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Peevyhouse v. Garland Coal & Mining Co. Revisited: The Ballad of Willie and Lucille

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PEEVYHOUSE v. GARLAND COAL & MINING CO. REVISITED: THE BALLAD OF WILLIE AND LUCILLE

Judith L. Maute*

**WILLIE PEEVYHOUSE AND GRANDSON**

* Professor, University of Oklahoma College of Law. J.D. 1978, University of Pittsburgh; LL.M. 1982, Yale University. This project had its inception in August 1982, while I prepared for my first week of law school teaching. I sought guidance from George B. Fraser, an esteemed senior colleague, regarding how I could explain the infamous *Peevyhouse* decision to my Oklahoma students. He replied, “Have you heard about the bribe scandal?” I knew then that *Peevyhouse* was a story to be told, but had no idea how it would end. Throughout, George has given sage advice and encouragement. In addition to the parties and their counsel, many other lawyers and judges have assisted with the project, sharing their recollections and observations, expertise and technical resources. I am particularly grateful to Jackie and R.B. Short, Barnes, Smith & Lewis, P.C., and graphic artist Chris Berry, who aided production of the maps and aerial photos contained herein.
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We picked a fine time to strip mine, Lucille.
It sure looks to me like we got a raw deal.
That smooth city-slicker said we'd all get rich quicker
I should have known it warn't real.
We picked a fine time to strip mine, Lucille.

* * *

We picked a fine time to strip mine, Lucille.
Make no mistake, hon, we got a raw deal,
I never went to law school,
I didn't know the value rule,
I thought sure we'd win our appeal,
The Supreme Court done gyped us, Lucille.¹

I. INTRODUCTION

Much of the law school case method is story-telling. Imaginative professors embellish facts to make a point. For many professors, the law cannot be divorced from the context of human experience; facts enliven cases and teach important moral lessons.² Especially compelling stories become woven into the fabric of legal folklore.³

Peevyhouse v. Garland Coal & Mining Co.⁴ is one such case. Willie and Lucille Peevyhouse owned 120 acres of land in Oklahoma where they lived, farmed, and grazed cattle. In 1954 they leased sixty acres to Garland Coal Company (Garland) for stripmining on the condition that Garland do certain remedial work to the affected land. When Garland quit the premises without doing the work, the Peevyhouses sued for $25,000, the estimated cost of performance.⁵ At trial, Garland conceded breach of contract and offered no legal excuse for nonperformance.⁶ The sole issue in the case, therefore, concerned damages, with the defense contending plaintiffs' recovery was limited to the diminished value of the land resulting from the breach. After allowing the jury to consider both diminution and cost evidence in
determining plaintiffs’ recovery, the trial judge entered judgment on the $5000 verdict. Both sides appealed to the Oklahoma Supreme Court which affirmed judgment for plaintiffs, but reduced damages to $300. The Pacific Reporter reflects a five-to-four split on the court, which held that where a breached contract provision is “merely incidental to the main purpose” and the economic benefit to the lessor from full performance is grossly disproportionate to the cost of performance, damages are limited to the diminution in the value of the land caused by the breach. All efforts at further appeal failed.


This Article contrasts reality with the folklore that caricatures the principals, or imagines facts which either exaggerate the injustice or make the case more balanced. It reconstructs the Peevyhouse case with information obtained from numerous sources. Richard Danzig’s important work on the capability problem demonstrated that clusters of systemic problems in litigation may “impede and dis-

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7 Peevyhouse, 382 P.2d at 120.
8 Id. at 114.
9 286 N.W. 235 (1939).
10 See, e.g., Parody, supra note 1; Barrow, supra note 2.
11 Any historical work purports to speak the “truth,” as understood from the author’s perspective. Yet, the honest historian must acknowledge the practical impossibility of claiming the events actually occurred as depicted. I have attempted to discover and understand all relevant aspects of the mining project, the litigation, and its aftermath. Garland Coal’s witnesses and trial counsel are deceased, thus my ability to develop fully Garland Coal’s perspective on the case are limited. Accuracy problems are further compounded by the ravages of time on memory and perceptions. For a discussion of factors affecting the accuracy of testimonial evidence, see JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 17-21 (1949).
12 Research is based on the trial transcript and exhibits, briefs, court documents, extensive interviews, and other historical data relevant to that era. Unless otherwise stated, court documents were obtained from the Oklahoma Department of Libraries, State Archives, Oklahoma City. J.F. Porter, III, the last president of the now dissolved Garland Coal Company, and the Peevyhouses have cooperated with this research and consented to their respective lawyers divulging confidential information.
13 The capability problem embodies a set of less noticed, less easily documented, and therefore less often discussed companion to value questions. RICHARD DANZIG, THE CAPABILITY PROBLEM IN CONTRACT LAW: FURTHER READINGS ON WELL-KNOWN CASES 1-2 (1978). Indeed, if values are the quiet engines of our legal system, the capability problems are the frictions,
tort efforts to further preferred values through a legal system." 14 Stewart Macaulay, Ian Macneil, and other relational scholars have persuasively argued that contract disputes may only be understood in the specific factual context of the ongoing relations between parties. 15 Relational contract theory is reflected in the way contracts are taught in many law schools. 16

On the scant and often confusing record before the Peevyhouse court, the decision is arguably defensible. The meager facts of record, deemed "unrealistic" and "artificial" by the court, 17 invite speculation and debate. While that debate fuels lively class discussions, the reported facts are grossly inaccurate. Consistent with the adversary process, the parties' respective counsel controlled the factual presentation. Whether caused by counsels' inadequate mastery of the facts, deliberate strategy choices, or adversary zeal, the deficient trial record distorted accurate fact-finding and proper legal analysis. This Article fully develops the context in which the contract was negotiated, partly performed, and breached. The added facts provide opportunities to enrich academic discussion of contract theory, lawyering skills, professional ethics, and systemic questions of justice.

The record omitted evidence regarding consideration for remediation, course of performance, and breach. 18 To obtain Garland's promises of remediation, the Peevyhouses waived the right to receive $3000 cash upon executing the lease. This amount equals $50 per acre and represents the amount coal operators customarily paid landowners for any surface damages caused by the mining. Upon executing the contract, the Peevyhouses received $2000 for advance royalties, and they later received an additional $500 royalty calculated on the total quantity of coal removed. Within days, Garland diverted a bothersome creek onto the Peevyhouse land so that it could continue mining elsewhere, unimpeded by water flow. Eventually Garland mined a small portion of the leased Peevyhouse land, but left the property earlier than expected, claiming the coal ran too deep. Heavy spring rains saturated the low-lying worksite, making it dangerously unstable. Garland made little effort to complete the promised remedial work. A bulldozer spent one day knocking off sharp peaks from the highwall and constructing a makeshift dirt fill to prevent the di-

14 Id. at 1-2.
15 See, e.g., William C. Whitford, Ian Macneil's Contribution to Contracts Scholarship, 1985 Wis. L. Rev. 545.
16 For example, University of Wisconsin students learn contracts in context, with extensive materials expanding on the sparse facts in reported cases. See Stewart Macaulay et al., Contracts: Law in Action (1995).
17 Peevyhouse, 382 P.2d at 112.
18 See infra Part II.
verted creek from running into the pit, causing further damage. Settlement efforts failed. Upon conclusion of the lease term, the Peevyhouses sued for damages. After their attorney paid the litigation costs from the $300 judgment, nothing remained for distribution to the Peevyhouses. They still live on the land, which has not been restored.

