RENDERED: NOVEMBER 8, 2019; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001178-MR;
NO. 2017-CA-001192-MR;
NO. 2017-CA-001925-MR;
AND
NO. 2017-CA-001961-MR

EQT PRODUCTION COMPANY;
AND EQT GATHERING, LLC APPELLANTS/CROSS-APPELLEES

APPEALS AND CROSS-APPEALS FROM FAYETTE CIRCUIT COURT
v. HONORABLE ERNESTO M. SCORSONE, JUDGE
ACTION NO. 09-CI-05779

BIG SANDY COMPANY, L.P. APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; DIXON AND LAMBERT, JUDGES.

LAMBERT, JUDGE: These appeals and cross-appeals arise from several rulings of the Fayette Circuit Court related to contract rights set forth in two deeds executed nearly a century ago addressing coal, oil, and gas interests on property

located in Pike County, Kentucky. EQT Production Company and EQT Gathering, LLC (collectively, "EQT") seek review of the Fayette Circuit Court's declaratory judgment requiring it to pay to relocate pipelines under certain circumstances and from the partial summary judgment barring unjust enrichment claims for payments made prior to a certain date. In its cross-appeal, Big Sandy Company, L.P. (Big Sandy), seeks review of the circuit court's interpretation of the phrase "coal workings, extended or projected," the decision to not hear evidence of the parties' prior dealings through the use of surface use agreements, the ruling as to when the statute of limitations began to run on its breach of contract claims, and the decision not to reform the deed as to the payment EQT owed to Big Sandy for coal left in place. Finding no error or abuse of discretion, we affirm.

Pursuant to the terms of two deeds, Big Sandy owns approximately 56,000 acres of coal property in Pike County, Kentucky. In December 1926, Big Sandy's predecessor in interest, Big Sandy Company, conveyed oil and gas interests on identified tracts by deed to R.J. Graf. It retained the coal and all other mineral estates on the Graf Property as well as ownership of the surface of certain portions. The deed provided that Big Sandy retained the dominant estate and intended to mine and remove coal and other minerals within that property. In a second deed executed in 1928 with identical pertinent language, Big Sandy conveyed the oil and gas interests on tracts of land to Kentucky West Virginia Gas

Company. Big Sandy currently holds the interest in the coal and surface rights, and EQT is the current interest holder of the oil and gas rights set forth in the deeds. EQT Gathering performs the pipeline activities. Pursuant to the terms of the deeds, EQT must pay Big Sandy a royalty of 1/8 of the oil produced from the property as well as for coal that is left in place around a well. EQT was also required to interfere as little as reasonably possible with Big Sandy's right to remove coal and other minerals, and to obtain approval for "[t]he location of any oil or gas well through coal workings, extended or projected[.]" Big Sandy leases the mining of its coal and minerals to third parties in exchange for a royalty.

On October 29, 2009, Big Sandy filed a complaint against EQT seeking to enforce rights it retained in the subject property as the dominant estate owner.[1] EQT held a subservient interest in the oil and natural gas rights, and Big Sandy alleged that EQT had failed to comply with the terms and intent of the deeds under which they operated. Big Sandy sought to enforce its rights under the deeds, a declaration as to their respective rights and obligations, and an accounting of royalties owed on EQT's oil production. In the complaint, Big Sandy alleged that EQT had breached the terms of the two deeds by drilling wells that passed through extended or projected coal workings without first obtaining its approval (Count I), failing to interfere as little as reasonably possible with Big Sandy's removal of coal

[1] The action was filed in Fayette County where Big Sandy's general managing partner lived.

(Count II), and refusing to provide an accounting of its oil production so that the proper royalties due could be determined (Count IV). Big Sandy sought a declaration from the court that EQT must obtain approval from it before locating wells on the properties that pass through coal workings, extended or projected; that EQT must relocate its pipelines – at its own expense – that interfere with coal mining or removal; and that EQT must obtain an easement or surface use agreement from Big Sandy before constructing any pipelines or using access roads over, through, or across the properties (Count III).

EQT filed an answer disputing Big Sandy's allegations as well as a counterclaim and its own petition for a declaratory judgment. EQT sought a declaration that it had not breached any obligations with regard to the deeds; that the parties were not obligated to enter into agreements related to surface use or the location of its oil and gas wells; and that Big Sandy was obligated to pay the cost to relocate pipelines when they were being moved at Big Sandy's request.

On May 11, 2010, EQT filed a motion to amend its answer and counterclaim to include a claim for unjust enrichment, alleging that when it changed its accounting system in 2001, it mistakenly began paying natural gas royalties to Big Sandy to which it was not entitled and did not discover this mistake until March 2, 2010. This was based upon information contained in a letter dated December 21, 2007, from Chauncey S. R. Curtz of Big Sandy to Lester

Zitkus of EQT that was attached as Exhibit C to Big Sandy's complaint. The letter stated, in pertinent part, as follows:

> Next, as I told you in my February, 2006 letter, the amount Equitable owes Big Sandy for coal left unmined in the vicinity of Equitable's wells has been accruing and increasing for some time. When we last met in Pikeville we told you the amount owed was becoming very significant, but we never heard anything more from you on the topic. Nor did we ever hear anything more on the issue we raised at that meeting about the payment of royalties by Equitable on gas we have been unable to confirm is owned by Big Sandy. As we told you, we are not sure why Equitable is paying Big Sandy royalty on gas produced from the wells listed on the attached Exhibit A.
>
> Because we never heard anything more from Equitable on these two issues, I recently totaled the amount due Big Sandy for coal left in place in the vicinity of Equitable's wells, as well as the amount Equitable has paid Big Sandy for gas produced from the wells that we have been unable to confirm are on our property. Coincidentally, as of the date of this letter, both totals are very nearly $650,000. As a result, we have elected to set-off the amounts due Big Sandy for coal left in place in the vicinity of Equitable's wells by the amount of royalty paid to Big Sandy for gas produced from those wells which we have been unable to confirm we own. As of December 1, 2007, we believe this set-off satisfies both of these accounts in full.

