STATE OF MICHIGAN

COURT OF APPEALS

TERRA ENERGY, LTD., Plaintiff/Counter-defendant-Appellant,	UNPUBLISHED December 3, 2002
v	No. 231429 Antrim Circuit Court LC No. 99-007582-CK
WHITE PINE ENTERPRISES, L.L.C. and STAR ENERGY, Defendants/Counter-plaintiffs-Appellees.	

Before: Fitzgerald, P.J., and Holbrook, Jr. and Cavanagh, JJ.

PER CURIAM.

A jury determined that plaintiff had no cause of action against defendants, but awarded damages against plaintiff in favor of defendants on their respective counterclaims. Plaintiff appeals from the August 22, 2000, judgment as of right.[1] We affirm in part, reverse in part, and remand.

FACTS

This case arises from a plan to extract natural gas from Kitchen Farms, a potato-growing concern in Antrim County owned by Robert and William Kitchen. Plaintiff Terra Energy, Ltd., is an exploration and development company that was "primarily involved in the Antrim gas trend," that would "propose projects and seek investors for those projects to join them jointly in the development of those projects." According to Michael Coy, the supervisor of accounting relating to the oil and gas producing activities of CMS Oil and Gas Company,[2] investors in, and operators of, such projects could be the same people. He explained that investors are financial contributors and part owners while operators had "responsibility of providing the accounting for the properties, revenue accounting, paying the bills associated with the expenses on those

[1] The trial court denied plaintiff's motions for new trial and judgment notwithstanding the verdict (JNOV).

[2] CMS Oil and Gas Company is the successor to Terra Energy, Ltd.

properties, and making sure that these investors or working interest owners were billed for their share of the costs."

Robert Kitchen is the owner of all shares of defendant Star Energy. Robert Kitchen and his wife own one percent of defendant White Pine, a trust for his wife owned fifty-eight percent, and his two sons each owned twenty percent. According to Robert Kitchen, Star Energy is the investor and White Pine is the landowner.

Star Energy and plaintiff entered into agreements for projects on "Kitchen Farms North" (KFN) and "Kitchen Farms South" (KFS). KFS was an eight-well project for which plaintiff's role was to "administer the program to the working interest owners in accordance with the "Joint Operating Agreement." According to Coy, Star Energy paid for its share of the drilling of those wells and had a working or ownership interest of twenty-five percent. Those wells went into production. However, Star Energy allegedly stopped paying its bills on the project after March 1995, in response to which plaintiff chose "to net against their revenue checks that were being generated as a result of the gas sales." Coy reported that the KFS project was sold to NOMECO Resources in late 1996 or early 1997.

A second project, KFN, operated under a joint operating agreement identical to that covering KFS, with Star Energy accepting a twenty-five percent working interest in that project. Coy testified that the first well on KFN was drilled in May 1995, but Star Energy allegedly failed to pay in support of the project as required by the agreement so the project was never completed.

Kitchen testified that in 1993 or 1994 some wells were drilled at the boundary of the land adjacent to his and so, in order to prevent "drainage" and to reap the profit potential on his land, Kitchen decided to sign a lease with a company that would give a firm commitment to drill the wells. According to Kitchen, at least four or five of plaintiff's agents cautioned him about drainage and informed him that adjoining projects situated north and east of KFN were draining KFN of underground gas. Plaintiff was involved in these adjoining projects.

Kitchen testified that plaintiff declared itself financially capable of drilling the eight wells envisioned for KFS and the nineteen wells envisioned for KFN. Plaintiff informed Kitchen that it might use third-party financers, "but that it would have nothing to do with us, they would sign contracts and they would have capabilities to drill projects." In light of plaintiff's representations, Kitchen entered into a lease agreement with plaintiff.

Kitchen explained that he was eager to get KFS started because of the problem of drainage by wells run by another operator within 330 feet of his fence line. He indicated that two or three weeks after the lease was signed plaintiff informed him that it wanted to extend the deadline for drilling from December 1 to December 21. Drilling began on December 17, 1994, and was completed on January 9, 1995. Kitchen's twenty-five percent portion of the cost to develop KFS was $450,000.

The KFN lease agreement called for the drilling of the first well on KFN on February 26, 1995. Plaintiff missed that deadline, and according to Kitchen plaintiff was not diligent in returning Kitchen's phone calls when he inquired about the matter. Kitchen testified that several months afterward he learned that "sometime in February . . . the owners of Terra Energy . . . were in negotiations to sell . . . to CMS." Kitchen testified that KFS came on line in the spring of 1995, but the production was "extremely bad" compared with neighboring projects, whose wells out-produced those of KFS by five hundred percent. Kitchen reported that some gas was sold from the project, but that White Pine did not receive a royalty check until March 1996.

Kitchen testified that nothing happened on KFN until May 1996, when plaintiff began bringing truckloads of black pipe to the project. Plaintiff allegedly informed Kitchen that it was going to drill one well on KFN to prevent one of the leases on that property from expiring. According to Kitchen, the lease

> was going to expire on June 1st. And, so, in order to stop the lease from expiring [plaintiff] drilled a well on Mr. Trunk's property on May 30th. And the conversation I had with [plaintiff's president] in late May was to describe that process, he told me they were going to drill the well, that's it – they weren't going forward with the project, I did not need to send him any money. They did not fracture the well, develop the well, they drilled the casing in the ground, cemented it, shut it in at the bottom, screwed the cap on top, walked away; that was so no gas could get out, and no water in and out of it. The hole in the ground that was there was to hold the lease, but not to have anything to do with production or messing with the 19 wells.