Part II of this Article develops the facts uncovered by this historical reconstruction of Peevyhouse. First, it details contract formation, including negotiations that produced a specialized bargain contrasting sharply with the standard agreement used in the dominant coal industry. It explains the stripmining process to aid the reader's understanding of what the parties expected under the contract and describes the actual performance and breach. Next, this Part recounts what happened in the litigation, starting with the pleadings and ending with plaintiffs' quixotic post-appeal efforts to obtain relief. The epilogue describes the current condition of the land, relates the remarkable outcome of Garland's bankruptcy, and reviews the statutory changes that now demand reclamation of stripmining sites.

This Article could be used to ground first-year law students on the relationships among doctrine process, lawyering skills, and ethics. Part III covers the landscape of contract doctrine, including contract interpretation and the parol evidence rule, substantial performance or material breach, mistake and impracticability excuses for nonperformance, and remedies. It analyzes these doctrines and their application to the facts. Subpart D on remediation considers the relative economic benefits of the exchange, which the Oklahoma Supreme Court assumed without any supporting facts. Next, it evaluates the various alternative measures for an injured party's recovery of money damages as protection from defeated contract expectations. Where plaintiffs, such as the Peevyhouses, cannot adequately prove the subjective loss in value, it concludes that contract and economic policy considerations strongly support the cost measure of damages. Alternatively, had plaintiffs anticipated that their expectation damages would be limited to diminution, they could have instead elected to seek restitution for the benefits Garland received. The potential recovery under this method was substantial. Finally, this Part considers and supports recent scholarship urging courts to more readily grant specific performance. Considering that plaintiffs must absorb most enforcement costs, money damages will typically undercompensate plaintiffs. In cases like Peevyhouse, equitable relief assures plaintiffs receive the benefit of the bargain and satisfies the public interest in reclamation.

Part IV considers systemic flaws in the adversary system that strain the quality of justice. Peevyhouse exemplifies litigation incapac-

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19 Telephone Interview by Craig Carpenter with Willie Peevyhouse (Jan. 11, 1988).
itiies that impede accurate fact-finding. Litigants often have unequal access to dedicated, competent counsel and to the resources available to support the litigation. Substantial mismatches between the parties and their counsel can distort legitimate outcomes. Some observers have opined that the Oklahoma Supreme Court was tainted by a bribery scandal that came to light shortly after *Peevyhouse* was decided. Part V considers this speculation in light of available information. Because the stakes were so small, there was no incentive to attempt a bribe. However, questions of judicial bias linger. Part VI concludes the Article, briefly surveying the continuing effect of *Peevyhouse* in environmental, natural resources, and landlord-tenant law.

II. CONTRACTS IN CONTEXT: THE UNEARTHED FACTS OF *Peevyhouse v. Garland Coal & Mining Co.*

Part II fully develops the facts surrounding the *Peevyhouse* litigation. Subpart A addresses issues of contract formation, discusses the coal industry's local dominance and stripmining operations, provides background information on the principal actors and their negotiations, and presents the resulting contract terms. Subparts B and C detail the actual contract performance, breach, and settlement negotiations. Subpart D, on litigation, provides background information on the parties' legal counsel and summarizes the pleadings, the trial, and the appeal. Subpart E first reports the initial decision of the Oklahoma Supreme Court and then recounts the unusual aftermath relating to rehearing petitions and changed votes. Finally, subpart F describes the current condition of the land, Garland Coal's extraordinary experience as a debtor who received distribution of surplus funds following its involuntary Chapter 7 bankruptcy, and the evolution of reclamation statutes.
A. Facts and Fiction of Contract Formation

That smooth talkin' stranger, I knew he was danger,
The minute he walked in our yard.
But his smooth city ways put us in a daze,
And that's when we let down our guard.
He said that his goal was to mine all the coal,
Lying beneath our farm.
But, he said not to worry, because in a hurry,
They'd put back our dirt with no harm.  

Hastings law professor Roscoe Barrow imagined much the same scene in his annual lecture on the responsibility of lawyers for the quality of justice.  

20 See Parody, supra note 1.

21 See Barrow, supra note 2.
to graze [and to] rest in the shade of the willow; and Willie says with pride, "What a spread, and all this is ours."

And Lucille adds, "It has given us a good life with God's help."

Willie cups his hand to his ear and says, "Listen! You can hear the quail bobwhiting." And as Lucille listens for the quail sound, she hears a car coming up the country road, dragging its comet of dust behind it, and the car stops in front of their door, and a city fellow alights, with trusty briefcase in hand.

He announces that he is agent of the coal company, shakes hands and asks if they have decided to take royalty from their coal rights.

Willie answers, "It's dry here. Mustn't turn the sod—dust will blow."

Lucille adds, "Nothing good ever comes from tinkering with nature."

The agent explains, "You don't know about Big John. This marvelous machine, it rolls up the topsoil like a carpet. It scoops out the coal like ice cream. It rolls the topsoil back again and everything is as it was before, except you have money in the bank."

Willie scratches his head and says, "If you'll put it in the writing that you will do that—that you will put it back the way it was—we will think about it."

Well, back at the office, the manager says, "Costs too much—cut that."

But counsel for the coal company is learned in the law. He advises, "You don't have to restore the land. Economic waste—just pay them the value of the land as it would be now if it had been restored. And that pasture land isn't worth much on the market today."

Back comes the agent with the document, and the restoration clause clearly typed on it. Lucille is cautious. "Willie," she says, "my intuition tells me, Don't sign."

But Willie says, "We got it in the writing, and that's binding."

1. Local Dominance of Coal.—After oil and gas, coal is Oklahoma's most important natural resource. Coal-bearing formations cover about one-quarter of the state's total area, and coal seams underlie approximately 11% of the state. Historically, the McAlaster coal district, which includes Haskell County, was the state's major coal producing area. The coal from Haskell County's rich lower Hartshorne vein, containing unusually hard bituminous coal, ac-

22 Id.
24 GASTON LITTLE, HISTORY OF OKLAHOMA 162-63 (1957).
counted for about 17% of all production, with the vast majority coming from the Stigler area.25

Stigler is nestled in the rolling hills of southeastern Oklahoma. In the early days it was a bustling commercial center for outlying farms, ranches, and mining operations.26 Mining was important to Stigler's economy, providing jobs, revenue to vendors, and cash to landowners.27 As such, most landowners passively accepted the fact and terms of mining offered by the operators. Under the standard arrangement, the mining company paid substantial amounts to the property owner upon execution of the lease. This payment had two components: one represented advance compensation for surface damages in an amount equivalent to the current market value of the land; the other was an advance royalty, against which the per ton royalty was credited. No existing law required reclamation, and typical landowners did not bargain for it.28 In their view, the mining stripped the land of all its value, leaving it worthless for the future. The surface damage payment effectively paid the property owners for the land, leaving them with whatever future value might be obtained from their continued title ownership.29

2. Stripmining Operations.—Stripmining entails digging a long, open trench through the overburden30 to expose a part of the seam for removal. After the exposed coal is removed, the operator makes a second, parallel cut with the overburden placed as spoil material31 into the first cut. The operator continues with successive cuts until the remaining coal lies too deep below the overburden to be mined economically. The last cut leaves a pit, or open trench bounded on one side


27 In addition to coal, Stigler's local economy depended on the timber and agricultural industries. See Haskell County History, supra note 26, at 51.

