:

Dear Mr. Rhorer,

> *Mr. Combs wanted me to fax what I had signed in regard to Tyree Lease*. I hope this helps. You should have original by tomorrow.

(Emphasis added.)

UAE also cites to the fact that the appellants' answer in the *Lindsey* litigation apparently admitted that the appellants intended to assign it a lease from the owner of the Tyree mineral estate. But, to the extent that the answer filed by the appellants in that settled matter could have any evidentiary value here, it must be qualified because it was drafted by Combs. Combs testified in the trial of this matter that, had the *Lindsey* litigation not been settled, he would have changed that statement to reflect that the appellants had only assigned UAE wells 41 and 42 through the abandoned well process.

One of the appellants' several arguments of error relating to the circuit court's finding of fraud and breach of contract relating to the Tyree mineral estate was that Ledford's execution of the 2007 amended assignment was the result of Ledford's unilateral mistake, and that he believed that it was simply a "quit claim" of PAL Oil's abandoned well interest and assignment of the surface agreement. In our review of the record, the 2007 amended assignment is the first instance where the appellants represented to UAE that UAE had obtained a mineral lease, whether that is actually what they intended to represent or not, from the Tyree mineral owner through the 2006 PAL Oil-UAE APA.

Nevertheless, the circuit court overlooked that the appellants may have firmly believed in Combs' advice regarding the "abandoned well process"

theory in executing the agreements in this matter. The circuit court simply determined that UAE's reliance upon the appellants' representations and warranties was "reasonable." In so doing, the circuit court overlooked that the evidence in this matter *only* demonstrates, prior to the 2007 amended assignment, that the appellants *represented* that UAE's interest in the Tyree mineral estate derived solely from the "abandoned well process," rather than a lease from the Tyree mineral estate owner. The circuit court was entitled to disregard any evidence it chose when it made it findings of fact in this matter. It was not authorized, however, to presume fraud, *Hickman Bank & Trust Co.,* 270 S.W. at 32, or to otherwise excuse UAE, as the plaintiff, from proving its claim, *see Purcell v. Michigan Fire & Marine Ins. Co. of Detroit*, 295 Ky. 232, 173 S.W.2d 134, 141 (1943), including whether UAE's reliance was reasonable given the facts of this matter.

Moreover, the circuit court overlooked that UAE had already begun operations on the Tyree mineral estate due to its belief that it had a mineral lease from the owner of the Tyree mineral estate *prior* to its receipt of Ledford's 2007 amended assignment, recalling that the 2006 PAL Oil-UAE APA did not include the Tyree lease. The circuit court overlooked that UAE never saw or asked to see any proof of ownership of a Tyree mineral lease from the mineral owner, or assignment of such a lease, naming PAL oil as a lessee or assignee; nor, for that matter, was there a listing of such in the 2006 PAL Oil-UAE APA. The circuit court overlooked that UAE, in spite of the foregoing, cited the 2007 amended

assignment as its excuse for ignoring both the Lindseys' claim of title to the Tyree mineral estate *and* its own contradictory title opinion, which it received at nearly the same time it asked the appellants to execute the 2007 amended assignment.

The appellants' claims of mistake relating to Ledford's execution of the 2007 amended assignment sufficiently raised the appellants' reliance upon Combs' "abandoned well process" advice as a factor that the circuit court should have considered in its analysis of UAE's fraud claim.

We also recognize that a circuit court's determination of "reasonable reliance" in the context of fraud is often fact-intensive. But, if these factors are indeed supported by evidence located somewhere within in the thirty-two volumes of record, hundreds of exhibits and trial testimony, the circuit court failed to mention this evidence in its opinion. Moreover, it did not consider the impact of the merger clause UAE included in its agreement with PAL Oil on UAE's claim of fraud.

We sit as a court of review. In our review, it appears that the parties and the circuit court made several presumptions, overlooked several critical issues and omitted several critical steps in their analyses of fraud relating to the Tyree mineral estate. An appellate court may affirm a lower court's decision on other grounds as long as the lower court reached the correct result. *See, e.g., McCloud v. Commonwealth*, 286 S.W.3d 780, 786 n. 19 (Ky. 2009). But, a determination of whether UAE reasonably relied upon Ledford's 2007 amended assignment, and a consideration of Combs' advice to the appellants in the context of the "malice"

factor of fraud, necessarily require additional findings of fact. Thus, prudence dictates that we reverse the circuit court's finding of fraud against the appellants, along with its related award of punitive damages, and remand this matter to allow the circuit court to revisit these issues, and take additional evidence regarding these issues.

To be clear, we are instructing the circuit court to do the following on remand:

1. Determine, regarding the intent element of fraud and in light of the evidence, whether the appellants reasonably relied upon the advice of their counsel, *i.e.*, Combs' advice regarding the "abandoned well process," when they executed the 2007 amended assignment.

2. Determine, in light of the evidence, whether UAE reasonably relied upon the 2007 amended assignment to justify its belief that it owned an assignment of an oil and gas lease from the mineral owner of the Tyree mineral estate, when at the same time UAE was on notice that there existed doubts as to whether the appellants owned the Tyree lease.

3. If the circuit court determines that the record supports UAE's claim of fraud, the circuit court shall reevaluate its award of damages relating to fraud, and its apportionment of those damages against each respective appellant, consistently with the evidence presented in this matter.

2) Issues of breach of contract and indemnity relating to the Tyree mineral estate: *UAE v. PAL Oil, Ledford, and Arthur*

As noted, the circuit court also determined that PAL Oil breached the 2006 APA by failing to transfer to UAE the Tyree mineral lease and an enforceable division order free and clear of all adverse claims. The circuit court also held Ledford and Arthur liable for PAL Oil's breach by virtue of their respective personal guarantees of the 2006 APA.