EQT alleged that amount of mistaken payments totaled approximately $777,000.00 and sought restitution of these amounts, plus interest. It later moved to amend its answer to include the information that a subsequent audit established it had underpaid oil royalties to Big Sandy in the amount of $20,056.95 and that Big

Sandy had refused to accept the check it tendered to pay it. In May 2010, the circuit court permitted EQT to amend its answer, and the parties entered into an agreed order permitting EQT to file an amended counterclaim and petition for declaratory judgment. Several months later, Big Sandy moved to amend its answer to the amended counterclaim to add an affirmative defense based upon the statute of limitations and laches for the unjust enrichment claim. The circuit court permitted it to do so pursuant to an agreed order.

In June 2010, EQT moved the circuit court for a partial summary judgment, in which it sought dismissal of Count III of the complaint related to the declaratory judgment petition. Shortly thereafter, Big Sandy filed a motion for partial summary judgment on Count III and Count IV, in which it had sought an accounting of EQT's oil production. Both parties presented their arguments as to the interpretation of the language in the deeds. In an order entered September 29, 2010, the court denied both motions, finding that disputed issues of material fact existed. Later mediation efforts were unsuccessful, and a trial was scheduled for May 2017.

In February 2017, EQT filed a motion for partial summary judgment on Counts I, II, and III of Big Sandy's complaint and on its own counterclaim for declaratory judgment. Big Sandy also filed a motion for partial summary judgment on EQT's unjust enrichment and declaratory judgment claims as well as on Counts

I, II, III, and IV of its complaint. In an order entered April 11, 2017, the circuit court denied EQT's motion as well as the portion of Big Sandy's motion related to the claims in its complaint and EQT's petition for declaratory relief. It took the portion of Big Sandy's motion related to the counterclaim for unjust enrichment under submission.

Prior to trial, the parties filed motions *in limine*, and EQT specifically sought to exclude "any evidence or testimony suggesting collateral agreements between the Parties about the use of and/or access to the surface define the Parties' rights and obligations under the Deeds." The parties entered into joint stipulations filed on May 2, 2017, and a bench trial commenced on May 8, 2017.

On June 15, 2017, the circuit court entered its judgment and order, and ruled on Big Sandy's motion for partial summary judgment on EQT's counterclaim for unjust enrichment. The judgment, which the court declared to be final and appealable, provided as follows:

> 1. EQT is ordered to pay Big Sandy $10,188.00 for coal left in place around wells that EQT drilled on the property at issue on or after October 29, 1994 under Counts I and II of Big Sandy's Complaint, with post-judgment interest accruing from the date of the entry of this Judgment until paid in full.
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> 2. With respect to the Parties' competing claims for Declaratory Judgment (Count III of Big Sandy's Complaint and EQT's Petition for Declaratory Judgment), the Court orders and adjudges as follows:

a. The Court will take under submission the Parties' joint request for a ruling on the meaning of the phrase "coal workings, extended or projected."

b. In the event that any of EQT's pipelines interfere more than as little as may be reasonably possible with mining and removal of coal and other minerals, per the terms of the Deed, EQT must relocate the pipelines and pay for such relocation.

c. Under the Deeds, EQT is not obligated to enter surface use agreements with Big Sandy, prior to performing activities on the property covered by the Deeds.

d. The issuance of a well permit by the Kentucky Division of Oil and Gas is not determinative of whether EQT obtained approval from Big Sandy or its lessees regarding the location of the wells, whether EQT acted reasonably in its oil and gas operations, or whether EQT otherwise complied with the terms of the Deeds. Events that occurred during the permitting process may be relevant for other purposes.

e. The Court declines to rule that EQT is explicitly required to coordinate and cooperate with Big Sandy regarding the placement of its pipelines, roads, facilities, and other surface installations or improvements. However, if EQT takes any action that would otherwise be a breach of the obligations set forth in the Deeds or otherwise set out in this Judgment, it may be liable for the consequences of such conduct.

> 3. With respect to Count IV of Big Sandy's Complaint, the Court orders and adjudges that Big Sandy is entitled to an accounting. Judgment is entered in favor of Big Sandy in the amount of at least $39,403.10, which is subject to increase based on the outcome of the accounting, with post-judgment interest accruing from the date of the entry of this Judgment until paid in full. EQT shall perform a query in its accounting system, by owner, for the period fifteen years prior to the filing of the Complaint, for all oil royalties on all oil wells owed to Big Sandy. The Court orders and adjudges that EQT is to produce the results of such query to Big Sandy with a written explanation as to how the royalties owed are being calculated. The Court further orders and adjudges that, to the extent EQT has royalty reports and oil tickets for oil royalties due to Big Sandy in its records, EQT must produce such oil tickets to Big Sandy so that Big Sandy may perform its own calculations. After EQT produces such information, if the Parties are unable to agree to the amount that EQT owes Big Sandy for unpaid oil royalties under Count IV of the Complaint, either Party may request a ruling from the Court on this issue.
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> 4. EQT's Counterclaim for Unjust Enrichment has been bifurcated and will proceed separately. The Parties are to submit proposed, mutually convenient dates for the unjust enrichment claim to proceed.