28 State and federal regulations now require posting of bonds to insure that reclamation work is done. See infra notes 309-29 and accompanying text.

29 This inference is drawn from the payment of $50 per acre which excluded reclamation normally provided in coal leases at that time. Interview with Willie and Lucille Peevhouse in Stigler, Okla. (Mar. 8, 1993).

30 See Glossary, infra Appendix B.

31 Id.
by the last spoil bank and on the other side by the highwall. By definition, the present pit is the site of the last cut. If the bottom of the last cut is beneath the water table, the pit eventually fills with water and is euphemistically called the "pond".

Steps (a) through (c) in the accompanying figure depict the parties' understanding of the mining to take place on the Peevyhouse land.

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32 Id.

33 Id.

34 See Kenneth S. Johnson, Description of Disturbed and Reclaimed Surface-Mined Coal Lands in Eastern Oklahoma, Text to accompany Map GM-17, at 4-5 (1974) (on file with author) [hereinafter Disturbed Surface-Mined Lands].
A stripmining operation strives for optimal efficiency by obtaining access to the entire strip of land on which the desired coal is located. Once the digging equipment is in place, it cuts a path so that the new excavation exposing the coal becomes the overburden on the land just mined. Upon completing one segment of the seam, the operator moves the equipment to the next segment and repeats the process throughout the targeted coal bed. For each mined segment, a pit remains if it is not filled in with overburden. The highwall is commonly steep and unstable, parts of which may be constantly at risk of collapsing into the pit. On the opposite side, the pit abuts the last pile of overburden produced in digging the pit. Successive rows of overburden remain for the entire width of that segment. Garland’s planned mining operation extended over a fifteen-mile, V-shaped strip beginning in the northwest, moving along the coal bed towards the southeast, and at the apex near the Peevyhouses’ land, moving back towards the southwest.

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35 Id.
36 Id.
37 See Step (c) in figure, supra note 35; see also infra note 54 (depicting pit with rows of overburden north of pit).
Lands disturbed by mining include:

- Spoil banks on mined and/or unrestored land
- Open cuts (most filled with water)
- Highwalls

**Outline of mining area as of aerial map dated 1964**

**Outline of mining area as of aerial map dated 1952**

**Area Mining Map**

The area mining map [hereinafter Area Mining Map] is based on data collected from the Oklahoma Geological Survey; Map GM-17; Garland's operations map; Defendant's Exhibit 8, contained in Record; a 1952 Aerial Photograph [hereinafter 1952 Aerial Photo], *infra* p. 1360; and a 1964 Aerial Photograph [hereinafter 1964 Aerial Photo], *infra* p. 1361 (all on file with author). Kenneth Johnson, Associate Director, Oklahoma Geological Survey provided technical consultation. The GM-17 map reflects all mining and reclamation through June 1973. Reclamation has been done by private operators as required by law since 1967, or through public funds expended by the Oklahoma Abandoned Mines Program. Generally, land mined before 1968 has...
3. The Players.—Willie and Lucille Peevyhouse had long ties to the community. They were born and raised in Haskell County. Willie’s grandparents settled there in the 1890s and their ten children firmly established the local branch of family. Willie was one of twelve children. He attended school in Stigler through the ninth grade. Lucille’s grandfather, Rev. Earlan Krumsiek, came to Haskell County in 1902. Her parents, still living, have spent their lives there. Lucille, one of five children, attended Stigler schools through the eighth grade.

Willie and Lucille married in 1947. They lived on a farm near her parents about seven miles outside the town of Stigler. In 1951 they bought eighty acres from her parents, the Krumsieks, for $12 per acre, and later acquired another forty acres. They built a house, cultivated a vegetable garden, and put in a pasture for grazing thirty head of cattle. The sixty acres eventually leased to Garland included a large stand of trees and fertile soil suitable for farming, which the Peevyhouses previously used for pasture.

Lucille worked for a local canning company until she left to maintain the family farm. Besides the farm, Willie worked at an ammunition depot and later did construction work. At the time they signed

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not been reclaimed. Chris Berry, a graphic artist employed by Barnes, Smith & Lewis, P.C., Oklahoma City, Oklahoma, prepared the Area Mining Map.

Accurate production figures between 1954 and 1957 are not available. The GM-17 map permits rough projections for production occurring between 1952 and 1964 when correlated with Garland’s operations map and the aerial photos.

<table>
<thead>
<tr>
<th>Owner</th>
<th>Leased*</th>
<th>Mined</th>
<th>Coal** Produced</th>
<th>Royalty#</th>
<th>Reclaimed*</th>
</tr>
</thead>
<tbody>
<tr>
<td>Southern</td>
<td>40</td>
<td>10</td>
<td>14,400</td>
<td>$2160</td>
<td>0</td>
</tr>
<tr>
<td>Robertson</td>
<td>120</td>
<td>35</td>
<td>50,400</td>
<td>7560</td>
<td>35</td>
</tr>
<tr>
<td>Fowler</td>
<td>80</td>
<td>33</td>
<td>47,520</td>
<td>7128</td>
<td>0</td>
</tr>
<tr>
<td>Nolen</td>
<td>100</td>
<td>30</td>
<td>43,200</td>
<td>6480</td>
<td>0</td>
</tr>
<tr>
<td>Peevyhouse</td>
<td>60</td>
<td>8.5**</td>
<td>15,912**</td>
<td>2500</td>
<td>0</td>
</tr>
<tr>
<td>Gaither</td>
<td>80</td>
<td>37</td>
<td>53,280</td>
<td>7992</td>
<td>13</td>
</tr>
<tr>
<td>Krumsiek</td>
<td>80</td>
<td>38</td>
<td>54,720</td>
<td>8208</td>
<td>32</td>
</tr>
</tbody>
</table>

* In acres; reclamation figures based on GM-17 data as of 1969.
** In tons, based on 12 inch minimum thickness of coal, producing an estimated 1440 tons. See Disturbed Surface-Mined Lands, supra note 34.
# Estimated royalty based on 15¢ per ton rate in printed contract unless noted otherwise.
** Letter from Dr. Samuel A. Friedman, Senior Coal Geologist IV, Oklahoma Geological Survey, to author (Oct. 7, 1993) [hereinafter Friedman Letter].

If the above projections are accurate, the Peevyhouses should have received $3,182.40 in royalties at 20¢ per ton. If Garland correctly paid them $2500 in royalties, 12,500 tons of coal were produced from their land.