Kitchen testified that in late August 1996 plaintiff expressed an intention to drill three wells on KFN, and asked Kitchen for $100,000 to cover his share of the attendant expenses. Kitchen testified that his check for this amount was dated August 30, 1996, and he later learned that on August 31, 1996, plaintiff closed the deal for its sale to CMS. He indicated that two wells were drilled and fractured during the first two weeks of September, and that no drilling occurred in October 1996. Kitchen later received a letter from plaintiff's president stating that poor test results resulted in a lack of funding partners, and suggesting that financing might be available for a ten-well project if White Pine were to reduce its royalties. Kitchen testified, however, that in fact the first three wells had showed promising results. Beginning in late 1995 or early 1996, Kitchen allegedly asked plaintiff to tender a release and leave the property so that Kitchen could get the project drilled by someone else. Plaintiff refused to provide a release, continued to assert rights in the matter, and made "shut-in" payments. Kitchen indicated that plaintiff's continued recorded interest in the land made it impossible for him to lease it to another concern.

Plaintiff's president, Robert Boeve, confirmed that the performance of the neighboring "Bart-Star" project, of which plaintiff owned a 12.5 percent interest, led plaintiff to believe that there was substantial gas to be harvested from KFN. Boeve indicated that Kitchen had negotiated a royalty rate higher than normal in the dealings with plaintiff.[3] Boeve further explained that royalties in this instance were calculated at the outlet of the gas compressor at the central facility, while it is more common to calculate from the wellhead. Thus, the leases allowed Kitchen to collect royalties without paying the post-production charges commonly assessed for incremental charges.

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[3] Boeve testified that the KFS and KFN projects involved a royalty rate of twenty-five percent, while most leases provided for a rate between 12.5 and twenty percent.

Steven Kohler, a petroleum and natural gas engineering consultant, reported that the Bart-Star project, consisting of nine wells, was originally completed in 1992 and eight wells were added in 1993. Five additional wells were drilled in 1998, and the "unit was actually expanded," adding that they "were drilled out towards both the western and southern borders" of that project. Daniel McGuire, an expert petroleum geologist, opined that drainage of gas from KFN land was taking place through the neighboring projects, including Warner-27, 36, and Bart-Star.

Steven Oliver, an expert in the field of petroleum engineering, testified that he was asked to examine KFS to see why it was producing less gas than nearby facilities, and to examine KFN to see whether the data gathered from the three test wells was sufficient to say that production would not be economical and that more wells should not be drilled. He was also asked to determine what the envisioned nineteen wells might produce. Oliver calculated "lost profits through 6-30-2000 and the . . . present value of future profits" of defendants as $2,913,968 in total damages for White Pine and $3,225,993 for Star Energy. He opined that the three test wells revealed positive data and would "signal going ahead with the project." He also opined that the Bart-Star project had drained 163 million cubic feet of gas from KFN, and he assigned a value of $386,000 to this gas.

Various claims and counterclaims were filed.[4] The trial court entered an order consolidating the causes and decreeing that Terra Energy would proceed as plaintiff/counterdefendant, and that White Pine and Star Energy would proceed as defendants/counterplaintiffs. Because White Pine owned royalty rights only, not working interests, and no one was seeking damages from White Pine, White Pine was dismissed as a defendant on a motion for summary disposition.

Plaintiff's position at trial was that Star Energy's share of production costs came to approximately $144,000, of which Star Energy had paid $100,000, leaving Star Energy owing $44,067.17 and interest, for a total of $76,000.

Defendants' position was that Kitchen knew there likely was gas on his farm that was being drained by neighboring projects and that he chose plaintiff for the projects on his land because of plaintiff's financial capability and experience. Defendants' theory was that plaintiff, after its sale to another company, failed to drill sixteen of the nineteen wells required for KFN, while failing to see the three that had been drilled through to production, preferring instead to extract what gas it could from KFN's reservoir through a neighboring project in which plaintiff had an interest reflecting more favorable terms. Defendants requested damages in the millions.

The jury concluded that Star Energy did not breach its agreement with plaintiff over KFN. On the counterclaims, however, the jury found that plaintiff breached the KFS lease as concerned White Pine but awarded no damages for that. The jury found that plaintiff breached the KFN lease with White Pine and awarded damages of $3,232,937. The jury additionally found that plaintiff had knowingly converted White Pine's gas in the amount of $368,600. Finally, the jury concluded that plaintiff did not breach its exploration and development

[4] William Kitchen's entity, B&J, was originally named a defendant, but the parties settled and B&J was dismissed by stipulation.

agreement with Star Energy as concerned KFS, but found otherwise with regard to KFN, and awarded Star Energy $3,643,594 in damages.

The trial court had ruled earlier that White Pine would be allowed to collect on the single largest of its counterclaims, and so entered judgment for $3,232,937. To this, the court added $737,200, twice the damages found for conversion, having concluding that treble damages were authorized by statute but that doubling that award in this instance avoided duplication. The court entered judgment in favor of Star Energy in the amount of $3,643,594.[5]

I

Plaintiff first argues that the trial court erred by rejecting plaintiff's argument that plaintiff should be relieved of any obligations under the KFN lease as of the moment when plaintiff's own inaction triggered provisions for expiration of the lease. We disagree.

Plaintiff first argues that the KFN lease expired in January 1996 on its own terms. The lease for KFN stated that it was to "remain in force for a primary term of 9 months . . . and as long thereafter as operations are conducted upon said land with no cessation for more than 90 consecutive days . . ." The lease further provides, "upon expiration of the primary term of this lease, if it shall not otherwise terminate in its entirety, this lease shall terminate 1) as to that portion of the leased premises which is not then included in the unit of a well or wells which are then producing or capable of producing oil or gas in paying quantities." Plaintiff contends that it performed its last operations on a KFN well on October 18, 1995, and therefore the lease expired by its own terms ninety days later with regard to forty-two acre units covered by wells drilled on KFN. With regard to the greater portion of the land that had no wells, plaintiff contended that the lease expired on September 24, 1995.