The court declined Big Sandy's request to reform the deeds, which required EQT to pay it 10¢ per ton for the 140 square foot block of coal left in place around a well. Big Sandy wanted the court to raise the 10¢ per ton amount to the present day value using the Consumer Price Index and use the 200-square-foot block left in place for the calculation as required by current regulations.

In a separate order entered the same day, the court ruled on Big Sandy's motion for partial judgment on the unjust enrichment counterclaim. The court stated that such claims are subject to a five-year statute of limitations pursuant to Kentucky Revised Statutes (KRS) 413.120 and that EQT had argued that, because it did not discover the issue giving rise to this claim until March 2, 2010, the discovery rule and the doctrine of equitable tolling should toll the running of the statute of limitations in this case. The court found that:

> [EQT], in the exercise of reasonable diligence, could have discovered the alleged overpayments at the time they were allegedly made and that [EQT] had at [its] disposal the information that would have allowed [it] to discover the alleged overpayments. [EQT's] corporate representative Nicole Atkison testified during her deposition that all of the information needed to discover the overpayment was at [EQT's] disposal and that the alleged overpayment could have been gleaned from the payment history.

The court went on to find that the first overpayment was made in 2002, and that each overpayment constituted a separate claim for unjust enrichment. It then concluded that EQT's right to recover for alleged overpayments that occurred five years prior to the time EQT filed its counterclaim for unjust enrichment on May 11, 2010, was barred by the statute of limitations. The court therefore granted Big Sandy's motion for partial summary judgment related to overpayments made more than five years prior to May 11, 2010, and dismissed those claims. It denied the motion with respect to overpayments made within that time period.

EQT appealed from the June 15, 2017, final judgment and from the order on the motion for partial summary judgment on the unjust enrichment counterclaim (Appeal No. 2017-CA-001178-MR). Big Sandy cross-appealed from the final judgment (Appeal No. 2017-CA-001192-MR).

The parties also filed briefs in support of their positions as to the meaning of the phrase, "coal workings, extended or projected." On August 23, 2017, the circuit court entered an order granting EQT's request for declaratory judgment in relation to that phrase, finding that EQT's interpretation was more in line with the language of the deeds than Big Sandy's interpretation. The court found that the phrase "does not refer to all coal that is mineable and merchantable, but rather finds that it refers to areas for which Big Sandy, or its lessees, have expressed a present interest to mine coal." The court looked to another use of the phrase in the deeds, which it stated was meant to "limit EQT's ability to drill through air courses of mines that are already in place, or any coal mine 'in operation or temporarily shut down.'" The court accorded the same meaning to the phrase the second time it was used in the phrase that was at issue. The court also found that Big Sandy's expert, Samuel Johnson, provided testimony that supported the conclusion that EQT's interpretation was appropriate. By agreed order entered September 1, 2017, the court held further proceedings related to EQT's unjust

enrichment counterclaim in abeyance pending final disposition of that claim on appeal.

By agreed order entered November 13, 2017, the circuit court deemed its June 15, 2017, order on Big Sandy's motion for partial summary judgment on the unjust enrichment counterclaim and its August 23, 2017, order granting EQT's request for a declaratory judgment, to be final and appealable rulings. EQT filed a notice of appeal from the November 13, 2017, order, which made the June 15, 2017, order final and appealable (Appeal No. 2017-CA-001925-MR). Big Sandy cross-appealed from the November 13, 2017, order, which made the August 23, 2017, order final and appealable (Appeal No. 2017-CA-001961-MR).

In its direct appeal, EQT contends that the circuit court erred in ruling in the declaratory judgment actions that it must pay to relocate pipelines and in determining that it could not recover payments mistakenly made to Big Sandy prior to May 11, 2005. In its cross-appeal, Big Sandy contends the circuit court erred in its interpretation of the phrase "coal workings, extended or projected," the ruling that the parties did not need to enter surface use agreements, the ruling that the statute of limitations on its breach of contract claims began to run when the well was drilled, and by failing to reform the deed as it requested.

EQT's Direct Appeal

For its first argument, EQT contends that the circuit court erred when it ruled that it must pay to relocate pipelines at Big Sandy's behest as part of its ruling on Big Sandy's petition for a declaratory judgment. It argued that the ruling should be reversed for three reasons: it conflicted with the rights EQT was granted under the deeds, contravened common law and the correlative rights doctrine, and imposed prospective, injunctive relief that was not ripe or enforceable.

In *Carroll v. Meredith*, 59 S.W.3d 484, 489 (Ky. App. 2001), this Court set forth the standard of review in cases where a bench trial was held:

> Since this case was tried before the court without a jury, its factual findings "shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses...." A factual finding is not clearly erroneous if it is supported by substantial evidence. However, a reviewing court is not bound by the trial court's decision on questions of law. An appellate court reviews the application of the law to the facts and the appropriate legal standard *de novo.*

(Footnotes omitted.) Because this issue concerns a question of law, we shall review the circuit court's rulings on a *de novo* basis.