39 See Haskell County History, supra note 26.
40 They paid between $10 and $20 per acre for the land. Interview with Willie and Lucille Peevyhouse, in Stigler, Okla. (Mar. 8, 1993).
41 Interview with Willie Peevyhouse, in Stigler, Okla. (Jan. 11, 1988); see also 1952 Aerial Photo, infra p. 1360; 1964 Aerial Photo, infra p. 1361.
the lease in 1954, the Peevyhouses were twenty-seven years old and had a four-year-old son.

Garland Coal Company, based in Fort Smith, Arkansas, had mined extensively throughout southeastern Oklahoma and Arkansas since around 1928. Garland maintained a local office in Stigler, the Haskell County seat. During the period covered by the lease, several different companies mined the area under a loose joint venture arrangement. They acquired mineral leases throughout the area and began stripping the rich Hartshorne vein. Garland Coal was, by far, the largest producer. Because of Garland Coal's prominent role in the local economy, the Stigler community was familiar with its key personnel and area mining activities. Burrow ("Burl") Cumpton, a civil engineer who had worked in Garland's Stigler office since 1952, negotiated the Peevyhouse lease for the company. Contrary to folklore, Garland's agent was no city slicker. Cumpton's family had long lived in the area. Some evidence suggests that he might have been a sharp trader.

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42 Garland Coal formed as a Delaware corporation sometime before 1928, owning property both in Arkansas and Oklahoma. Its corporate history is complex with many unknown details. Garland acquired Sallisaw Stripping from the Missouri & Pacific Railroad sometime in the late 50s. J.F. Porter, Jr. (since deceased) owned one-half of Sallisaw Stripping, with two other investors owning the balance. At some point, the Porter family acquired full ownership of Garland. Porter was not actively involved in the daily business operations; however, he was involved with the company at the time of the Peevyhouse matter. Telephone interview with J.F. Porter, III, President, Garland Coal Co. (Mar. 9, 1993).

43 Stigler, by Oklahoma standards, is an old town. Originally Indian Territory, white settlers arrived in 1887. It incorporated in 1905, two years before statehood. See HASKELL COUNTY HISTORY, supra note 26, at 48-49.

44 Garland's production from Haskell County relative to other operators in the relevant years is as follows:

<table>
<thead>
<tr>
<th>Year</th>
<th>Percent of Total Production</th>
<th>Site</th>
</tr>
</thead>
<tbody>
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See STATE OF OKLAHOMA, FORTY-SIXTH ANNUAL REPORT OF MINES AND MINING OF OKLAHOMA 8-9 (1954); STATE OF OKLAHOMA, FORTY-SEVENTH ANNUAL REPORT OF MINES AND MINING OF OKLAHOMA 8-9 (1955); STATE OF OKLAHOMA, FORTY-EIGHTH ANNUAL REPORT OF MINES AND MINING OF OKLAHOMA 8-9 (1956); STATE OF OKLAHOMA, FORTY-NINTH ANNUAL REPORT OF MINES AND MINING OF OKLAHOMA 6-7 (1957).

45 See Record, supra note 6, at 95-97. He apparently spent a lot of time in Haskell County; he testified that he had been familiar with the land values based on trades made in the area for the last twenty-five years. Cumpton was a civil engineer trained at the University of Oklahoma, who at the time of trial had 40 years of experience, working also in Oregon, Montana, Washington, and Arkansas.

46 Interview with Chris Blankenship, Cumpton's grandson-in-law, in Stigler, Okla. (Mar. 8, 1993).

47 Apparently Cumpton had personal experience with local land values. He and two other Garland employees acquired a financial interest in land which Garland then mined. One em-
4. *The Negotiations.*—The Peevyhouse land, while quite small in relation to the total acreage and quantity of coal Garland expected to mine, was key to a profitable mining operation. The targeted vein cut through the Peevyhouses' back twenty-acre parcel and a small portion of their forty-acre parcel. By leasing the Peevyhouses' sixty acres, Garland could move its mining operation efficiently from northwest to southeast.\(^4\)

It appears Garland was strongly motivated to obtain the Peevyhouse lease in order to divert Cedar Creek from the mining site onto their land. Cedar Creek naturally ran north of the property, passing through the heavily mined land owned by neighbors Nolen and Fowler, and eventually flowed onto the northeast corner of the Peevyhouses forty-acre parcel. Its diversion from the mining site was essential to avoid interference with ongoing mining operations.\(^5\) Even before execution of the Peevyhouse lease, Garland began pumping water from the creek onto the Peevyhouses' land. Garland began blasting for the diversion immediately after the lease was signed.\(^6\)

The Peevyhouses were opposed to permitting any mining on their land.\(^7\) An earlier mining operation stopped at their property line, leaving behind the disturbed land, including a dangerous pit, highwall, and unsightly overburden.\(^8\) Their reluctance, combined with Garland's need to divert the creek, undoubtedly enhanced their bargaining power. Nevertheless, there is no indication they used this power to exact unreasonably favorable contract terms. The Peevyhouses waived the right to payment of $3000 for surface damages in exchange for the promised remedial work. From Garland's perspective, the exchange appeared economically rational. It saved a $3000 immediate cash outlay, enabled prompt creek diversion, and obtained rights to mine the Peevyhouse land. Alternatively, Garland might have purchased the land outright. It bought a 1.6-acre triangle of land from Thomas Laird, who owned the twenty-acre strip immediately south of the Peevyhouse twenty-acre parcel and refused to lease the property.

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4.\(^{48}\) See Area Mining Map, *supra* note 38.
5.\(^{49}\) Letter from R.W. Funston, P.E. to Charles Dietrich (Mar. 22, 1990) (on file with author) [hereinafter Funston Letter]. He explains: "A creek is diverted by constructing a new channel around the mining operations and typically back into the original creek downstream so as to not affect downstream water rights. The original creek is then blocked off to divert water into the new channel."
6.\(^{50}\) Interview with Willie Peevyhouse, in Stigler, Okla. (Mar. 30, 1990).
7.\(^{51}\) See Interview with Willie and Lucille Peevyhouse, in Stigler, Okla. (Mar. 8, 1993).
8.\(^{52}\) For evidence of the mining, see 1952 Aerial Photo, *supra* note 38. Precisely when, and by whom, this mining occurred is not known.
to Garland. Had the Peevyhouses refused to lease, Garland’s mining operation could have skipped over their property and moved to the next leased property along the coal bed. It had done so previously when it could not reach agreement with another local property owner.53

53 Telephone Interview with Willie Peevyhouse (May 3, 1995).
Detailed Site Map

54 Detailed Site Map prepared by Chris Berry, Graphic Artist at law office of Barnes, Smith & Lewis, P.C., based on Defendant's Exhibit 3 [hereinafter Detailed Site Map]. The dotted line indicates the natural course of Cedar Creek, which Garland diverted into shaded diversion ditch south of pit. Garland purchased triangular shaped parcel from Thomas Laird, who refused to enter a mining lease.
Lease negotiations between Cumpton and the Peevyhouses extended over several sessions. The two men dealt directly with each other while Lucille participated behind the scenes, assisting Willie in identifying issues and desired terms. It appears the Peevyhouses were an astute and careful negotiating team. While they lacked advanced education and sophisticated business experience, the final agreement reflects sound judgment and survival skills acquired from living off the land.