On appeal, PAL Oil contends that the only document supplying the basis for its breach of the 2006 APA is the 2007 amended assignment and that the 2007 amended assignment should not have supplied such a basis because all of the parties to this litigation executed it due to a mutual mistake.[43] That mutual mistake, as PAL Oil describes it, is that all of the parties knew that PAL Oil was only conveying UAE its "abandoned well interest" in the 2006 APA, rather than an oil and gas lease it held with the owner of the Tyree mineral estate.

Similarly, Ledford and Arthur argue that the circuit court erred in holding them liable for indemnifying UAE for its costs associated with obtaining a valid Tyree mineral lease and otherwise settling the Lindsey litigation. In particular, Ledford and Arthur argue they are not liable for indemnifying UAE because the 2007 amended assignment does not conform to KRS 371.065, Kentucky's guaranty statute, and because the 2006 APA—which they admit they did guarantee—only provided for a sale of PAL Oil's "abandoned well interest," rather than an oil and gas lease from the owner of the Tyree mineral estate.

[43] Prior to trial, PAL Oil moved for summary judgment on the basis of mutual mistake in this regard; the circuit court denied its motion.

As we have discussed throughout this opinion, however, PAL Oil purported to convey UAE the right to explore for oil on the Tyree mineral estate as part of the 2006 APA. And, regardless of whether PAL Oil believed this right came from the Division of Oil and Gas Conservation or the Tyree mineral estate owner, UAE clearly understood that it would receive this right from PAL Oil as a consequence of the 2006 APA. To use yet another automobile analogy, PAL Oil is essentially arguing: "Back in 2006, everyone knew I was selling UAE an *automobile*. It wasn't until September of 2007 that anyone believed that I had sold UAE a *car* instead." And, regardless of how PAL Oil chose to label or consider the right to explore for oil in the Tyree mineral estate, PAL Oil conveyed no such right to UAE.

In short, the circuit court correctly refused to allow PAL Oil to rescind the amended assignment on the basis of mutual mistake, correctly held PAL Oil liable to UAE for breaching their contract, and correctly held Ledford and Arthur liable for indemnifying UAE. All of the parties understood that PAL Oil was conveying UAE the right to explore for oil on the Tyree mineral estate as part of the 2006 APA; this included Ledford and Arthur, who guaranteed the 2006 APA when it was executed. It would have been a pointless gesture for the circuit court to have rescinded the 2007 amended assignment—along with any guaranty from Ledford or Arthur included therein—because the amended assignment merely gave a different name to that same right to explore; PAL Oil had already obligated itself to convey that right to UAE when it originally executed the 2006 APA; and, PAL

Oil was already in breach of that obligation before it executed the 2007 amended assignment.

3) Damages relating to the Tyree Lease: contract and tort

At the conclusion of this litigation (including UAE's "expired lease claims discussed more fully below), the circuit court awarded UAE a total of $1,521,597.30 in damages, $300,000 of which represented punitive damages. Part of this figure represented damages awarded for PAL Oil's breach of the 2006 APA and Ledford's and Arthur's indemnity liability to UAE with respect to the Tyree property. In that respect, the circuit court held:

> PAL Oil, Ledford and Arthur are jointly and severally liable for $858,900.69 in connection with UAE's breach of contract claim regarding the Tyree Lease and indemnity claim regarding the Lindsey Litigation. This award includes, the $145,000 paid to PAL Oil for the Tyree Lease; the value of the additional 1/16th royalty paid by UAE to Chesapeake over the projected life of the lease ($250,000); and the fees and costs, including payment of settlement amounts, incurred in the Lindsey Litigation ($463,900.69).

With respect to what the circuit court cited as the appellants' collective fraud against UAE relating to the Tyree property, the circuit court essentially restated the amounts it had already awarded UAE for breach of contract and indemnity:

> (1) Compensatory Damages:
> (a) Fraud regarding the Tyree Lease:
> (i) The Court awards $858,900.69 to UAE in connection with their fraud claim regarding the Tyree Lease. This award includes, the $145,000 paid to PAL Oil for the Tyree Lease; the value of the additional 1/16th

> royalty paid by UAE to Chesapeake over the projected life of the lease ($250,000); and the fees and costs, including payment of settlement amounts, incurred in the Lindsey Litigation ($463,900.69).
>
> (ii) The fault attributable to each [appellant] for these damages is as follows:[44]
>
> Ledford: 60%
> Arrowhead: 5%
> PAL Oil: 5%
> Arthur: 10%
> Parks: 20%

In a footnote, the circuit court's judgment also explains that in restating the same judgment twice, it was not doubling UAE's award of compensatory damages relating to the Tyree property; it was simply using UAE's fraud claim as a basis for making additional parties liable for paying varying percentages of the $858,900.69 in compensatory damages:

> The purpose is only to memorialize that PAL Oil, Ledford and Arthur are jointly and severally liable under a breach of contract theory under the 2006 Asset Purchase Agreement between PAL Oil and UAE, even though they are not jointly and severally liable for the damages awarded for fraud.

In reversing the circuit court's finding of fraud and remanding it for further consideration, we need not address the award of the additional $300,000 in punitive damages based upon the fraud, or the circuit court's assignment of specific percentages of liability to specific appellants relating to the punitive and

[44]As to how and why the circuit court determined these various percentages of fault attributable to each appellant, the record is silent. The circuit court also directed each respective appellant to pay varying percentages of an additional $300,000 punitive damages award to UAE based upon its findings of fraud.

compensatory damages awards relating to fraud, or the propriety of the circuit court's decision to add Parks and Arrowhead as liable parties. Furthermore, in the current absence of any finding of fraud, additional provisions of the 2006 PAL Oil-UAE APA come into play. For example, Section 15.1 provides:

> (b) Limitation of Liability. . . . [A]ll claims by [UAE] for indemnification under Section 15.1 shall be limited as follows:
>
> > (i) the maximum amount of [PAL Oil's] aggregate liability with respect to all claims for indemnification under Section 15.1 shall be limited to of [sic] Five Hundred Ninety Five Thousand Dollars and No Cents ($595,000.00), except that such limit shall not apply with respect to Damages arising from claims based upon fraud, intentional misrepresentation or gross negligence[45] by [PAL Oil] or environmental claims[.]