The present matter involves the interpretation of two deeds, and we recognize that "[t]he rules applicable to construction and interpretation of a deed or trust are generally analogous to the rules of construction and interpretation of contracts." *Williams v. City of Kuttawa*, 466 S.W.3d 505, 509 (Ky. App. 2015).

> An unambiguous written contract must be strictly enforced according to the plain meaning of its express terms and without resort to extrinsic evidence. *Allen v. Lawyers Mut. Ins. Co. of Kentucky*, 216 S.W.3d 657 (Ky. App. 2007). Even if the contracting parties may have intended a different result, a contract cannot be interpreted contrary to the plain meaning of its terms. *Abney v. Nationwide Mut. Ins. Co.*, 215 S.W.3d 699, 703 (Ky. 2006). A contract is not ambiguous if a reasonable person would find its terms susceptible to only one meaning. *Cantrell Supply, Inc. v. Liberty Mut. Ins. Co.*, 94 S.W.3d 381, 385 (Ky. App. 2002). However, if the provisions in controversy are reasonably susceptible to different or inconsistent, yet reasonable, interpretations, the contract is deemed to be ambiguous. *Id*.

Cadleway Properties, Inc. v. Bayview Loan Servicing, LLC, 338 S.W.3d 280, 286 (Ky. App. 2010). In keeping with our statement above regarding our standard of review, "[t]he construction of a contract, including the determination as to whether there are any ambiguities, is a question of law for the courts to decide and is subject to *de novo* review." *Id*. at 284 (citations omitted).

This issue centers on the interpretation of the following portion of the relevant deeds:

> Second party agrees to so use said land and to so treat same and to so put and use his pipe lines, pumps and buildings upon same as to interfere as little as may be reasonably possible with the mining and removal of said coal and other minerals, and to cause no unnecessary damage and waste to the remaining estate in the lands, the coal, other minerals, surface, fencing, building or timber and that whether said building, fencing or timber are now on said land or may hereafter be placed thereon by the first party, its successors or assigns, lessees or

> tenants, and shall pay for any damage done while using said land to crops or fences.

The circuit court ruled if EQT's pipeline operations interfered more than as little as reasonably possible, EQT must pay to relocate the pipelines. This echoed the court's ruling at trial that because EQT would have breached the terms of the deeds if its pipelines interfered more than as little as reasonably possible, the proper relief would be to require EQT pay to relocate them. We note that the court did not rule that any of the EQT's pipelines needed to be relocated pursuant to the terms of the deeds; it merely ruled that in the event one needed to be relocated pursuant to those terms, EQT must pay to do so.

EQT initially asserts that this ruling "gives Big Sandy unbridled discretion to decide if and when EQT's pipelines must be moved at EQT's expense." We disagree that this is the result of the court's ruling. Rather, the circuit court made a prospective ruling that EQT would have to pay to relocate a pipeline only in the event that it interfered more than as little as reasonably possible with Big Sandy's mining operations in contravention of the deeds. The court certainly did not rule that Big Sandy would be the sole decision-maker as to whether a pipeline unreasonably interfered with its operations. That would be left for a fact finder to decide if the parties were unable to reach an agreement out of court; the circuit court here was merely declaring what the remedy would be.

Turning to the merits of the issue, EQT first contends that the circuit court failed to enforce the unambiguous deeds as written, that it improperly inserted a payment obligation that had not been contemplated by the parties, that the deeds gave it the necessary surface rights to construct and operate the pipelines, and that it should not have to bear the burden of paying to relocate the pipelines when Big Sandy was the only one to benefit. We disagree. As Big Sandy argues, EQT has ignored the language of the deeds that requires it to interfere as little as reasonably possible with Big Sandy's ability to mine the property. While the language of the deeds does not include a payment clause, such a remedy must be available to Big Sandy in the event that EQT were to violate that portion of the deeds. The remedy would not be triggered in every circumstance where Big Sandy wanted EQT to relocate its pipelines; it would only be triggered when EQT's pipelines interfered more than as little as reasonably possible with Big Sandy's operations.

Second, EQT asserts that pursuant to Kentucky law and the correlative rights doctrine, it has the right to use the surface for its operations and Big Sandy must be obligated to pay to relocate the pipeline when it was the one to disturb the *status quo*. In support of this argument, EQT cites to *Lindsey v. Wilson*, 332 S.W.2d 641, 642 (Ky. 1960), in which the former Court of Appeals stated:

> An oil and gas lessee, or owner of the minerals, unless expressly limited by the terms of the lease or

> conveyance, has the right to use and occupy so much of the surface as may be necessary and reasonably convenient in the exercise of his rights in operating his facilities and marketing the oil or gas, even to the preclusion of any other surface possession. On the other hand, the lessor, or owner of the surface, and those in privity with him, may utilize the surface as he pleases so long as he does not interfere with the legitimate and reasonable activities and operations of the lessee or mineral owner. The rights are correlative and must be exercised with due regard which each demands. *Horseshoe Coal Co. v. Fields*, 207 Ky. 172, 268 S.W. 1078; *Jenkins v. Depoyster*, 299 Ky. 500, 186 S.W.2d 14; *Blue Diamond Coal Co. v. Press Eversole*, Ky., 253 S.W.2d 580; 58 C.J.S. Mines and Minerals § 201(e); Willis' Thornton on Oil and Gas, § 131; Summers, Oil and Gas, § 652.