The KFN lease also specified that "Lessee may at any time surrender this lease as to all the lands covered thereby, by delivering or mailing a release thereof to the Lessor, if lease is not recorded, or by placing a release of record in the proper county, if lease is recorded." There is no dispute that the lease for KFN had been recorded with the register of deeds or that no release was recorded up to the time of trial. In rejecting plaintiff's argument that the lease expired by its own terms in January 1996, the trial court concluded that plaintiff could not "take that position, having refused to provide the release and made shut-in payments. As a matter of law, you cannot claim expiration . . . [defendants] may claim expiration . . . but you can't because your people are . . . prevented from any such expiration of the kind." The court entered an order that provided in relevant part that the KFN lease terminated during the trial on June 27, 2000.

Plaintiff is essentially arguing that its own failure to perform as contractually required limits its potential damages because the lease expired according to its provisions governing a lack of operations on the land. However, defendants were the parties aggrieved by plaintiff's failure to perform while continuing to assert rights under the lease. Where one party breaches the lease in a way that triggers the expiration provision, it is the aggrieved party, not the breaching one, who has the choice of acting as if the lease were terminated on the spot, or

[5] The court denied plaintiff's posttrial motions for new trial and judgment notwithstanding the verdict.

holding the breaching party to continuing obligations under the lease. Here, defendants were not able to clear the cloud on title that the recorded lease presented, or the few wells on the land that signaled an earlier operator's involvement, and rightly claimed damages that accrued while the issue went unresolved. Defendants therefore had a contractual right to assert that the lease had expired, but plaintiff remained liable for damages resulting from its lack of performance and refusal to release.

Further, a contract normally includes an implied duty of good faith and fair dealing in its performance and enforcement. See *Hammond v United of Oakland, Inc*, 193 Mich App 146, 151-152; 483 NW2d 652 (1992) (excepting employment contracts); *Stark v Budwarker, Inc*, 25 Mich App 305, 313 n 7; 181 NW2d 298 (1970). In this case, if plaintiff wished to gain the benefit of the provision for expiration from its inactivity, it should have tendered a formal, recorded, release, as specified in ¶ 13 of the lease.[6] Instead, plaintiff continued to assert rights to the land by making shut-in payments and by maintaining a recorded interested in it, thus inhibiting defendants' ability to engage other operators in order to develop the minerals. Only later, as a litigation strategy, plaintiff found it expedient to maintain that the lease had expired long before trial. The trial court thus properly read the lease as allowing defendants options in the face of plaintiff's inactivity, not as limiting plaintiff's liability in the matter.

II

Plaintiff asserts that the trial court erred by allowing the jury to assess damages against plaintiff for its failure to perform under the KFN lease, including its failure to drill additional wells, because the lease provided for expiration of the lease, not damages, for the operator's failure to drill wells. Preserved claims of instructional error in civil cases are subject to review de novo, but a trial court "may be entitled to some level of deference under the abuse of discretion standard of review if the decision to give or withhold a certain jury instruction depends on a factual determination, i.e., whether the evidence will support the instruction." *Hilgendorf v St. John Hospital and Medical Center Corp*, 245 Mich App 670, 694; 630 NW2d 356 (2001), quoting *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000).

Plaintiff argued after the close of proofs that the lessee's declining to drill all wells envisioned by the lease should result in no penalty greater than termination of the lease. The trial court ruled that the KFN lease did not impose a strict affirmative duty on plaintiff to drill all nineteen wells, but instead imposed an obligation to develop the site as would a "reasonable and prudent operator." The court impliedly held that damages could stem from any failure of the latter duty, including if the failure took the form of failing to drill additional wells. The court instructed the jury as follows:

> White Pine has counterclaimed against [plaintiff] on the basis of implied covenant of reasonable development. An implied covenant is an obligation imposed on the lessee by the oil and gas lease. White Pine has counterclaimed that [plaintiff] breached this implied covenant by not drilling additional wells in

[6] Although the language of this provision appears permissive instead of mandatory, "Lessee may at any time surrender this lease . . . ," it appears that what is permissive is the decision to surrender, not the proper way to do so.

> [KFN]. To establish a breach White Pine must show that a reasonable and prudent operator would drill one or more wells and that the additional wells would produce gas in paying quantities. If you find that [plaintiff] has breached this covenant and that the breach has caused damage to White Pine, you must award damages to White Pine . . ..

Plaintiff cites authority for the proposition that a lease such as the one in question is an "unless" lease, according to which failure to perform simply causes the lease to expire after the specified term. Among plaintiff's authorities is a case from the Sixth Circuit, which includes the following pronouncement:

> It appears to be the well settled rule in oil and gas leases that a lease containing a definite primary term, with the provision that the lease will terminate at the end of such term unless the lessee or his assignee performs some additional act provided by the lease, such as the payment of money or additional drilling, does not place a binding duty upon the lessee to do anything. Such a lease is usually described as an "unless" lease. The "unless" clause is regarded as a limitation on the lessee's estate or the period of the grant. Unless the lessee performs the additional act, which he is not obligated to perform, the lease automatically terminates at the expiration of the primary grant. Such a lease is distinguished from the so-called 'or' lease where the lessee is obligated either to drill a well or pay rental, and can be held in default upon failure to do so. [*Joyce v Wyant*, 202 F2d 863, 864-865 (CA 6, 1953).]