In the absence of the necessary additional findings of fraud we have directed the circuit court to make upon remand, we cannot review the propriety of any specific measure of damages relating to the Tyree mineral estate. Therefore, upon remand, the circuit court shall also review this matter subject to its additional findings.

4) Evidentiary issues

PAL Oil, Ledford, and Arthur argue that the circuit court erred with respect to excluding and admitting certain evidence in this matter. The extent of their argument is as follows:

[45] UAE included a claim of negligent misrepresentation against the appellants relating to the Tyree mineral estate, but the circuit court made no findings in that regard, UAE requested no findings in that regard, and UAE filed no cross-appeal.

> The [appellants] called Michael Dean as a witness, and without even having heard any questions directed to him, the court abused its discretion by not allowing him to take the witness stand. He would have offered proof about whether the [appellants] caused UAE's damages and would have clarified points discussed by Ines Lindsey, who, inconsistently, was allowed to testify about the Estill County case for UAE. The court also allowed UAE to offensively introduce exhibits that it had redacted, and abused its discretion by not compelling production of the documents UAE claimed were privileged and not reviewing the redactions in camera prior to trial. A new trial is warranted.

The general rule is that relevant evidence[46] is, with some exceptions, admissible.[47] One such exception is KRE 403, which provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence." We review a trial court's decision to exclude evidence under an abuse of discretion standard, and "[t]he test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). Moreover,

> No error in either the admission or the exclusion of evidence . . . is ground for granting a new trial or for

[46] Kentucky Rule of Evidence (KRE) 401 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

[47] KRE 402 provides that "All relevant evidence is admissible, except as otherwise provided by the Constitutions of the United States and the Commonwealth of Kentucky, by Acts of the General Assembly of the Commonwealth of Kentucky, by these rules, or by other rules adopted by the Supreme Court of Kentucky. Evidence which is not relevant is not admissible."

> setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. . . .

CR 61.01.

Although it was excluded, the appellants made an offer of Dean's testimony by way of affidavit. *See, e.g.,* KRE 103(a)(2). Dean's affidavit provides that one-fifth of the lump sum UAE paid to the Lindseys represented the Lindseys' lost oil royalties, four-fifths represented "surface damage," and that the amounts the Lindseys had claimed for "surface damage" solely related to actions that UAE had taken on the Tyree property that were "inconsistent with any mineral estate lessees [sic] obligations to preserve the surface estate in a workmanlike manner." Dean's affidavit further describes examples of this surface damage. Thus, taken at face value, the appellants sought to call Dean to elicit 1) a legal interpretation of the UAE-Lindsey-Chesapeake settlement; and 2) a legal conclusion regarding whether UAE's conduct on the Tyree property exceeded the conduct to be expected from a reasonable mineral lessee.

With that said, the circuit court did not abuse its discretion in excluding Dean's testimony. It is clear that the appellants called Mike Dean to testify in his capacity as the Lindseys' attorney, rather than in his capacity as the managing member of Big Sinking Oil. While the UAE-Lindsey-Chesapeake settlement specified that Dean was the only attorney entitled to an attorney's fee in the *Lindsey* litigation, it appears that Big Sinking Oil made no claim for relief in that matter. Insofar as UAE's contract claims against PAL Oil, Ledford, and

Arthur are concerned, the opinion of an attorney as to the legal effect, interpretation, and consequence of a document is not admissible. *See* 32 C.J.S. Evidence § 546(86); 31A Am. Jur. 2d Expert and Opinion Evidence § 357; *General Elec. Co. v. Cain*, 236 S.W.3d 579, 585 (Ky. 2007); *see also* 2A C.J.S. Affidavits § 39 (2006) ("It is improper for affidavits to embody legal arguments, and legal arguments and summations in affidavits will be disregarded by the courts."). Moreover, as it relates to this matter as a whole, it is unclear how Dean intended to "clarify" his own clients' testimony. But, given that Dean's only connection to this matter was as the Lindseys' attorney, whatever questions the appellants sought to ask Dean should have been asked to the Lindseys.

We decline to address the remainder of the appellants' contentions of error regarding the circuit court's decisions to exclude or admit evidence (*i.e.*, the circuit court's introduction of redacted exhibits and what they assert was its abuse of discretion in "not compelling production of the documents UAE claimed were privileged and not reviewing the redactions in camera prior to trial"). At best, these contentions do not demonstrate anything more than harmless error and, in any event, they are too vague to be considered "arguments" within the meaning of CR 76.12(4)(c)(v). *See Cherry v. Augustus*, 245 S.W.3d 766, 781 (Ky. App. 2006).

III. "THE EXPIRED LEASES": *UAE v. ARROWHEAD, LEDFORD, PARKS, AND ARTHUR*

Arrowhead, which is owned by Ledford and Arthur, executed contracts with UAE contemporaneously with, and identical to, the PAL Oil-UAE 2006 and 2007 APAs. As part of the 2006 Arrowhead-UAE APA, Arrowhead sold UAE two oil and gas leases, known respectively as the "John and Patsy Marcum Lease" and the "Sally Stewart Lease." As part of the 2007 Arrowhead-UAE APA, Arrowhead sold UAE two other oil and gas leases, known as the "Mitchell Goff Lease" and the "Simp Horn Lease." Ledford and Arthur personally guaranteed both of these APAs. In addition, while no evidence in this matter demonstrated that Parks owned any interest in Arrowhead, he also personally guaranteed the 2007 Arrowhead-UAE APA.