EQT also relies upon the opinion of the Sixth Circuit Court of Appeals in *Columbia Gas Transmission, Corp. v. Limited Corp.*, 951 F.2d 110 (6th Cir. 1991), in which that Court discussed Kentucky common law applicable to the case. The Court specifically noted that because,

> The provision upon which Limited relies does not address the situation at bar. We, therefore, must turn to case law to resolve the issue of who must bear the costs and expenses when, as the district court found, the owner of the dominant estate wishes to undertake a project that interferes with reasonable use by the owner of the servient estate.

Id. at 113.

As Big Sandy points out, the deeds in the present case specifically address the situation at hand, meaning that there is no need to apply either common law or the correlative rights doctrine. Therefore, we find no merit in this argument.

Third, EQT asserts that the circuit court improperly granted prospective injunctive relief without any objective, measurable standard for triggering the obligations it imposed in the ruling, making it speculative and unenforceable. We disagree.

We note that "a declaratory judgment action is not a claim for damages, but rather it is a request that the plaintiff's rights under the law be declared." *Commonwealth v. Kentucky Retirement Systems*, 396 S.W.3d 833, 838 (Ky. 2013).

> Declaratory judgment actions are simply different. Historically, the Act originated because the courts at that time (1922) were not permitted to adjudge legal rights unless a remediable right had already been violated. *See De Charette v. St. Matthews Bank & Trust Co.*, 214 Ky. 400, 283 S.W. 410, 413 (1926) ("The primary purpose of the Declaratory Judgment Act is to relieve litigants of the common-law rule that no declaration of rights may be judicially adjudged, unless a right has been violated for the violation of which relief may be granted.") The Act allows courts to determine a litigant's rights before harm occurs, and requires the existence of an actual controversy. Such a controversy occurs when a defendant's position would "impair, thwart, obstruct or defeat plaintiff in his rights." *Revis v. Daugherty*, 215 Ky. 823, 287 S.W. 28, 29 (1926). A declaratory judgment action may be brought standing alone, or may be brought with the substantive claim seeking

> recompense. *Fontaine v. Dep't of Finance*, 249 S.W.2d 799 (Ky. 1952).

Id. at 839. Here, the circuit court properly considered and ruled on whether the deeds afforded a remedy to possible future situations where a pipeline unreasonably interfered with Big Sandy's removal of minerals. We agree with Big Sandy that the circuit court did not misuse the declaratory judgment process in ruling that EQT would have to pay to move its pipelines in the event that its pipeline interfered more than as reasonably possible with Big Sandy's rights. The court did not – and should not – have gone any further with this ruling, as there were no present violations of the deeds and, therefore, no factual findings to make.

For its second argument, EQT argues that the circuit court erred in granting a partial summary judgment in favor of Big Sandy on EQT's unjust enrichment claim and holding that EQT could not recover payments it mistakenly made to Big Sandy prior to May 11, 2005. It presents three separate reasons why the circuit court erred, which we shall examine in turn. We note that pursuant to KRS 413.120(11), a five-year statute of limitations period applies to this claim.

Our standard of review is set forth in *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996), as follows:

> The standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law. Kentucky Rules of Civil Procedure (CR)

> 56.03. There is no requirement that the appellate court defer to the trial court since factual findings are not at issue. *Goldsmith v. Allied Building Components, Inc.*, Ky., 833 S.W.2d 378, 381 (1992). "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest, Inc. v. Scansteel Service Center, Inc.*, Ky., 807 S.W.2d 476, 480 (1991). Summary "judgment is only proper where the movant shows that the adverse party could not prevail under any circumstances." *Steelvest*, 807 S.W.2d at 480, *citing Paintsville Hospital Co. v. Rose*, Ky., 683 S.W.2d 255 (1985). Consequently, summary judgment must be granted "only when it appears impossible for the nonmoving party to produce evidence at trial warranting a judgment in his favor. . ." *Huddleston v. Hughes*, Ky.App., 843 S.W.2d 901, 903 (1992), *citing Steelvest, supra* (citations omitted).

"Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue *de novo*." *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001) (footnote omitted).

First, EQT argues that a disputed issue of material fact existed as to when it could have reasonably discovered that Big Sandy had been accepting royalty payments it was not entitled to receive. It stated that it began making mistaken royalty payments to Big Sandy in 2002, after changing its payment system. EQT asserted that it had no reason to review prior payments without a request from the owner of the royalty, so nothing triggered EQT that an error had been made. Because ownership data and royalty payment information were

maintained in two different departments and due to its size, EQT would not verify the accuracy of an owner's interest unless that owner made a request. It then stated that Big Sandy's practice was to compare royalty checks with its royalty interests and that Big Sandy claimed it waited more than four years before notifying EQT.

On the other hand, Big Sandy argues that EQT did not dispute that it had all of the information necessary to discover the mistaken payments, and the circuit court stated in the order on the motion for partial summary judgment that "[EQT's] corporate representative Nicole Atkison testified during her deposition that all of the information needed to discover the overpayment was at [EQT's] disposal and that the alleged overpayment could have been gleaned from the payment history." We do not agree with EQT that any disputed issues of material fact were left to be decided which would have precluded the circuit court from ruling on the legal issue.