The Sixth Circuit in *Joyce* was applying Louisiana law. *Id.* at 865. Defendants rely on another case involving Louisiana law, *Cockburn v O'Meara*, 141 F2d 779, 782 (CA 5, 1944). In that case, the Fifth Circuit stated as follows:

> It was provided in the assignment that, if after drilling operations were commenced, the operations, were restrained or stopped by order of court or by order of the Louisiana Department of Conservation, appellant might relieve himself of all liability by reassigning said leases to appellee. This, we think, clearly indicates that appellant would be relieved of liability only when performance was prevented by court order or order of the Louisiana Department of Conservation. It does not suggest that appellant would be relieved of liability where he arbitrarily failed to commence actual drilling within the time stipulated, nor does it suggest that in such case, the only penalty contemplated by the parties was forfeiture of appellant's rights under the assignment. We think the more reasonable interpretation consonant with the intention of the parties is that upon a breach of the obligation to commence the well as provided in the contract, appellant should immediately forfeit all rights under the assignment, and be liable to appellee for such damages as appellee otherwise had sustained. [*Id.* at 784.]

Joyce includes no suggestion that the operator willfully refused to operate while asserting rights to the project, in frustration of the lessor's desire to obtain a release and ship the project to different operators. Because the latter considerations were in evidence in this case, the two are distinguishable. Conversely, *Cockburn* underscores a feature in the KFN lease that strongly implies affirmative duties under the lease, not just the operator's option of passively letting it lapse. Similar to the lessee's obligation identified in *Cockburn* to continue operations unless legally prevented from doing so, the KFN lease provides that if "Lessee is prevented from, or delayed in commencing . . . or resuming operation . . . by circumstances not reasonably within Lessee's control, other than financial, this lease shall not terminate and Lessee shall not be liable in damages so long as said circumstances continue . . ." By excusing liability where plaintiff is prevented from operating by circumstances not within plaintiff's control, the lease impliedly holds plaintiff liable for damages for failing to perform for reasons stemming wholly from plaintiff's own initiative. Therefore, we conclude that the trial court did not err in declining to limit White Pine's remedy for plaintiff's failure to act as a reasonable and prudent operator, including by way of drilling additional wells, to termination of the lease.

III

Plaintiff maintains that the trial court erred by instructing the jury in a manner that allowed the jury to award damages that are duplicative of profits that defendants stand to earn from extraction and marketing of the gas remaining in KFN. Jury instructions are reviewed in their entirety to determine whether the parties' theories and the applicable law were fairly presented. *Case, supra* at 6.

On the question of damages, defendants requested an instruction that "the proper measure of damages is the White Pine . . . royalty on the gas that should have been produced and sold from the wells in prudent operation thereof." Plaintiff argued that because the gas remained in the land for future extraction, damages should be based on "the rent on stream of income" for the period covered by any breach. The trial court rejected plaintiff's argument, responding as follows:

> I'm going to reject that instruction on the grounds . . . if a breach is found it would not adequately and fairly compensate [defendants]. The reason . . . first, it was a sweetheart of a lease by all accounts by everybody, and the chances that White Pine could get a similar good deal would seem to me to be uncertain at best and slim and nonexistent most likely, that's the first thing. There are permanent damages by virtue of [plaintiff's] not drilling this property, assuming the jury finds a breach of the obligations by [plaintiff] that's the first thing. In addition, you have, since this time, leakage, and so forth.
>
> So, I don't think the instruction proposed by [plaintiff] would be a fair measure of damages. I do have some concerns about other measures of damages suggested also at various times by White Pine, but they seem agreeable to a more general statement of damages, which I think is probably the best that can be done under the circumstances.

The court added:

> [T]here is gas that when the property is developed that will be captured; that would have been extracted had [plaintiff] drilled the property and . . . when the property is subsequently developed that could permit a double recovery. I don't necessarily think that is a good instruction, but the absence of a good instruction being proposed I will give a more general instruction. And the Court

> of Appeals hopefully will realize when not presented with good instructions I get to pick one. Under the standard of review that instruction was outrageous, mine was not outrageous, therefore it should be fine.

The trial court ultimately instructed the jury as follows:

> For breach of a contract, or an implied covenant, the injured party is entitled to the value he or she would have received had the contract, or covenant, been performed. In awarding damages the injured party should be put in as nearly as possible the same position as if the contract or covenant had been performed.

The court thus apparently settled on an avowedly imperfect instruction that it thought would be good enough if it survived this Court's review under the abuse-of-discretion standard.

The jury's awards of contract damages, $3,232,937 to White Pine for breach of the lease, and $3,643,594 to Star for breach of the development agreement, exactly matched those proposed by Oliver. Each figure is the sum of "Lost Profits thru 6/30/00" and "Present Value of Future Profits," the latter in each instance being considerably greater than the former. Oliver's testimony and documentation makes clear that Oliver's total damage calculations included his projections of profits from royalties from the KFN project throughout the project's entire productive life.

Plaintiff points out that Oliver, defendants' witness, estimated that 163 million cubic feet of gas had been drained from KFN by the "Bart-Star" project, asserts that the total capacity of KFN was 13.9 billion cubic feet, and argues that the evidence supports the conclusion that no more than 1.2 percent of KFN's gas drained to other projects. Concerning the estimate of KFN's total capacity, plaintiff provides no record citation for the figure 13.9 billion cubic feet, but merely states, "According to counsel for [defendants], all of the gas that was once there (no less than 13.9 billion cubic feet) may be gone because it has been drained off into . . . the adjoining . . . projects." However, defendants' Exhibit 46A, detailing Oliver's calculations, estimates that over a projected life of thirty-three years, with nineteen wells producing, KFN should yield a total of 13,916.3 million cubic feet of gas, which figure is indeed the equivalent, in rounded numbers, of 13.9 billion cubic feet. Running the unrounded numbers, Oliver's estimated drainage by "Bart-Star" comes to 1.171 percent, indicating that plaintiff properly rounded upward in arriving at 1.2 percent.