The written contract clearly anticipated leaving an open pit on the Peevyhouses’ land. This shows that Garland planned to make the last cut on their land, leaving behind a water-filled pit and the diverted creek. To minimize the long-term consequences of the mining, the Peevyhouses negotiated remedial provisions that would provide access to a small amount of land north of the pit, assure its future utility as pasture land, and enhance the safety of persons and livestock when near the pit.

The Peevyhouses rejected many of the standardized lease terms. They insisted on striking several provisions that they thought gave the lessee inordinate powers. Most important, they gave up the customary advance payment for surface damages. Because they wanted the land restored to usable condition after the mining, they agreed to forego payment of $3000 ($50 per acre for 60 acres) in exchange for Garland’s promise to do remedial work. Willie explained his view that it was not right to take money for land and allow work to be done on it that would make the land worthless in the future.

5. The Contract.—The contract was signed November 23, 1954 in the Stigler law office of J.F. Hudson, Garland’s local counsel. The Peevyhouses had no counsel. They signed the preprinted form lease containing some handwritten modifications and one typed page defining the remedial and other specific duties. Careful examination of the document is necessary to understand how the negotiated provisions were intended to protect interests important to the Peevyhouses. The printed lease is a typical industry-drafted document obtaining

55 Record, supra note 6, at 105-06.
56 See Detailed Site Map, supra note 54 (showing location of pit and land rendered inaccessible due to pit’s location); Record, supra note 6, at 18-23 (explaining intended remedial work); see also infra notes 139-41 and accompanying text.
57 Interview with Willie Peevyhouse, in Stigler, Okla. (June 2, 1988).
58 Garland also entered a lease covering the same property with The Alliance Trust Company. As prior owner of extensive land in Haskell County, Alliance reserved a one-half interest in the mineral and natural gas rights. This lease, dated November 1, 1955, is typed by hand. Alliance received $2.00 per acre annually as advance royalty with 30¢ per ton payable for extraction. Alliance Trust Company Lease (on file with author) [hereinafter Alliance Lease]. Telephone Interview with Willie Peevyhouse (Mar. 30, 1990).
59 Peevyhouse Coal Lease, infra Appendix C.
maximum prerogatives for the lessee company and release of liability to the lessor. The lessee had no duty to extract any coal or pay any minimum royalty.

Contrary to some folklore, the Peevyhouses were not naive country bumpkins deceived into relinquishing control of the family farm by Cumpton's slick verbal assurances. Rather, the final contract reflects their understanding of the situation, and their cautious efforts to protect the family's financial and personal interest in the land. For example, they limited the lease term to five years and refused to grant Garland a renewal option upon expiration of the primary term. They negotiated a 20¢ per ton royalty instead of 15¢, as printed in the form lease. From observing mining on neighboring properties, the Peevyhouses knew they wanted neither noise from heavy equipment and blasting nor a mining road near their personal residence. Accordingly, they denied Garland rights of passage over land that was not leased by deleting standard language giving the lessee rights of ingress and egress over all the lessor's property. As amended, Garland had no right to disturb, in any way, the sixty acres on which the Peevyhouse home, pasture, and garden were located.

(a) Standard provisions.—Paragraph six of the printed form granted Garland broad authority to alter the Peevyhouses' property without liability for damages. It provided:

It is understood that . . . the Lessors agree to furnish Lessee, in consideration of said royalty, all surface as may be necessary to be used by Lessee in the operation of strip pits, and may be used by Lessee for drainage ditches, haulage roads, spoil banks, tipples, tracks, and any other structures that Lessee finds necessary in the operation of said strip pit or pits or coal mine and the lessee agrees that all such structures shall be located consistent with good operating practice so as to cause the least damage or inconvenience to the owner or user of such surface; . . . Lessor agree that they will save harmless and indemnify the Lessee from any claim or liability arising from any damage to the surface of these lands caused by such operations; it is further recognized the Lessee shall have the right without liability to the Lessor, wherever it may be neces-

60 The standard form lease, entered by several neighboring property owners, provided for a five-year primary term with an option to renew. Actual lease terms extended 10 to 15 years. Interview with Willie Peevyhouse, in Stigler, Okla. (Mar. 30, 1990).
61 It is unknown how much other individual landowners received in royalties. See supra note 38. Garland executed leases November 1, 1955 with Alliance Trust Company, Ltd. and The Investors' Mortgage Security Company, Ltd., who owned an undivided one-half interest in the mineral rights in some local property, paying 30¢ per ton royalties. See Alliance Lease, supra note 58; see also Black Crystal Coal Co. v. Garland Coal & Mining Co., 267 F.2d 569 (10th Cir. 1959).
63 This distinction is important; it would have supported a tort claim for damages to the home from blasting activities if timely brought. See infra notes 112-13 and accompanying text.
sary in conducting such operations, to change the course of any streams or water courses and to erect and maintain such drainage ditches as it shall deem advisable having due regard for the successful operation of said strip pit and damage to the remainder of the property.\textsuperscript{64}

(b) Peevyhouse amendments; remedial duties.—In contrast to the printed language of indemnification emphasized above, the one page, hand-typed addendum enumerates Garland's remedial obligations for damage resulting from mining. Paragraph seven, consisting of eight subdivisions, clearly was the product of individualized negotiations. It acknowledged payment of $2000 as an advance royalty to be credited for coal removed later and prohibited transfer or assignment without lessor's written permission. Garland Coal agreed to have the property surveyed and boundary lines established before commencing mining operations. Five subparagraphs specified Garland Coal's remedial duties:

-7b-
Lessee agrees to make fills in the pits dug on said premises on the property lines in such manner that fences can be placed thereon and access had to opposite sides of the pits.

-7c-
Lessee agrees to smooth off the top of the spoil banks on the above premises.

-7d-
Lessee agrees to leave the creek crossing the above premises in such a condition that it will not interfere with the crossings to be made in pits as set out in 7b.

-7e-
Lessee agrees to build and maintain a cattle guard in the south fence of SW\textsuperscript{1/4} SW\textsuperscript{1/4} of Section 7 if an access road is made through said fence.

-7f-
Lessee further agrees to leave no shale or dirt on the highwall of said pits.\textsuperscript{65}

The factual context aids in interpreting these provisions. The parties anticipated that one or more pits would remain on the land and that Garland would construct fills across any pits to ensure safe access. Garland was to survey the land before beginning mining; the fills across the pit were to be constructed along the north-south and east-west property lines.\textsuperscript{66} They assigned to Garland the responsibility for dealing with the creek diversion in a way that protected the fills providing access across any remaining pits. They apparently understood that Cedar Creek would erode the fills if it flowed into—and not outside of—the pit through the diversionary channel. These fills

\textsuperscript{64} Peevyhouse Coal Lease, \textit{infra} Appendix C (emphasis added).
\textsuperscript{65} \textit{Id.}
\textsuperscript{66} \textit{See} Detailed Site Map, \textit{supra} note 54.
would serve as fenced pathways for safe passage of people and livestock over the pit to the intended pasture.\textsuperscript{67} Garland agreed to level the spoil banks, preparing the area for vegetation, so the land eventually could be used for pasture.\textsuperscript{68} Garland apparently planned to use the overburden and the material obtained from smoothing the highwalls as fill for the crossings stipulated in the contract.\textsuperscript{69} To help stabilize potentially dangerous conditions, Garland agreed to remove shale and dirt from the highwall.