EQT then argues that the discovery rule and the doctrine of equitable tolling applied in this case to stop the statute of limitations from accruing. Kentucky's discovery rule is codified in KRS 413.130(3):

> In an action for relief or damages for fraud or mistake, referred to in subsection (11) of KRS 413.120, the cause of action shall not be deemed to have accrued until the discovery of the fraud or mistake. However, the action shall be commenced within ten (10) years after the time of making the contract or the perpetration of the fraud.

The Supreme Court of Kentucky explained the discovery rule in *Wilson v. Paine*, 288 S.W.3d 284, 286-87 (Ky. 2009), as follows:

> Ordinarily, lack of knowledge of one's rights is insufficient to prevent operation of statutes of limitation. *Wilcox v. Sams*, 213 Ky. 696, 281 S.W. 832 (1926). However, when the complained of injury is not immediately discoverable, courts steer away from the unfairness inherent in charging a plaintiff with slumbering on rights not reasonably possible to ascertain. The discovery rule, a means by which to identify the "accrual" of a cause of action when an injury is not readily ascertainable or discoverable, was first enunciated in *Tomlinson v. Siehl*, 459 S.W.2d 166 (Ky. 1970), and later refined in *Hackworth v. Hart*, 474 S.W.2d 377 (Ky. 1971). "[T]he statute begins to run on the date of the discovery of the injury, or from the date it should, in the exercise of ordinary care and diligence, have been discovered." *Id*. at 379. This rule entails knowledge that a plaintiff has a basis for a claim before the statute of limitations begins to run. The knowledge necessary to trigger the statute is two-pronged. One must know: (1) he has been wronged; and (2) by whom the wrong has been committed. *Drake v. B.F. Goodrich Co.*, 782 F.2d 638, 641 (6th Cir. 1986). *See also Hazel v. General Motors Corp.*, 863 F.Supp. 435, 438 (W.D. Ky.1994) ("Under the 'discovery rule,' a cause of action will not accrue until the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, not only that he has been injured but also that his injury may have been caused by the defendant's conduct."). As such, the discovery rule works as a "savings" clause or a "second bite at the apple." *Queensway Financial Holdings Ltd. v. Cotton & Allen, P.S.C.*, 237 S.W.3d 141, 148 (Ky. 2007).

Wilson v. Paine, 288 S.W.3d at 286-87. The former Court of Appeals instructed in *Hunt v. Picklesimer*, 290 Ky. 573, 162 S.W.2d 27, 30-31 (1942), that the rule

applies only if the act giving rise to the cause of action was not known or "could not have been discovered through the exercise of ordinary diligence until after the beginning of the five-year period preceding the institution of the suit."

As to the application of equitable tolling, EQT cites to KRS 413.190(2), which provides:

> When a cause of action mentioned in KRS 413.090 to 413.160 accrues against a resident of this state, and he by absconding or concealing himself or by any other indirect means obstructs the prosecution of the action, the time of the continuance of the absence from the state or obstruction shall not be computed as any part of the period within which the action shall be commenced.

We agree with the circuit court and Big Sandy that EQT failed to discover its overpayments due to a lack of reasonable diligence on its part. We reject EQT's excuse that it was too large of an operation to discover the mistaken payments when it certainly had the information available to it and recognize that there is no allegation that Big Sandy misrepresented any information to EQT or committed any type of fraud. We also reject EQT's argument that Big Sandy obstructed its ability to pursue the unjust enrichment by "knowingly allow[ing] these payments to accrue so that it could 'set-off' amounts that it claimed it was owed by EQT."

Finally, EQT claims that its unjust enrichment claim should relate back to the date Big Sandy filed its complaint rather than from the time it filed its

amended counterclaim in May 2010. Big Sandy argues, first, that EQT should not be permitted to raise an issue that was not first raised in the circuit court and, second, that the unjust enrichment claim could not relate back to the filing of the original complaint pursuant to CR 13.01 because the claims did not arise from the same issues. Big Sandy also points out that the circuit court's oral ruling on April 28, 2017, permitted it to prosecute its claims for payments made five years before the complaint was filed in October 2009, and did not limit its right to the five-year period before the Amended Counterclaim was filed in May 2010. EQT states that the circuit court changed its ruling without explanation in the written order entered June 15, 2017.

> We remind the circuit court that it speaks only through written orders entered upon the official record. *See Midland Guardian Acceptance Corp. of Cincinnati, Ohio v. Britt*, 439 S.W.2d 313 (Ky. 1968); *Com. v. Wilson*, 280 Ky. 61, 132 S.W.2d 522 (1939). Thus, any findings of fact and conclusions of law made orally by the circuit court at an evidentiary hearing cannot be considered by this Court on appeal unless specifically incorporated into a written and properly entered order.

Kindred Nursing Centers Ltd. Partnership v. Sloan, 329 S.W.3d 347, 349 (Ky. App. 2010).

We find no merit in EQT's arguments and hold that the circuit court did not commit any error in applying the statute of limitations as it did to EQT's unjust enrichment claim.

Big Sandy's Cross-Appeal

Big Sandy's first argument addresses the circuit court's interpretation of the phrase "coal workings, extended or projected." Big Sandy contends that this phrase applies to all mineable and merchantable coal, while EQT argues that the circuit court properly interpreted the phrase to refer to areas Big Sandy had expressed the present intent to mine coal.