Plaintiff further points out that the evidence suggests that Oliver's figures suggest that only 4.4 billion cubic feet of gas would have been extracted on KFN between 1996 and 2000, had it been aggressively developed, and points out that this then leaves 9.5 billion cubic feet for defendants to do with as they like. Again, plaintiff's figures accurately reflect Oliver's; the latter suggests total production for those first five years, inclusively, as 4,412,491 thousand cubic feet, which, in slightly rounded numbers, equals 4.4 billion cubic feet, less than a third of the total capacity of 13.9 billion cubic feet (from which Oliver reported only 163 thousand cubic feet drained by a neighboring project to date).

The jury evidently accepted at face value Oliver's figures concerning gas drained to "Bart-Star," in that it awarded precisely the $368,600 for conversion suggested by Oliver's testimony. This should indicate, then, that the jury thought that "Bart-Star" had drained, to date, 163 million cubic feet of gas from KFN, no more and no less.

Indeed, having accepted Oliver's calculations exactly as concerned both the drainage to "Bart-Star," and the past and future damages suffered by both defendants as a function of royalties earned over the life of the KFN project, the jury cannot be considered to have concluded that all the gas had been drained from KFN as of the time of trial. Still, the jury need not have believed that all but 1.2 percent of the gas remains to be extracted, in that the evidence suggests that two other neighboring projects were draining gas also, albeit in unspecified quantities. Another basis for the damage awards that reasonably takes the future into account, even if the jury believed that nearly 98.8 percent of the gas remained, is evidence that defendants had arranged for what the trial court termed a "sweetheart deal," meaning a more favorable deal than most of that sort, in terms of both the royalty rate and the basis for calculating them.

Still, because the awards of damages give defendants what the evidence suggests is the full benefit of their contracts with plaintiff, double recovery is possible to whatever extent defendants choose to develop KFN further. There were only hints in the evidence concerning how much gas may be extracted in the future from KFN, and no specific indication in evidence that the project has been rendered forever depleted or otherwise inoperable by events leading to the present situation.

Because the jury's award comported with the trial court's very general instructions on damages, if the plain likelihood of double recovery is apparent, and deemed improper, then the instructions were flawed insofar as they permitted that result.[7]

Plaintiff relies on *Miller Bros v DNR*, 203 Mich App 674; 513 NW2d 217 (1994). In that case, this Court ruled that where the DNR has imposed an indefinite ban on oil and gas drilling on certain land in frustration of the plaintiffs' desire to develop their mineral rights, but where there was no risk of loss of the existing minerals, the plaintiffs were entitled to "rent" for the duration of the ban. *Id.* at 678-679, 688. The court below thus erred in ordering, as its remedy, the state to pay the plaintiffs the full value of the mineral rights, and the plaintiffs in turn to convey title to the state. *Id.* at 685. This Court suggested that such rent be calculated as "a function of the purchase value and market interest rates," in other words, "something close to the amount of money they could have received in interest on present value of the income stream." *Id.* at 688-689. Defendants attempt to distinguish *Miller* on the ground that it is an inverse-condemnation case, involving a temporary taking of mineral rights, but that factual distinction bears but little on the logic involved in preventing a party from collecting damages for lost profits that that party stands to reap in the future:

> If the plaintiffs are given anything less than compensation for the full value of the property in anticipation that the ban may be lifted but the director never lifts the ban, the public will have been enriched at plaintiffs' expense. On

[7] In fact, this issue concerns not double recovery in the strict sense duplicative damages collected from one or more tortfeasors, but rather windfall damages, to the extent that defendants receive payment from plaintiff for lost profits that defendants will in time earn from continuing the operations that gave rise to this litigation.

> the other hand, if plaintiffs are given compensation for the full value and the director cancels the ban at some point in the future, plaintiffs will have been enriched at the public's expense. [*Id.* at 686-687.]

Another distinction, of course, is that in *Miller* the trial court had, in effect, imposed full condemnation, with just compensation, as the remedy, whereas in the instant case the court permitted, and the jury awarded, damages calculated as royalties (minus expenses, in the case of Star Energy) over the projected life of the project, while leaving its minerals in the original owners' hands. Still, in the instant case, the award of all the profits that defendants' expert calculated the project to be worth, while leaving in defendants' hands the greater part of its gas for possible future development, leaves defendants in a position ultimately to have profited twice from the project.

Defendants rely on a 1941 case, *Compton v Fisher-McCall, Inc*, 298 Mich 648; 299 NW 750 (1941). That case, like the instant one, raised the question, "Could it . . . be said that a reasonably prudent operator, with full knowledge of all such facts and circumstances, in the exercise of ordinary care, would have thought that and have drilled offset wells with the reasonable expectation of producing oil therefrom in paying quantities?" *Id.* at 654. In affirming the judgment for the plaintiff, the Supreme Court concluded that there was "sufficient testimony that the oil which might have been produced could have been sold at a profit equal to at least the amount of the verdict." *Id.* at 656. However, in *Compton*, the evidence suggested that "substantial drainage was taking place," *id.* at 654, leaving the reader to guess *how* substantial, while in the instant case the evidence suggests that the greater part of the gas on defendants' land remains available for extraction and marketing. Further, unlike in *Compton*, in this case the verdict included a specific finding concerning damages from gas that had been drained by one neighboring project—the only drainage for which precise information was put into evidence—and that drainage constituted only 1.2 percent of the total capacity of the project.