Shortly after UAE began having its difficulties with the Tyree mineral estate, UAE began to scrutinize the other interests it had purchased from the appellants. Upon scrutinizing the four leases just mentioned, UAE came to believe that each of those four leases had expired as a matter of law prior to when it purchased them from Arrowhead and that they were therefore worthless. UAE then determined that its best course of action would be to not attempt any oil exploration activities on any of the properties described in these leases.

After discovering that UAE had not attempted any oil exploration activities on any of the properties described in these leases, Arrowhead came to believe that UAE had, as a matter of law, abandoned each of these leases and that these leases were no longer valid as a consequence. Having arrived at this

conclusion, Arrowhead then declared UAE in breach of Section 18.17(a) of both the 2006 and 2007 APAs, which provides:

> It is agreed and understood that if at any time Buyer or Buyer's Successor desires to cease operation on any of the Leases, and has (i) no intention of selling the Lease(s), and (ii) no intention of maintaining its rights under the Lease(s) through intermittent operation or otherwise, then Buyer or Buyer's Successor shall give Seller or Seller's Successor written notice of such situation at least thirty (30) days prior to termination of its rights under the Lease(s). If, within thirty (30) days of the postmark date of such notice, Seller or Seller's Successor notifies Buyer or Buyer's Successor that Seller or Seller's Successor desires to assume such interest, Buyer or Buyer's Successor shall assign all of its right, title, and interest in said Lease(s) to Seller or Seller's Successor, provided that Seller or Seller's Successor shall pay all costs, fees or expenses and shall post all bonds or other forms of surety necessary or required to give effect to such assignment.

Arrowhead sued UAE for breach of contract and demanded the fair market value of these four leases, pursuant to the above provision.[48] As both a defense to Arrowhead's action and a counterclaim for breach of contract, UAE asserted that the four leases that it had purchased from Arrowhead had expired before UAE could have had an opportunity to have abandoned them.

The question thus became: Who breached first? To answer this question, the circuit court was required to determine 1) whether these four leases were still valid; and, if they were no longer valid, 2) when they became invalid,

[48] Arrowhead actually alleged that UAE had abandoned about thirteen oil and gas leases at the trial of this matter, but on appeal it only argues that the circuit court erred in determining that UAE had not abandoned the Sally Stewart, Simp Horn, Mitchell Goff, and John and Patsy Marcum leases.

e.g., had they been abandoned by UAE, or had they already expired when UAE purchased them? To make these determinations, the circuit court treated this matter as an action for a declaration of rights. This was proper. *See, e.g., Walter v. Ashland Oil & Refining Co.*, 300 Ky. 43, 187 S.W.2d 425 (1945) (providing that a declaratory action is a vehicle for determining rights and interests of parties under an oil and gas lease).

Despite Arrowhead's objection, however, the circuit court did not require any of the lessors to be joined as parties to this action when it conducted the declaratory actions respecting each of these four leases. And, the circuit court proceeded to declare the rights of these nonparty lessors—along with Arrowhead, Ledford, Parks, Arthur, and UAE—when it eventually determined that these four leases were invalid and had expired. Thereafter, the circuit court dismissed Arrowhead's claims and found Arrowhead in breach of its contracts with UAE. It held Arrowhead, Ledford, and Arthur jointly and severally liable for $130,000 relating to the 2006 APA, and held Arrowhead, Ledford, Parks, and Arthur jointly and severally liable for an additional award of $185,000 relating to the 2007 APA.[49]

On appeal, Arrowhead argues that the circuit court erred by failing to join the lessors to this action prior to adjudicating the several declaratory actions relating to the four above-referenced leases. We agree. KRS 418.075 provides in

[49] Specifically, the circuit court awarded $65,000 for the John and Patsy Marcum Lease; $65,000 for the Sally Stewart Lease; $120,000 for the Simp Horn Lease; and, $65,000 for the Mitchell Goff Lease.

relevant part: "When declaratory relief is sought, all persons *shall* be made parties who have or claim any interest which would be affected by the declaration[.]" (Emphasis added.) Clearly, the lessors had an interest affected by the circuit court's declaration of rights; it is clear that the circuit court's ultimate decision in this matter could not be binding upon any of them; and, therefore, the lower court should have declined to declare the rights of those who were parties to this action, (*i.e*, Arrowhead, Ledford, Parks, Arthur, and UAE) until those nonparty lessors were joined. *See Herbert C. Heller & Co. v. Hunt Forbes Const. Co*, 222 Ky. 564, 1 S.W.2d 970 (1928). Consequently, we reverse these respects of the circuit court's judgment, and remand this matter for the circuit court to allow the parties leave to join any property owners whose interests may be affected. Unless such persons are made parties, the circuit court shall dismiss, without prejudice, Arrowhead's and UAE's respective claims of breach of contract against one another. *Id*.; *see also* KRS 418.065.[50]

IV. THE HENDERSON LEASE: *UAE v. ARROWHEAD, LEDFORD, PARKS AND ARTHUR*

On July 8, 2009, the circuit court entered partial summary judgment in favor of UAE on UAE's claim of indemnity against Arrowhead, Ledford, Parks, and Arthur regarding the "Henderson" lease, which is one of the oil and gas leases UAE purchased from Arrowhead through the 2007 Arrowhead-UAE APA. Its

[50] In light of our holding, it is unnecessary for this Court to address Arrowhead's, Ledford's, Parks', and Arthur's two additional arguments relating to this issue, which are that the damages the circuit court awarded to UAE were excessive and that the circuit court erred in dismissing its counterclaims of breach.