Willie now believes Garland agreed to the remedial work just to obtain the right to divert the creek and that it mined the land only to recoup the advanced royalty. He thinks Garland never intended to perform the remedial work.\textsuperscript{70} Some Peevyhouse folklore coincides with this perception that Garland's promises were fraudulent.\textsuperscript{71} This claim cannot be substantiated. Cumpton died long ago. No Garland personnel involved in the transaction survive to shed light on the circumstances surrounding contract formation and performance. No concrete evidence of fraud satisfies the high burden of proving this judicially disfavored claim.

B. Performance

Well, they dug up the coal from a big strip mine hole
In what used to be our front lawn.
Every day they would dig, and the hole got so big,
Till one day the coal was all gone.
I said, "Mr. Garland, man what is your plan
To put all our dirt back in place?"
He said, "you know it's funny — we just ran out of money
And on your farm it would just be a waste.\textsuperscript{72}

In comparison to other landowners who leased land without protective restrictions, Garland left the Peevyhouse personal acreage in

\textsuperscript{67} Record, \textit{supra} note 6, at 18-23. Willie wanted fences along the fills as added security that livestock would not stray from solid ground and drown in the pit.

\textsuperscript{68} Id. at 14.

\textsuperscript{69} In the course of normal stripmining operations, the overburden and highwall from one trench is used to fill the pit created by the preceding cut. Preliminary reclamation work is now done as a part of the overall mining operation. \textit{The Oklahoma Conservation Commission, Reclaiming Oklahoma's Abandoned Mine Land} 4-6 (1987).

\textsuperscript{70} Interview with Willie Peevyhouse, in Stigler, Okla. (June 2, 1988). Willie understood Cumpton's trial testimony as an admission that the company never intended to perform the remedial work. \textit{But see} Record, \textit{supra} note 6, at 106:

Mr. McConnell (for plaintiffs): Mr. Cumpton, when you negotiated and obtained that lease from the Peevyhouses, did you intend to comply with the terms of that contract, those specific terms of the lease that are included in there? Mr. Cumpton: Yes, we did.

\textsuperscript{71} See \textit{Parody, supra} note 1; Barrow, \textit{supra} note 2.

\textsuperscript{72} See \textit{Parody, supra} note 1.
relatively good condition. Because the Peevyhouses refused to lease the land on which they lived, gardened, or used for pasture, the stripmining activity was somewhat removed from their daily life.

This mining operation took place along a V-shaped stretch extending approximately fifteen miles. The overall segment including the Peevyhouse land covered a total area of 800 acres, although only 250 acres were actively mined. The sixty acres the Peevyhouses leased to Garland comprised 10% of the total area and only about 5% of the land actually mined.

Garland began working near the Peevyhouse land in October 1954, a month before the lease was signed. Otis Scroggins, Haskell County Engineer, surveyed the leased acreage for Garland before it began mining. On November 24, the day after the lease was signed, Garland began blasting to dam Cedar Creek and build the diversionary channel. This diverted the creek's flow onto the Peevyhouse land south of the current mining activity.

Although Garland continued mining in Haskell County until January 1958, it mined this particular segment during 1956 and 1957. It removed substantial quantities of coal from the other leased properties, but comparatively little coal from the Peevyhouse land. The Peevyhouses received only about $500 beyond the $2000 advance royalty. Garland's likely profits earned from the sale of coal removed from the Peevyhouse land ranged from $25,000 to $34,500. This figure does not include other economic benefits Garland derived from the lease, such as creek diversion.

Some of the land that was mined extensively has since been reclaimed through the Oklahoma Abandoned Mine Land Reclamation Program. Ironically, these property owners received the most money from the mining (royalties and advanced surface damages) and were among the largest beneficiaries of public largesse. See supra note 38.

See Area Mining Map, supra note 38.

His survey was the basis for Garland's operations map charting all mining activity in the immediate area, including test borings and coal depths. His survey also determined the property lines on which Garland maintained production data for royalty payments. See Record, supra note 6, at 111-18.


See, e.g., Clifton Few v. Garland Coal & Mining Co., No. 6982 (W.D. Okla.), aff'd, 267 F.2d 785 (10th Cir. 1959).

See Area Mining Map, supra note 38.

Id.

Interview with Willie and Lucille Peevyhouse, in Stigler, Okla. (Mar. 8, 1993). This assumes Garland paid them all the royalties to which they were entitled. See also Record, supra note 6, at 108-09.

Garland extracted about 12,500 tons of coal from the Peevyhouse land. Stigler coal sold for $6.70 a ton in the spring of 1957. Estimated production costs ranged from $3.94 to $4.70 a ton, giving the operator a net profit of somewhere between $2.00 and $2.76 per ton. Figures derived from district court findings in Garland Coal & Mining Co. v. Black Crystal Coal Co., No. 4254 (E.D. Okla. 1958), aff'd, 267 F.2d 569 (10th Cir. 1959) (on file with author). The Gaither family owned several parcels of land in the area and operated Black Crystal Coal Company.
Actual mining on the Peevyhouse land was short-lived. Garland began coal removal in February 1957 and ended sometime that spring. Exceptionally heavy spring rains broke a six-year drought. Willie recalled that nine inches fell on February 14. In April and May, heavy precipitation caused widespread flooding of major area rivers and their tributaries. The flood conditions must have resolved any doubts Garland had about continuing to mine at this location. Garland pulled the dragline from the worksite and resumed mining at a higher and drier site. When Garland prepared to stop mining, Burl Cumpton explained to Willie that the coal depth fell from forty-five to seventy feet below the surface shortly after the mining operation moved onto their land. Cumpton claimed that despite a ready market for coal, the price was not high enough to justify the increased costs of extracting the coal from the lower depth.

Contrary to Garland's assertion, there was little if any difference in the coal depth on the Peevyhouse land as compared to adjacent areas that Garland fully mined. The operations map indicates coal depths ranging from thirty to sixty feet from the surface, whereas the coal bed on the Peevyhouse land was about twenty-five to forty-eight feet deep. If Garland stopped working this segment because the coal depth increased extraction costs, this decision was based on generally doing business as the Cedar Creek Coal Company. They were cotenants with Garland Coal on a thirty acre parcel northeast of the area depicted on the operations map. During the period of March 12-31, 1957, they removed and sold 4933.6 tons from the parcel. Garland sued to enjoin further mining and sought an accounting. The parties stipulated to a market price of $6.70 per ton. Garland presented evidence that it cost $3.94 to produce and market the coal. Black Crystal contended the costs exceeded the market price. The district court judge did not think either method was accurate or proper. Ultimately, it ordered division of the net profits using a cost of $4.70 per ton, and awarded Garland $4933.60, or one-half of the $2.00 per ton net profit.