Among defendants' sister-state cases is a 1914 case from Illinois, *Daughetee v Ohio Oil Co*, 263 Ill 518; 105 NE 308 (1914), which also involved an operator who had a duty to use "reasonable diligence" in developing the minerals at hand, *id.* at 524. The court stated, "It is no answer to a suit of this character to say that the oil or gas is still on the premises and may be extracted at some time by somebody in the future." *Id.* at 527. However, the court did not discourse on the proper measure of damages, and the decision itself does not indicate how they were determined in that instance.

More recent authority speaks to the state's policy concerning double recovery, and confirms that double recovery is strongly disfavored. E.g., *Holloway Construction Co v Oakland Co Bd of Rd Comm'rs*, 450 Mich 608, 617-618; 543 NW2d 923 (1996) (awards of interest), and *Grow v W A Thomas Co*, 236 Mich App 696, 717-718; 601 NW2d 426 (1999) (attorney's fees).

For these reasons, we conclude that the trial court abused its discretion in instructing the jury so as to allow it to award damages that are duplicative of profits that defendants stand to earn from extraction and marketing of the gas that remains in KFN. If on remand the parties cannot settle the issue, then the trial court should either amend the current judgment to grant plaintiff rights to future profits from the project, for which plaintiff is presently being forced to pay, or conduct a new trial to resolve factual questions concerning the future profitability of the site for the purpose of ensuring that plaintiff will not be obliged to pay for lost profits that are not in fact lost. In that event, plaintiff's argument that damages should have been calculated as interest on the stream of income that should have come into play for the time in question presents one legitimate way of assessing damages, but necessarily the best one. An instruction covering the duty to mitigate, and admonishing the jury not to award damages duplicative of profits defendants can still reap from their project, seems most likely to take into account questions of drainage, the unlikelihood of defendants' executing as favorable an agreement with a new operator, etc.

IV

Plaintiff argues that the trial court abused its discretion by failing to instruct the jury to reduce any liability on plaintiff's part to the extent that White Pine stood to benefit from the delay in developing KFN by way of higher market prices for natural gas. Plaintiff did not request this instruction below and, therefore, this issue is unpreserved. Unpreserved claims of instructional error are reviewed for plain error affecting substantial rights. See *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000).

In support of this argument, plaintiff points only to figures from Oliver whereby Oliver factored into his projections of the overall earnings that KFN should have produced a steadily rising price of gas for the years ahead. However, where Oliver had actual prices to work with, his figures show the price of gas going in both directions, down to $2.47 per thousand cubic feet in 1997 from $2.53 in 1996, then down another penny the year after that. For the projections covering the years 2002 to 2010, Oliver showed the price of gas rising by just over three percent each year. The jury, having accepted Oliver's conclusions on total damages, presumably accepted also Oliver's projections on the price of gas.

It would have been reasonable for plaintiff to request that the jury be instructed to take the rising price of gas into account, by way of projecting Oliver's figures further into the future, starting from when the lease was terminated. It would then have been well for the trial court to instruct the jury to note any benefit to defendants resulting from those rising prices and to discount the damage award accordingly. However, because plaintiff was silent on these principles at trial, appellate relief is not warranted. No manifest injustice resulted from the jury's reliance on Oliver's conservative estimates on the future price of gas.[8]

V

Plaintiff contends that the trial court abused its discretion by denying plaintiff's motion for judgment notwithstanding the verdict and new trial that were based on the theory of double recovery. When reviewing a trial court's decision on a motion for JNOV, this Court views the evidence in a light most favorable to the nonmoving party to determine whether a factual question exists over which reasonable minds could differ. *Central Cartage Co. v Fewless*, 232 Mich App 517, 524; 592 NW2d 422 (1998). The issue of damages in this case, including questions concerning the future profitability of KFN, was certainly one upon which reasonable

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[8] However, on remand plaintiff is free to present these arguments at that time.

minds could differ. The trial court thus correctly declined to impose judgment contrary to the verdict as a matter of law.

MCR 2.611(A)(1)(a) and (d) authorize a new trial as a remedy for, respectively, an abuse of discretion that denied a party a fair trial, and a "clearly or grossly" excessive verdict. A trial court should not set aside a jury verdict if there is competent evidence to support it. *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 194; 600 NW2d 129 (1999). An appellate court owes deference to a trial court deciding a great-weight motion, in light of the latter's advantage in having actually heard the evidence and observed the witnesses. *Ellsworth, supra* at 194.

For the reasons discussed in Issue III, the award of damages constitutes a substantial and undeserved windfall for defendants. The reasons warranting reversal and remand on appeal likewise warrant the granting of a new trial on the issue of damages below.

Defendants point out that plaintiff presented no evidence on the future profitability of KFN. However, defendants themselves presented such evidence, in the form of Stephen Oliver's calculations and testimony. Again, the jury's verdict indicates that the jury accepted Oliver's figures at face value. No rational reading of those figures, given the total capacity of the reserve, the life of the project, the rate of gas extraction, and the extent of drainage, could leave one doubting that KFN remains a very promising source of profitable gas. For these reasons, the trial court's statements that the prospect for future development of KFN "was speculative based upon the evidence that was before the jury at trial" was not entirely correct. In light of Oliver's figures, the conclusion that no profits remained to be reaped from KFN was more speculative than concluding that substantial profits remained to be had. If the parties cannot settle this issue on remand, it requires further evidentiary development.