order was entered in response to cross-motions for summary judgment submitted by each of these parties. The circuit court prefaced its order by stating that UAE's indemnity claim related to "losses and liabilities that arose in litigation concerning adverse claims" against this lease; that the parties had agreed that there were no factual issues regarding this lease; and, that UAE's entitlement to indemnity from these appellants depended solely upon the interpretation of the 2007 Arrowhead-UAE APA. The facts surrounding the Henderson lease were described by the circuit court, in relevant part, as follows:

> In the February 28, 2007 Agreement, the defendants conveyed several oil and gas leases to UAE which purportedly comprised the entirety of the Henderson Lease. In actuality, Wiser Oil Company (Wiser) owned an outstanding one-half undivided interest in the Henderson Lease. Wiser had become a wholly owned subsidiary of Forest Oil Corporation (Forest) and had ceased doing business in Kentucky. UAE made several unsuccessful attempts to contact both Wiser and Forest and eventually filed a Petition to Declare Trust in Estill Circuit Court. It was only after this petition was served on Forest did its counsel contact UAE's counsel and the parties were able to negotiate a purchase of Wiser's interest by quit claim deed for five hundred dollars ($500.00).

Thereafter, the circuit court related these facts to the language of the 2007 Arrowhead-UAE APA. In relevant part, it held:

> [T]he Court finds the 2007 Agreement to be clear and unambiguous and shall therefore strictly enforce it according to its terms and will not resort to extrinsic evidence. In Sections 6.1(f) entitled "No Liens or Encumbrances on Acquired Assets", the [appellants] clearly warrant that the Thomas Henderson Lease is not subject to any "interest, encumbrance, restriction, lease,

> license, easement, liability, or any adverse claim of any nature whatsoever" and that "no Person other than Seller has any interest or claim against any of the Acquired Assets." The defendants also clearly agreed in Section 15.1(i) to indemnify the plaintiff for any breach of the warranties set forth in the agreement.
>
> It is undisputed that the Henderson Lease was subject to the undivided one-half interest of Wiser at the time the parties entered into the contract. The Court finds this to be an adverse claim against UAE's interest in the lease and that someone other than that seller had an interest or claim against the Acquired Assets. Therefore, the existence of Wiser's interest constituted a breach of Section 6.1(f) which triggered the [appellants'] duty to indemnify UAE for all costs expended in obtaining Wiser's interest.

Ultimately, the circuit court awarded UAE $500 for the price UAE paid to Forest Oil in exchange for Forest Oil's quitclaimed interest in the Henderson mineral estate. The circuit court also awarded UAE $47,196.61 for UAE's attorney's fees incurred in litigating both the Henderson lease and in litigating an unrelated matter involving the "Gladys Marcum" lease (another lease that Arrowhead had sold UAE in the 2007 Arrowhead-UAE APA). The circuit court did not delineate which part of this latter award of attorney's fees represented the Henderson or Marcum litigation.

Arrowhead, Ledford, Parks, and Arthur raised no objection to the amount of attorney's fees that the circuit court awarded to UAE, nor to how the circuit court calculated it. Rather, prior to when the circuit court entered its judgment these appellants argued that two provisions of the 2007 Arrowhead-UAE

APA operated to either completely or partially bar UAE from recovering this amount.

First, these appellants pointed to Section 15.1(b)(ii). In relevant part, that part of the agreement provides:

> 15.1 Indemnification by Sellers.
>
> . . .
>
> (b) Limitation of Liability. . . . [A]ll claims by Buyer for indemnification under Section 15.1 shall be limited as follows:
>
> . . .
>
> (ii) Buyer shall not be entitled to seek payment or indemnification for any individual or specific Damages unless such individual or specific Damages in total exceed $10,000.000, and then Buyer shall only be entitled to amounts by which such total exceeds $10,000.00.

Arrowhead, Ledford, Parks and Arthur conceded that attorney's fees and settlement amounts incurred by UAE in resolving the Henderson and Marcum matters qualified as "Damages"[51] under the terms of the 2007 Arrowhead-UAE APA. But, they argued that the Henderson and Marcum matters constituted two separate claims for indemnity, and that Section 15.1(b)(ii) operated to reduce the total amount of damages that the circuit court might ultimately award to UAE by

[51] Our opinion has previously cited the definition of "Damages" per the various APAs at issue in this matter.

$10,000 with respect to each of those two claims for a total reduction of $20,000. The circuit court disagreed with this interpretation of Section 15.1(b)(ii) and determined that the $10,000 limitation "need only be applied once." Thus, its combined award to UAE relating to both the Henderson and Marcum leases reflects only one deduction of $10,000.

Arrowhead, Ledford, Parks, and Arthur contend that the circuit court erred in this respect, and we agree. Section 15.1(b) clearly and unambiguously provides that "*all claims* by Buyer for indemnification under Section 15.1 shall be limited[.]" (Emphasis added.) Here, UAE made two separate claims for indemnity reflected in this part of the circuit court's award: one relating to the Marcum lease, and one relating to the Henderson lease. Section 15.1(b)(ii) further provides *how* all claims shall be limited. The circuit court aggregated UAE's claims relating to the Marcum and Henderson leases because it mistakenly read Section 15.1(b)(ii) in a vacuum; it placed undue emphasis upon the phrase, "Damages in total," while ignoring the plain language of Section 15.1(b). Therefore, a further reduction of $10,000 to this award is warranted.

Arrowhead, Ledford, Parks, and Arthur also pointed to another provision of the 2007 Arrowhead-UAE APA as a defense to UAE's claim of indemnity, prior to when the circuit court entered its judgment. This latter provision, which they argued was a complete bar to UAE's recovery of any indemnity with respect to the Henderson lease, is entitled "Section 15.3 Procedure for Third Party Claims"; it contains three subsections (*e.g.*, "(a)," "(b)," and "(c)").