The circuit court decided this issue in its August 23, 2017, order as follows:

> The Deeds impose the following restriction: "The location of any oil or gas well through **coal workings, extended or projected**, shall be subject to the approval of the coal lessee of first party or the first party herein." (Emphasis added). Big Sandy alleges that EQT failed to obtain its approval prior to drilling certain wells, taking the position that "coal workings, extended or projected" refers to *all* coal that is mineable or merchantable. EQT contends that it was only required to seek approval from Big Sandy, or its coal lessees, to drill through coal workings for which Big Sandy, or its lessees, had expressed an intent to mine coal.
>
> **CONCLUSIONS OF LAW**
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> This Court finds that EQT's interpretation of "coal workings, extended or projected" is more consistent with the language of the Deeds. Therefore, this Court finds that "coal workings, extended or projected" does not refer to all coal that is mineable and merchantable, but rather finds that it refers to areas for which Big Sandy, or its lessees, have expressed a present intent to mine coal. The Court comes to this determination due to an

understanding of contract law, as well as the expert testimony presented by the parties in this case.

The phrase "extended or projected" is used twice in the Deeds, and the Court must give it the same meaning in both situations. Furthermore, the phrase is unambiguous and the Court has the duty to assign it the ordinary meaning of its terms. An unambiguous phrase must be interpreted according to the plain meaning of its express terms and the "fact that one party may have intended different results" is not enough to construe the words in a different manner. *Abney v. Nationwide Mut. Ins. Co.*, 215 S.W.3d 669, 703 (Ky. 2006).

The phrase "extended or projected" is first used in creating the following limitation: "The party of the second part . . . shall not drill through any entry or haul way **extended or projected air course in any coal mine in operation or temporarily shut down** on said premises without the consent of the first party or its successors in interest." (Emphasis added). This clause is first used in order to limit EQT's ability to drill through air courses of mines that are already in place, or any coal mine "in operation or temporarily shut down." The phrase is used for a second time one paragraph later: "The location of any oil or gas well through **coal workings, extended or projected**, shall be subject to the approval of the coal lessee or first party or the first party herein." (Emphasis added). Because the phrase "extended or projected" was first used to describe existing coal mining activity, the Court must accord the same meaning to it the second time it is used. While Big Sandy argues that "coal workings, extended or projected" refers to all mineable and merchantable coal, there would be no need to include the phrase "extended or projected" if all of Big Sandy's property was subject to approval. Furthermore, the phrase "mineable and merchantable" does not appear anywhere in the Deeds, and this Court cannot add terms to the Deeds. *See Superior Woolen Co.*

> *Tailors, Inc. v. Samuels & Co.*, 293 S.W. 1078 (Ky. 1927).
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> Lastly, Big Sandy produced an expert, Samuel Johnson ("Johnson"), in order to provide testimony on quantifying and valuing coal that was impacted by oil and gas well drilling operations. While the Court recognizes that he was not retained for the purpose of providing an opinion on the interpretation of the meanings of the Deeds, his background in the coal industry and education, as confirmed by Big Sandy, is sufficient foundation for his testimony regarding coal mining custom and practice. Consequently, Johnson's testimony further supports the conclusion that EQT's interpretation was appropriate. His testimony supports the conclusion that "workings" are areas where coal is either actively mined or has been mined. Johnson Dep. 54: 6-8. Furthermore, he supports the conclusion that "projected" or "extended" refers to situations where a coal operator has developed a plan as to how coal will be worked in the future. Johnson Depo. 56: 4-8.
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> In light of the unambiguity of the phrase "coal workings, extended or projected," as well as the expert testimony from Johnson, this Court finds that EQT's interpretation is most consistent. Thus, this Court finds that the phrase "coal workings, extended or projected" refers to coal for which Big Sandy has a present intent to mine.

We agree with EQT that the circuit court's interpretation was proper as a matter of law and thus affirm the ruling. Likewise, we find no merit in Big Sandy's argument that the circuit court should not have considered its expert, Johnson's, testimony on the meaning of the phrase at issue because he had not been engaged for that purpose.

For its second argument, Big Sandy asserts that the circuit court erred in ruling that the parties did not need to enter into surface use agreements. Big Sandy had sought a declaratory judgment that EQT must enter into such agreements consistent with the parties' prior course of dealing, but the court declined to admit any evidence of surface use agreements the parties had entered into in the past. In the June 15, 2017, order, the circuit court found "that the Deeds govern the Parties' relationship with respect to such property and it will not require the Parties to enter into any agreements relating to such property not explicitly required in the Deeds." We find no abuse of discretion in the circuit court's decision not to admit this evidence in light of the lack of such a requirement in the Deeds. *See Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999) (applying an abuse of discretion standard to evidentiary rulings: "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles."). And we find no error in the circuit court's legal interpretation of the deeds on this issue.

For its third argument, Big Sandy contends that the statute of limitations for its breach of contract claims in Counts I and II of the complaint began to run when the well was drilled, not when it was mined. The circuit court explained the bases for these counts, the parties' respective positions, and its ruling in its June 15, 2017, order as follows:

18. Big Sandy asserted breach of contracts claims in Counts I and II. In Count I, Big Sandy claimed EQT failed to obtain approval from Big Sandy or its coal lessee prior to drilling wells through extended or projected coal workings on the Property, in violation of the Deeds. Evidence was presented showing that even when approval is given for EQT to drill a well on the property covered by the Deeds, the Deeds still require EQT to pay Big Sandy for certain coal left in place surrounding the well. Big Sandy has never sent EQT an invoice for payment for lost coal surrounding wells drilled by EQT. EQT has never paid Big Sandy for any lost coal surrounding wells drilled by EQT.