VI

Plaintiff maintains that the trial court committed prejudicial error by allowing the jury to award damages against plaintiff for conversion and in trebling those damages. Plaintiff does not attack the jury's conclusions concerning amounts of gas converted, its value, or the relevant time frame, but focuses this challenge exclusively on the legal theories reflected in the trial court's instructions, and in its decision to award special damages. The court instructed the jury on White Pine's conversion claim as follows:

> Conversion is any distinct act of dominion wrongfully exerted over another person's property in denial of or inconsistent with the rights therein. If you find from the evidence that Terra wrongfully deprived White Pine of the opportunity to claim and take gas underneath the North Kitchen Farms in which White Pine had an interest, then Terra will be liable for conversion. If you find that Terra converted White Pine's gas, then the measure of damages will be the number of MCF of gas converted multiplied by the highest market price per MCF of gas during the period of time gas was being converted. If you find that the conversion was willful or in bad faith, no reduction in conversion damages should be made for any cost in the Bart-Star project incurred by Terra, including cost for drilling, transportation, processing, or compression. If you find the conversion was not willful, or in bad faith, conversion damages should be reduced for the

> cost in the Bart-Star project incurred by Terra, including cost for drilling, transportation, processing or compression.

This instruction obscures the distinction whether plaintiff converted White Pine's gas by preventing White Pine from gaining the benefit of its contract for the harvesting of that resource, or simply by siphoning White Pine's gas out from under White Pine's land through the expedient of wells placed at the property line. The blurring of those distinctions was apparently intentional. White Pine's theory of recovery was not that the adjoining operation was not fully entitled to capture all the gas it could, but that some of what the adjoining operation did capture and market should have been produced by way of the KFN project, and would have but for plaintiff's obstinacy in the matter.

White Pine sought a finding that conversion had taken place in order to take advantage of the provisions for treble damages, plus costs and attorney's fees, set forth in the conversion statute, MCL 600.2919a. That statute provides as follows:

> A person damaged as a result of another person's buying, receiving, or aiding in the concealment of any stolen, embezzled, or converted property when the person buying receiving, or aiding in the concealment of any stolen, embezzled, or converted property knew that the property was stolen, embezzled, or converted may recover 3 times the amount or actual damages sustained, plus costs and reasonable attorney's fees. This remedy shall be in addition to any other right or remedy the person may have at law or otherwise.

At issue is whether plaintiff, as owner of an operating interest in the "Bart-Star" project, comes under the provision for treble damages. The primary purpose of statutory interpretation is to ascertain and give effect to the intent of the Legislature. *Haworth, supra*, 210 Mich App at 227. "[T]he meaning of the Legislature is to be found in the terms and arrangement of the statute without straining or refinement . . .." *Gross v General Motors Corp*, 448 Mich 147, 160; 528 NW2d 707 (1995).

Concerning whether conversion took place at all, defendants' theory is that plaintiff willfully refused to develop the gas in KFN, instead preferring to siphon what it could from that location through wells located in a neighboring project through which plaintiff operated under a more favorable contract. Plaintiff relies on *Wronski v Sun Oil Co*, 89 Mich App 11; 279 NW2d 564 (1979), where this Court articulated the rule of capture: "The owner of a tract of land acquires title to the oil and gas which he produces from wells drilled thereon, though it may be proved that part of such oil or gas migrated from adjoining lands." *Id.* at 21 (internal quotation marks and citations omitted). *Wronski* recognized an exception to the unbridled rule of capture, however, where the mineral reserve in question is under a governmental conservation or proration order, an operator's overproduction in the face of which subjects that operator to liability for conversion to all the owners of interests in the pool. *Id.* at 24-25. Not in dispute is that the instant case involves no governmental proration or conservation order. Plaintiff argues that the absence of any proration or conversation order in this instance left plaintiff and other interests free to extract all the oil that could be extracted from neighboring projects, citing the rule of capture. However, *Wronski* does not suggest that violation of conservation orders is the *only* way that minerals may be converted by entities operating from adjacent parcels. The present case suggests another, where an operator refuses to act on one project while both asserting rights to the inactive project and exercising its operating interest in a neighboring project that is drawing from the same reservoir.

Even so, however, the trial court erred in awarding special statutory damages on the conversion claim.[9] MCL 600.2919a places special liability on a person for knowingly "buying, receiving, or aiding in the concealment of any stolen, embezzled, or converted property . . .." A person can neither buy nor receive from oneself, nor aid oneself in concealing property. *People v Kyllonen*, 402 Mich 135, 145; 262 NW2d 2 (1978), citing MCL 750.535, as amended by 1974 PA 55. *Kyllonen* concerned a provision of the penal code that paralleled the one at issue here. However, the Legislature has since enlarged the scope of the penal provision to bring the thief, or convertor, him- or herself under its provisions, having added the words "possesses" and "conceals." *People v Hastings*, 422 Mich 267, 269-272; 373 NW2d 533 (1985), citing MCL 750.535, as amended by 1979 PA 11. The civil conversion statute, MCL 600.2919a, as quoted above, was not revised along those lines. It continues to target only persons who buy, receive, or aid in concealing converted property, not the actual convertor him- or herself. "[T]he statute is not designed to provide a remedy against the individual who has actually stolen, embezzled, or converted the property. Indeed, the statute carefully compartmentalizes the actions of those assisting and the actions of the principal." *Marshall Lasser, P.C. v George*, 252 Mich App 104, 112; 651 NW2d 158 (2002).

Defendants persuaded the trial court that plaintiff's various roles in the "Bart-Star" project, as operator and part owner, caused plaintiff to act as a receiver of converted property. However, no matter how many different hats plaintiff wore, or how many separate contracts were involved, plaintiff cannot deliver gas to itself. The Legislature's disinclination to extend to civil defendants the special liability, to which it has amended the criminal conversion statute to subject criminal convertors, applies in this case. If it is a close question whether the facts of this case show plaintiff to be a convertor of White Pine's gas, it would be engaging in fiction to regard plaintiff as a buyer or receiver of converted property, or an aider in its concealment, in this instance.