In relevant part, Section 15.3(a) provides:

> (a) In order for a Person (the "Indemnified Party") to be entitled to any indemnification by another Person (the "Indemnifying Party") pursuant to this Section 15 in respect of, arising out of or involving a claim or demand made by any Person against the Indemnified Party (a "Third Party Claim"), such Indemnified Party must notify the Indemnifying Party in writing of (and in reasonable detail regarding) the Third Party Claim promptly, and in any event within ten (10) business days after receipt by such Indemnified Party of notice of the Third Party Claim. Failure to give such notification shall not affect the indemnification otherwise provided under this Agreement except to the extent that the Indemnifying Party or its ability to defend or resolve the Third Party Claim shall have been actually prejudiced as a result of such failure (except that the Indemnifying Party shall not be liable for any expenses incurred prior to the day on which the Indemnified Party gives such notice). At the time a claim for indemnification is made and thereafter, the Indemnified Party shall provide the Indemnifying Party with copies of any material in its possession describing the facts or basis of the Third Party Claim or containing any other information relevant thereto.

Giving UAE the benefit of the doubt, we will assume that when UAE discovered what it believed was Forest Oil's interest in the Henderson lease, its discovery constituted "a claim or demand made by any person [Forest Oil] against the Indemnified Party [UAE]" (*e.g.*, a "Third Party Claim"). If UAE wanted indemnity from Arrowhead relating to this "Third Party Claim," this provision required UAE to do the following: 1) Notify Arrowhead "in reasonable detail" regarding Forest Oil's claim; 2) do so "promptly" or "within ten (10) business days after" UAE made this discovery; and, 3) provide Arrowhead "with copies of any material in its possession describing the facts or the basis of the Third Party Claim

or containing any other information relevant thereto." If UAE failed to do so, its potential indemnity would be reduced in proportion to the extent that its failure prejudiced Arrowhead, *or Arrowhead's ability to defend or resolve the Third Party Claim*. Moreover, if UAE failed to notify Arrowhead as described above, its failure would exonerate Arrowhead from any liability for paying UAE's attorney's fees and other expenses in resolving the Third Party Claim.

Next, we consider Section 15.3(b):

> (b) If a Third Party Claim is made against an Indemnified Party, the Indemnifying Party shall be entitled to participate in the defense thereof and, if it so chooses, to assume and control the defense thereof with counsel selected by the Indemnifying Party. Should the Indemnifying Party so elect to assume the defense of a Third Party Claim, the Indemnifying Party shall not be liable to the Indemnified Party for legal expenses subsequently incurred by the Indemnified Party in connection with the defense thereof. If the Indemnifying Party assumes such defense, then the Indemnified Party shall have the right to participate in the defense thereof and to employ at its own expense counsel not reasonably objected to by the Indemnifying Party separate from the counsel employed by the Indemnifying Party, it being understood that the Indemnifying Party shall control such defense and shall be empowered to make any settlement with respect to such Third Party Claim, subject to the remaining terms of this Section 15.3. The Indemnifying Party shall be liable for the reasonable fees and expenses of counsel employed by the Indemnified Party for any period during which the Indemnifying party has not assumed the defense thereof (other than the period prior to the day on which the Indemnified Party gives notice of the Third Party Claim as provided above). If the Indemnifying Party chooses to defend or prosecute any Third Party Claim, then all the parties hereto shall cooperate and shall cause their Affiliates to cooperate in the defense or prosecution thereof. Such cooperation

> shall include the retention and (upon the Indemnifying Party's request) the provision to the Indemnifying Party of records and information that are reasonably relevant to such Third Party Claim, and making employees available on any basis reasonably requested by the Indemnifying Party to provide additional information and explanation of any material provided hereunder or otherwise relating to the Third Party Claim. Whether or not the Indemnifying Party assumes the defense of a Third Party Claim, the Indemnified Party shall not admit any liability with respect to, or settle, compromise or discharge, such Third Party Claim without the Indemnifying Party's prior written consent. If the Indemnifying Party assumes the defense of a Third Party Claim, then the Indemnified Party shall agree to any settlement, compromise or discharge of such Third Party Claim that the Indemnifying Party may recommend if such settlement, compromise or discharge would only result in the entry of a monetary judgment for which the Indemnified Party is fully indemnified hereunder.

Like Section 15.3(a), part (b) also emphasizes that Arrowhead, as the "Indemnifying Party," would have the right to participate in and direct any defense or prosecution of a Third Party Claim. It provides that if Arrowhead chooses to direct the defense or prosecution of the Third Party Claim, it would not be liable for UAE's subsequent attorney's fees and litigation expenses. It also provides that that if UAE, as the "Indemnified Party," chooses to litigate the Third Party Claim prior to giving Arrowhead the "notice" previously described, Arrowhead would not be liable for UAE's resulting attorney's fees and expenses. It emphasizes again that Arrowhead and UAE are to *cooperate* in defending any Third Party Claim. It emphasizes that the definition of the word "cooperate" includes "provid[ing] additional information and explanation of any material provided hereunder or

otherwise relating to the Third Party Claim." Finally, it mandates that Arrowhead's liability for indemnifying UAE in relation to any Third Party Claim is contingent upon Arrowhead's "prior written consent" to any settlement, compromise, or discharge.

Finally, Section 15.3(c) once again underscores the necessity of cooperation:

> (c) [Arrowhead] and [UAE] shall cooperate with each other and make reasonable efforts with respect to mitigating or resolving any claim or liability which any party is obligated to indemnify any other party hereunder.

With that said, we will now review UAE's conduct in resolving Forest Oil's Third Party Claim, beginning with how UAE gave Arrowhead "notice" of this claim. UAE appraised itself of what it believed was Forest Oil's half-interest in the Henderson lease on or about December 10, 2007; the record contains a title opinion to that effect, produced by UAE, bearing that date. UAE asserts that it gave Arrowhead notice of Forest Oil's Third Party Claim by filing its complaint in this matter on December 27, 2007. And, in that regard, UAE's complaint provides only the following:

> 37. Another Lease identified in the 2007 Agreement and assigned to UAE was a lease between Thomas Henderson, as Lessor, and Arrowhead, as Lessee (the "Henderson Lease").
>
> 38. There is another conveyance of record, however, that predates the Henderson Lease and which provides to a third party, a one-half interest in the working interest that was to have been conveyed to UAE by Arrowhead under the Henderson Lease.