19. In Count II, Big Sandy claimed that EQT's oil and gas activities, including the construction of pipelines, the use of access roads, and the location of wells, did not interfere as little as reasonably possible with the mining and removal of coal and other minerals by Big Sandy, its successors, assigns, lessees, or tenants.

20. On the first day of trial, Big Sandy informed the Court that it was adopting what it contended was EQT's position with respect to Count I, that any breach of contract for failure to obtain approval for the location of a well occurs at the time mining takes place around a well and thus the statute of limitation begins to run from the date that a well is mined around. EQT maintains that the statute of limitations begins to run on the date that the alleged breach occurs; therefore, breach of contract claims related to drilling a well begin to run when the well is drilled. Big Sandy also informed the Court that there were sixty-one wells at issue in Count I and II that had been mined around after October 29, 1994. . . .

21. Pursuant to KRS 413.090, claims based on a written contract must be brought within fifteen years after the cause of action first accrued. KY. REV. STAT. ANN. § 413.090(2) (West 2017). Kentucky courts recognize that a cause of action for breach of contract

> normally accrues at the time of the breach. *Hoskins' Adm'r v. Kentucky Ridge Coal Co.*, 305 S.W.2d 308, 311 (Ky. 1957) ("Usually an action *accrues* at the time of infliction of a wrong or breach of contract.") (emphasis in original). When the relevant facts are not in dispute, the Court may determine the validity of a statute of limitations defense as a matter of law. *See, Carr v. Texas E. Transmission Corp.*, 344 S.W.2d 619, 621 (Ky. 1961).
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> 22. At the close of the first day of trial, the Court made a ruling that the act of drilling each well started the running of the statute of limitations on Big Sandy's breach of contract claims. Therefore, Big Sandy's breach of contract claims for all wells drilled more than fifteen years before Big Sandy filed its complaint on October 29, 2009 are barred by the statute of limitations.

Big Sandy correctly recites the elements for a breach of contract as requiring proof of the existence of a contract, of a breach of that contract, and that the breach caused damages. *See Barnett v. Mercy Health Partners-Lourdes, Inc.*, 233 S.W.3d 723, 727 (Ky. App. 2007). Big Sandy argues that the circuit court was incorrect in its ruling because its breach claim could not have accrued until it had suffered damages by attempting to mine the coal around the well, not when the well was drilled. However, we agree with EQT and the circuit court that any breach would occur when the wells were drilled. EQT points to Big Sandy's allegations in Counts I and II that it breached the deeds by drilling the wells without approval and in a manner that interfered more than as little as reasonably possible with its coal operations. We also agree with EQT's argument that while there may be some uncertainty about the specific amount of damages, that does not

mean a party does not have a cognizable cause of damages for breach of contract. "[W]hile Kentucky law does not tolerate uncertainty as to the *fact* of damage (*i.e.*, recovery will not be had where there is uncertainty as to whether the damage has in fact occurred), once the existence of some damage is certain, uncertainty as to the *amount* of that damage will not defeat recovery." *Gibson v. Kentucky Farm Bureau Mut. Ins. Co.*, 328 S.W.3d 195, 205 (Ky. App. 2010). Therefore, we find no error in the circuit court's ruling related to the statute of limitations.

For its fourth and final argument, Big Sandy urges this Court to hold that the circuit court erred in declining to reform the deeds to change the payment terms for coal left in place based on their unconscionability. The deeds required EQT to pay 10¢ per ton for the 140 square foot block of coal that was left in place around a well. Big Sandy argues that these terms are now unconscionable and wanted the circuit court to reform the deeds to reflect modern prices and volume. The circuit court declined to reform either aspect of the payment terms as those terms were set forth in the deeds, and Big Sandy now asserts that it is entitled to equitable relief to correct the unconscionable terms.

In response, EQT cites to *Louisville Bear Safety Service, Inc. v. South Central Bell Tel. Co.*, 571 S.W.2d 438 (Ky. App. 1978), in which this Court stated that "the doctrine of unconscionability is used by the courts to police the excesses of certain parties who abuse their right to contract freely. It is directed against one-

sided, oppressive and unfairly surprising contracts, and not against the consequences per se of uneven bargaining power or even a simple old-fashioned bad bargain[.]" *Id*. at 440 (citing *Wille v. Southwestern Bell Telephone Co.*, 219 Kan. 755, 549 P.2d 903 (1976)). We note that Big Sandy has improperly relied upon an opinion from this Court that was ordered not-to-be-published by the Supreme Court of Kentucky; therefore, we shall not consider that opinion. CR 76.28(4)(c).

We find no abuse of the circuit court's considerable discretion in declining to reform the terms of the deeds as Big Sandy requested, particularly as this was in keeping with other aspects of its rulings deferring to the language of the deeds. While there have certainly been changes that have occurred in the decades since the deeds were signed, we cannot hold that the circuit court's decision was outside of its discretion.

For the foregoing reasons, the judgments of the Fayette Circuit Court are affirmed.

ALL CONCUR.

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