VII

Plaintiff argues that the trial abused its discretion by refusing to admit the testimony of Bob Boeve and by refusing to allow amendment of plaintiff's witness list to allow the testimony of Phil Durrett concerning the reasons why potential partners in the KFN operation chose not to continue with the project. Plaintiff contends that the testimony was relevant to the critical issue whether plaintiff acted as a reasonable and prudent operator in the matter. This Court reviews the trial court's evidentiary rulings for an abuse of discretion. *Price v Long Realty, Inc*, 199 Mich App 461, 466; 502 NW2d 337 (1993).

With regard to Phil Durrett, plaintiff argues for the substantive admissibility of Durrett's testimony, but makes no effort to rehabilitate its procedural irregularities and deficiencies in listing that witness, or in disclosing what his testimony was expected to be. Nor does plaintiff

[9] Again, the trial court recognized that the conversion and contract claims substantially duplicated each other, and thus invited duplicative damage awards. The court accordingly doubled the conversion damages instead of tripling them.

attack any of the trial court's factual assertions above. "[A]n abuse of discretion will be found when the decision is 'so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias.'" *Dacon v Transue*, 441 Mich 315, 329; 490 NW2d 369 (1992), quoting *Spalding v Spalding*, 355 Mich 382, 384-385; 94 NW2d 810 (1959). Because plaintiff only belatedly settled firmly on its desire to bring in Durrett, and did not timely disclose what it expected would be the substance of Durrett's testimony, and because the subject matter involved was of a very technical and sensitive nature that would have been very burdensome for defendants to address in the time allowed, it was no perversion of will or defiance of judgment for the trial court to disallow that witness.

With regard to Bob Boeve, outside the presence of the jury he testified that he respected the opinions of Chevron and Guardian and took them into account when deciding not to drill further. When asked about other considerations, Boeve indicated that the decision not to drill was based on "our own sense of the quality of the test wells . . . and the fact that we would have the funding considerations to replace funding." In sustaining defendants' objection to Boeve's testimony, the trial court explained:

> The only possible reason opinions of Guardian . . . or . . . Chevron about . . . the quality of the project as distinguished from the money they were prepared to put up can only be important for a prudent operator's decision if there's testimony these two opinions were critical or very important in the decision that was made, I didn't hear any testimony to that effect. So I'm going to sustain the objection. We got the important material in which these two funding sources knew of the test results and declined to go forward and declined to fund the money, that is clearly irrelevant to a prudent operating decision of whether to go forward or not.

The trial court decided the question as a matter of relevance, not hearsay. The court's conclusion that advice from Chevron and Guardian was less than critical in connection with plaintiff's decision not to drill additional wells was supported by Boeve's own statements outside the presence of the jury. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, . . . or by considerations of . . . needless presentation of cumulative evidence." MRE 403. In light of the stringent standard for an abuse of discretion, a trial court's decision on a close evidentiary question ordinarily cannot be an abuse of discretion. *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995). Accordingly, we conclude that the trial court did not abuse its discretion in disallowing Boeve's testimony concerning Chevron's or Guardian's opinion of the likely success of the KFN project.

VIII

Plaintiff asserts that the trial court erred by instructing the jury that there were issues concerning plaintiff's successors in interest (assignees) that could not be resolved in the instant case. We disagree.

A recorded assignment by plaintiff to Rock Oil Company, L.L.C., of "an undivided 1/3 of all reversionary interests in the Oil and Gas Leases set forth . . . " dated July 23, 1998, was admitted into evidence. Also admitted into evidence was a document dated July 29, 1998, reflecting in turn a recorded assignment by Rock Oil to Rabbit River Resources Company, L.L.C., of "an undivided 1/3 of all reversionary interests of Grantor in the Oil and Gas Leases set forth . . ." Boeve testified that KFN was among the leases covered by both assignments. He indicated that former owners of plaintiff owned Rock Oil and that himself and an accountant of plaintiff owned Rabbit River. Boeve acknowledged that the assignments had been recorded, but admitted that there was no recorded release of the KFN interest attendant to the assignment to Rock Oil or Rabbit River.

In the course of deliberations, the jury questioned the effect of the assignments on the order terminating the KFN lease. The trial court, noting that a recorded interest can not be "cut off" by action to which the holder of the interest is not a party, instructed the jury that the assignments reflect issues that could not be resolved in the instant litigation. We find no error in this instruction. The decision in a particular case can only bind the parties to that case. Se, e.g., *Giegling v Helmbold*, 357 Mich 462, 465; 98 NW2d 536 (1959). The trial court properly declined to rule on the rights of parties who were not before it.

IX

Last, plaintiff argues that the trial court erred by regarding White Pine and Star Energy as separate entities. Plaintiff fails to address the question of preservation, or provide any record citation to show that it anywhere at trial asked that the two defendant companies be treated as one and the same. MCR 7.212(C)(7). Conversely, counsel for plaintiff stipulated to a modified form of SJI2d 41.01, which specifies that multiple defendants are entitled to separate consideration of their defenses, and did not object when the trial court instructed the jury to consider separately the two counterclaims by the two defendants, the latter apparently reflecting the agreed-upon modification. The record thus indicates that plaintiff affirmatively waived objections to the recognition and preservation of the separate statuses of the two defendants/counterplaintiffs, extinguishing the issue for purposes of appellate consideration. *People v Carter*, 462 Mich 206, 214-216; 602 NW2d 582 (2000). Accordingly, this Court treats plaintiff's arguments on appeal as related to the specific defendant or defendants against whom they were tailored as presented.

We affirm the jury's verdict of no cause of action on plaintiff's claims, but reverse the award of damages against plaintiff on defendant's counterclaim and remand this case to the trial court for a new trial on the issue of damages. Jurisdiction is not retained.

/s/ E. Thomas Fitzgerald
/s/ Donald E. Holbrook, Jr.
/s/ Mark J. Cavanagh