Below, Arrowhead, Ledford, Parks and Arthur asserted that UAE only informed them that it had been in the process of obtaining a one-half interest in the Henderson lease from Forest Oil on March 30, 2009, the date of UAE's motion for partial summary judgment in this matter relating to the Henderson lease. UAE did not deny this. They asserted that until March 30, 2009, UAE had objected to making any responses to their discovery requests with respect to UAE's allegations involving the Henderson lease. UAE did not deny this. On June 8, 2008, UAE filed its "Petition to Declare Trust" in Estill Circuit Court regarding the Henderson lease; the face of this petition reflects that it was served upon Forest Oil, but it omits any mention of Arrowhead. Arrowhead claimed that UAE never informed it about UAE's $500 settlement with Forest Oil in July, 2008, or gave it an opportunity to participate in that settlement, and there is nothing in the record to the contrary. Indeed, there is no indication that Arrowhead, or any of the appellants, knew about, consented to, or were even given the opportunity to cooperate with anything that UAE did regarding the Henderson lease.

Nevertheless, the circuit court determined that Section 15.3 and its subsections did not bar UAE's claim of indemnity relating to the Henderson lease for three reasons:

> [1] [T]he filing of this lawsuit in December 2007 provided sufficient notice to Defendants of UAE's claim relating to the Henderson Lease in order to satisfy UAE's obligations under the contractual notice provision in the 2007 APA; [2] that [appellants'] ability to resolve the adverse claim of Forest Oil was not prejudiced in any

> way by UAE's alleged failure to provide notice at an earlier date (since it is difficult to imagine that they could have purchased Forest Oil's interest for less than the $500 paid by UAE); and [3] that the fees UAE is seeking to recover were incurred after [appellants] knew or should have known of the adverse claim against UAE's interest in the Henderson Lease.

On appeal, Arrowhead, Ledford, Parks and Arthur argue that Section 15.3 should have acted as a bar to UAE's claim of indemnity relating to the Henderson lease. We agree.

The essential purpose of Section 15.3 was to give Arrowhead, as the indemnifying party, the first opportunity to cure any defects in what it had conveyed to UAE through their agreement. Arrowhead's contractual duty in this respect was not contingent upon what it knew or should have known—Section 15.3 contains no such language. In any event, the circuit court made no finding that any of the appellants should have been on constructive notice of Forest Oil's claim, or that any of the appellants' conduct relating to the Henderson lease amounted to fraud or bad faith.[52] Rather, Arrowhead's contractual duty was contingent upon UAE's *cooperation*. At a minimum, this required UAE to give Arrowhead enough notice about Forest Oil's Third Party Claim to allow Arrowhead to resolve it. UAE's complaint only indicates that some third party had a claim to the Henderson lease. It omitted any mention that UAE was attempting to resolve that claim. UAE omitted that information and refused to otherwise inform Arrowhead that it was in the process of resolving Forest Oil's complaint. Consequently, UAE not

[52] In its final order in this matter, the circuit court specifically found that none of the appellants had acted fraudulently with respect to the Henderson lease.

only failed to give Arrowhead the requisite notice under Section 15.3(a), UAE completely eviscerated *Arrowhead's ability to defend or resolve the Third Party Claim* per that section.

It makes no difference whether UAE settled Forest Oil's claim for $500 or $500,000: Section 15.3(a) clearly and unambiguously provides that if Arrowhead's ability to resolve the Third Party Claim is utterly destroyed, so too is UAE's right to indemnity. It was error for the circuit court to award UAE any amount of indemnity relating to the Henderson lease.

V. ADDITIONAL ARGUMENTS RELATING TO UAE'S TOTAL DAMAGES IN THIS MATTER

The total damages awarded by the circuit court must be modified per our holding in this matter. Nevertheless, the appellants present two more issues with respect to the total amount of damages that the circuit court is entitled to award, whatever that total might be. These two issues regard 1) the extent of non-punitive damages that the circuit court may award in this matter; and 2) the circuit court's decision to award UAE its fees and costs associated with collecting its total judgment.

a. The extent of UAE's potential compensatory damages

PAL Oil, Ledford, and Arthur assert that they should not be held liable to UAE for any damages beyond $872,000[53] relating to the 2006 APA. Their argument is as follows:

> The [appellants] asked in Interrogatories for UAE to identify with particularity the amount of damages it was claiming. UAE lumped all of its claims relating to the 2006 APA into one sum, $872,000. Then at trial, UAE claimed damages of $988,900.69, which is $116,900.69 more than the amount claimed. Part of this award is $250,000 for estimated future losses because of the "extra" 1/16 working interest in the Tyree Lease, which was not stated as part of the $872,000 claimed in Interrogatories. The Court should truncate damages by $250,000, or at least by $116,900.69 because those damages were awarded in excess of the total amount last claimed by UAE. Fratzke v. Murphy, 12 S.W.3d 269, 271 (Ky. 1999); Lafleur v. Shoney's Inc., 83 S.W.3d 474 (Ky. 2002).