82 Interview with Willie and Lucille Peevyhouse, in Stigler, Okla. (Mar. 8, 1993). Daily reports of Climatological Data from the U.S. Department of Commerce Weather Bureau are not sufficiently detailed to confirm this recollection. That quantity of rainfall could have occurred at their Stigler property, but not be recorded by the data collection system. Interview with Howard L. Johnson, Assistant State Climatologist, Oklahoma Climatological Survey, in Norman, Okla. (Aug. 1, 1994) [hereinafter Howard Interview].

83 See U.S. DEPARTMENT OF COMMERCE WEATHER BUREAU, CLIMATOLOGICAL DATA FOR OKLAHOMA (Feb.-May 1957) (copies on file with author). Reporting stations near Stigler indicate February rainfall slightly above normal; March near normal; April approximately three times normal (12.94" compared to 4.5" normal) and May one-third above normal (9.85" compared to 6.0" normal). The resulting floods specifically involved the streams and creeks around Stigler. Howard Interview, supra note 82. Cedar Creek's proximity made the pit located on Peevyhouse land especially vulnerable.

84 See Glossary, infra Appendix B.


86 Interview with Willie Peevyhouse, in Stigler, Okla. (June 2, 1988).

87 See Friedman Letter, supra note 38. To evaluate Garland's asserted reason for leaving, I examined its operations map which depicts course of activity, coal depths, and test borings for the mined segment. The area covered is coextensive with that depicted on the Area Mining Map. Garland's operations map was entered into evidence as Defendant's Exhibit 8 (on file
applicable conditions and nothing unique about the Peevyhouse property.\textsuperscript{88} Moreover, the operations map suggests that Garland did not plan to go much deeper than forty-five feet on the Peevyhouse and immediately adjacent land.\textsuperscript{89} Perhaps Garland decided it could not profitably continue mining a coal bed it considered thin.\textsuperscript{90} In any event, Garland had not planned to make more than one or two additional cuts on Peevyhouse land. Garland offered no excuse as to why it did not perform the promised remedial work.

C. Breach and Settlement Negotiations

Garland had no contractual duty to remove a specific quantity of coal from the Peevyhouse land. It could quit at any time, for any reason. Cumpton testified that Garland paid the Peevyhouses appropriate royalties for the coal taken from their land.\textsuperscript{91} Compared to other properties mined, the Peevyhouses were left with the most damage from the least actual mining: the pit, highwall, and diversionary channel are mostly on their land.\textsuperscript{92}

Nonperformance of the remedial work was the only breach of the Peevyhouse contract. As Garland prepared to leave the site, Burl Cumpton and Willie discussed the remedial work. They tentatively agreed that Garland would simply smooth off the spoil banks, stabilize the highwall, redirect the creek into the pit and level the diversionary channel.\textsuperscript{93} A bulldozer spent one day smoothing off the sharp peaks on the spoil banks and building a dirt levee across the pit. More heavy rains interrupted these makeshift efforts. When saturated ground caused unstable conditions, Garland ceased all remedial efforts. Wil-
lie then offered to accept $500 so he could hire a bulldozer and level the ground himself. Garland refused. Willie then told Burl that the price of settlement would increase $500 each time he returned to Garland's Stigler office about the matter. Six fruitless visits later brought the settlement demand to $3000. Finally, Garland presented a check for $3000 conditioned on the Peevyhouses signing a release.

The Peevyhouses knew of Woodrow McConnell because he was from Stigler and had represented their neighbor, Clifton Few, in a pending tort claim against Garland. The Peevyhouses went to Oklahoma City to discuss the proposed settlement with McConnell. He advised them against signing the release unless a certain paragraph was deleted. They recall his explanation: "If you sign [this], you take full responsibility to your neighbors for damage [being done to their land from the creek], and your neighbors will look to you." Settlement discussions ended when Garland refused to delete the objectionable paragraph.

D. Litigation

1. Counsel for the Parties.

(a) Plaintiffs' counsel.—Woodrow McConnell left Stigler to serve in the military and thereafter attended the University of Oklahoma College of Law. He had five years of legal experience in his small private practice when he filed the Peevyhouse suit. As a sole practitioner, assisted at trial by Ranel Hanson, McConnell had to do the best he could with limited resources. He lacked both the time and resources available in a larger firm practice to spend on extensive research and fact-gathering. Most of McConnell's practice was at the trial court level. He appeared before the Oklahoma Supreme Court in one case besides Peevyhouse.

McConnell described himself as "a thorn in the side" of Garland Coal, which he sued at least four times. In Few v. Garland Coal, a private nuisance action, the Tenth Circuit affirmed plaintiff's verdict of $6500 actual and punitive damages and inferred malice and evil intent.

95 Id.
97 Interview with Gomer Smith, Jr., Oklahoma City attorney, in Oklahoma City, Okla. (June 17, 1992). Little is known of Ranel Hanson. Born in 1910, he graduated from the University of Oklahoma College of Law in 1954, and is listed as a sole practitioner in the 1955-1962 editions of Martindale-Hubbell.
98 Id.
100 Telephone Interview with Woodrow McConnell, retired Oklahoma City attorney (Mar. 31, 1989).
intent from evidence of "such reckless and wanton disregard of another's rights." McL McConnell had also recently settled a property damage and personal injury claim against Garland brought on behalf of W.H. Powell, another Peevyhouse neighbor.

Throughout McConnell's thirty-five year legal career, he practiced torts and personal injury law, usually as a sole practitioner. His torts orientation was reflected in his view of the Peevyhouse case, that a party should not be able to walk away from a contract and escape punishment. McConnell presumably accepted the case on a contingency basis, planning to deduct one-third of any recovery plus costs. The Peevyhouses paid him nothing for his legal services.

(b) Defendant's counsel.—The Looney, Watts, Looney & Nichols ("Looney, Watts") firm frequently represented Garland Coal in its Oklahoma City lawsuits, including each case brought by McConnell. Looney, Watts was highly regarded, both for its quality of work and its political connections. The firm defended damage suits of

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101 Garland Coal & Mining Co. v. Few, No. 6982 (W.D. Okla.), aff'd, 267 F.2d 783, 790 (10th Cir. 1959) (unpublished court documents, on file with author). Garland had no lease with Few, hence the claims for property damage sounded in tort. The complaint sought both compensatory and punitive damages for injuries caused by blasting of explosives and the creek diversion. Id. (imposing strict liability for private nuisance caused by mining near to plaintiff's land, causing property damage and impairing quiet use and enjoyment of the property).

Oklahoma courts have followed this punitive damage principle, and it continues to flourish. See, e.g., Silkwood v. Kerr-McGee Corp., 769 F.2d 1451, 1455 (10th Cir. 1985) (holding that requisite malice for award of punitive damages may be inferred from gross negligence that indicates a conscience indifference to the consequences of one's acts), cert. denied, 476 U.S. 1104 (1986); Spaeth v. Union Oil Co. of Cal., 762 F.2d 865, 866-67 (10th Cir. 1985) (finding breach of oil and gas implied covenant to protect against drainage; sustaining $2 million punitive damages); Gulf Oil Corp. v. McCoy, 416 P.2d 948, 952 (Okla. 1966) (holding that malice can be inferred from reckless and wanton disregard of another's rights).