To the extent that the appellants argue that *Fratzke* or *Lafleur* mandate a reduction in the amount of the total damages awarded to UAE, they misinterpret both cases. As explained in *Thompson v. Sherwin Williams Co., Inc.*, 113 S.W.3d 140, 144 (Ky. 2003),

> [T]he purpose and the only requirement of CR 8.01(2) is that information be furnished as to the "amount claimed" in unliquidated damages, not an itemization of each category of unliquidated damages for which that amount is claimed. *Fratzke, supra*, at 272–73. The rule is a substitute for the previous procedure of stating the amount claimed in the *ad damnum* clause of the complaint and serves the same purpose as the former procedure in addition to the salutary purpose of

[53] The appellants make no contention that *Fratzke v. Murphy*, 12 S.W.3d 269 (Ky. 1999), or *Lafleur v. Shoney's Inc.*, 83 S.W.3d 474 (Ky. 2002), have any bearing upon an award of punitive damages. Indeed, UAE asked for an award of punitive damages several times higher than $300,000. Rather, the appellants take issue with the other damages awarded to the appellees.

> facilitating settlements. *LaFleur, supra*, at 478–79. Although a request for a categorization of damages is within the scope of CR 33.01, it is not within the requirement of CR 8.01(2).

In short, *Thompson* explains that CR 8.01(2)—the Civil Rule described in *Fratzke* and *LaFleur* as the basis for limiting a total award—is concerned with the total amount of damages claimed, not with categories of damage. In seeking to isolate specific sums as "related to the 2006 APA," PAL Oil, Ledford, and Arthur have ignored this distinction and have, nevertheless, resorted to categorizing damages.

Moreover, CR 8.01(2) would not otherwise reduce UAE's award of damages. As UAE points out in its brief, the total amount of its damages between its claims relating to both the 2006 APA and 2007 APA (discussed more fully below) was $1,336,000. This is an amount in excess of the total amount of non-punitive damages that the circuit court awarded UAE.

b. Award of fees and costs associated with collecting the total judgment

The circuit court's judgment in this matter provides that UAE "is also awarded post-judgment interest accumulating at the statutory rate of twelve percent (12%) per annum until the date the Judgment is paid in full, plus attorneys' fees and costs incurred in collecting on this judgment." The appellants argue that the circuit court erred in granting UAE its "attorney's fees and costs incurred in collecting on this judgment.

Inasmuch as the appellants are arguing that post-judgment attorneys' fees are never warranted in breach of contract disputes, they are incorrect. In *Moorhead v. Dodd*, 265 S.W.3d 201 (Ky. 2008), the Kentucky Supreme Court held that the following contractual provision entitled a successful litigant to such fees:

> In order to induce Helen H. Moorhead . . . and National City Bank, Kentucky, Trustee ["Sellers"] . . . to enter into the Agreement attached hereto, and in consideration of the premises contained in said Agreement . . . J. William Manning and Hazel Manning . . . hereby unconditionally and irrevocably guarantee to Sellers . . . (A) The prompt payment when due and at all times thereafter of all amounts due under said Agreement; and (B) All fees, expenses, costs and charges of any nature whatsoever, including without limitation, reasonable attorneys fees of Sellers required to be paid by Sellers in enforcing any of their rights and remedies under said Agreement or under this Guaranty . . . .

The language of the various APAs at issue in this litigation contains equally broad language. Each APA specifies that if indemnity is warranted, that indemnity includes the recovery of "Damages." "Damages," in turn, is contractually defined as "all losses, damages, penalties, fines, judgments, costs, amounts paid in settlement, expenses and fees, including reasonable attorneys' and accountants' fees and expenses." Therefore, we agree that the various APAs in this matter entitled UAE to some measure of post-judgment attorneys' fees.

We find error, however, in the circuit court's phrasing of this award because it fails to provide *any* measure for those fees. If and when UAE files a post-judgment petition for attorneys' fees[54] relating to the APAs, UAE will be

[54] *See, e.g., Moorhead*, 265 S.W.3d 201.

required to prove that those fees were *reasonable*; the APAs require any award of attorneys' fees to be reasonable, and, as a general matter, Kentucky law requires any award of attorneys' fees to be reasonable. *Brooks v. Lexington-Fayette Urban County Housing Authority*, 332 S.W.3d 85, 91 (Ky. App. 2009). Thus, on remand, the circuit shall make this specification.

CONCLUSION

We REVERSE the circuit court's determination of fraud, and REMAND for the circuit court to reconsider that matter and make additional findings consistent with this opinion.

We AFFIRM IN PART, REVERSE IN PART, and REMAND with respect to UAE's claim for contractual indemnity relating to the Tyree mineral estate. We AFFIRM the circuit court's determination that PAL Oil, Ledford, and Arthur are liable for indemnifying UAE, pursuant to the terms of the 2006 PAL Oil-UAE APA, for PAL Oil's failure to convey to UAE any valid right to explore for oil on the Tyree mineral estate. However, because the circuit court's calculation of UAE's award of damages relating to indemnity appears to be dependent upon and inseparable from an additional finding of fraud, we REVERSE and REMAND for the circuit court to reconsider the amount of UAE's indemnity award concurrently with its reconsideration of the appellants' liability for fraud.

We REVERSE each of the circuit court's determinations relating to the "expired" or "abandoned" leases, *i.e.*, the "John and Patsy Marcum," "Sally

Stewart," "Mitchell Goff," and "Simp Horn" leases, and REMAND these matters with directions for the circuit court to permit the parties to join any property owners whose interests may be affected by an adjudication of rights relating to those leases. Unless such persons are made parties, the circuit court shall dismiss, without prejudice, Arrowhead's and UAE's respective claims of breach of contract against one another relating to these leases.

We REVERSE the circuit court's award of indemnity to UAE relating to the Henderson lease. The circuit court shall VACATE any part of UAE's total award relating to that matter.

Furthermore, in the event that the circuit court determines, following its reconsideration of this matter, that UAE is entitled to collect any amount of prospective attorneys' fees from the appellants, the circuit court shall specify in its Judgment that any such fees shall be "reasonable."

LAMBERT, SENIOR JUDGE, CONCURS.

KELLER, JUDGE, CONCURS IN RESULT ONLY.

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