103 See McConnell Interview (final comment made as author departed from interview; not on tape). Punitive damages are generally not recoverable for breach of contract. See E. ALLAN FARNSWORTH, CONTRACTS § 12.8, at 874 (2d ed. 1990).

104 See McConnell Interview, supra note 100 (details not recalled but customarily accepted contingent fee).

105 That is to say, they made no direct payment to him, either for consulting about the proposed settlement, or for his representation in the lawsuit. It is unclear how the $300 damage award was finally disbursed; the Peevyhouses received nothing. Litigation costs easily could have consumed the entire amount.

106 See III MARTINDALE-HUBBELL LAW DIRECTORY 3804-05 (1959). This was the firm name from 1938 to 1960. In 1960, the firm's name changed to Looney, Watts, Looney, Nichols & Johnson for the duration of its representation of Garland in the Peevyhouse case. No statements contained in this Article should be understood as referring to the firm outside of this limited time period.
all kinds in state and federal court, including workers’ compensation and surety law.  

Clyde Watts, lead defense counsel, was, by all accounts, an outstanding litigator.  

He graduated from the University of Oklahoma College of Law in 1931 and practiced with Looney, Watts for his entire professional career.  

When Peevyhouse was tried, Watts had nearly twenty years of litigation experience in federal and state courts and was named counsel in several reported appellate opinions relating to contract law, including cases in which he successfully invoked the parol evidence rule.  

Garland undoubtedly benefitted from his litigation expertise and specialized contract knowledge.

2. Pretrial: Pleadings.—On February 29, 1960, McConnell filed an action for money damages in Oklahoma County District Court, Oklahoma City.  

Although the breach occurred in spring of 1957, the five-year lease did not expire until November 23, 1959. The two-count complaint sounded in contract and tort. It identified only the specific parcels Garland had leased, mistakenly alleging that the Peevyhouses’ home was located on the leased premises. The contract claim demanded $25,000, as the cost to complete the remedial work promised in the breached provisions. The tort claim demanded recovery of $1750 for the damage to their home and water well caused by dynamite blasting performed in an unworkmanlike manner.

It appears that specific performance was not seriously considered as a remedial option. The Peevyhouses do not clearly recall. They say

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108 Interview with Gomer Smith, Jr., Oklahoma City attorney, in Oklahoma City, Okla. (June 17, 1992).
109 Watts died in 1975, at age 67, when a small airplane he was piloting crashed.
110 See Casualty Co. of N.Y. v. L.C. Jones Trucking Co., 238 F.2d 369, 372 (10th. Cir. 1956) (discussing insurance defense, policy exclusion); St. Paul-Mercury Indem. Co. v. Martin, 190 F.2d 455, 457-58 (10th Cir. 1951); Lucas v. Western Casualty & Surety Co., 176 F.2d 506, 507-08 (10th Cir. 1949) (involving construction contract); Brewer v. National Surety Corp., 169 F.2d 926, 928 (10th Cir. 1948) (considering construction contract; parol evidence rule excluded evidence of alleged oral agreement).
111 It is unclear why the action was brought in Oklahoma City rather than in Stigler, the county seat of Haskell County. McConnell may have thought the jurors would be more generous in Oklahoma County. As a practical matter, he would not have to travel the 170 miles to appear in court.
112 We now know the Peevyhouses did not lease this personal land; the allegation is wrong. The parcels on which they lived and maintained a garden were not included in the lease and have a different legal description.
113 The complaint alleged that the: performance of mining operations on plaintiffs [sic] lands . . . in such close proximity to the home and improvements on plaintiffs [sic] premises that as a result thereof plaintiffs [sic] water well was destroyed, the walls and joists of his [sic] home was jarred and knocked out of plumb, the walls settled and cracked, the wall paper was split and ruined . . . .
Complaint, supra note 5.
they wanted the work done and that they did not need or want the money. Eventually they gave up waiting for Garland, and McConnell said they could have used money damages to have the work done.\(^\text{114}\) He recalled they planned to do the remedial work themselves, using any leftover money to pay medical bills owed for treatment of Lucille's brain tumor.\(^\text{115}\) The Peevyhouses specifically deny this point, asserting that medical insurance covered all these medical expenses.\(^\text{116}\)

Quite possibly McConnell gave little thought to specific relief. Assuming he considered it, given equity's historical reluctance to become involved with construction disputes, McConnell could have reasonably predicted such relief was unlikely. His professional orientation also may have influenced the decision. As one who primarily practiced tort law, he was accustomed to seeking money damages. Moreover, because the case had been taken on a contingency basis, he had an interest in creating a fund from which he could recover a fee.

Regardless of the reason for not seeking specific performance, Garland's counsel perceived this election as evidence of opportunistic, strategic behavior.\(^\text{117}\) Garland answered by general denial, asserting the mining operations complied both with proper custom and practice and the lease requirements.\(^\text{118}\) It further asserted that estoppel barred the plaintiffs' suit because they did not object to the manner of operations in a timely fashion.\(^\text{119}\)

 Apparently no pretrial discovery took place, even though Oklahoma procedure allowed for depositions, interrogatories, and production of documents.\(^\text{120}\) This is not surprising, because the local legal culture was in transition, leaving behind the days of no discovery and trial by ambush.\(^\text{121}\) At the time, little emphasis was given to discovery.\(^\text{122}\) Depositions were probably not economically feasible for the plaintiffs. The pretrial conference order identified the case as a simple breach of contract action, involving neither negligence nor

\(^\text{114}\) Interview with Willie and Lucille Peevyhouse, in Stigler, Okla. (Mar. 8, 1993). Written comments from Willie deny they needed or wanted the money; they simply wanted the work done.


\(^\text{116}\) Interview with Willie and Lucille Peevyhouse, in Stigler, Okla. (Mar. 8, 1993).

\(^\text{117}\) Interview with John Hayes, Looney, Watts attorney who worked on the Garland defense, in Oklahoma City, Okla. (May 13, 1989).

\(^\text{118}\) Answer at 1, Peevyhouse (No. 149,243) (on file with author).

\(^\text{119}\) Id.

\(^\text{120}\) See generally R. Dale Vliet, Oklahoma Discovery Procedures, 2 Okla. L. Rev. 294 (1949) (describing available state discovery procedures).

\(^\text{121}\) Telephone Interview with Roland Tague, Oklahoma City attorney (Aug. 30, 1993).

\(^\text{122}\) Interview with Gomer Smith, Jr., Oklahoma City attorney, in Oklahoma City, Okla. (June 17, 1992).
novel questions of law or statute. From all outward appearances, this case had no important policy or theoretical significance. Little did they know.

3. Trial.—The Honorable W.R. Wallace, Jr. presided at the two-day jury trial. Lawyers considered him an average legal mind, but conscientious, fair, and politically astute. Consistent with the "sporting theory of justice," Judge Wallace generally did not intervene to correct imbalances arising from one party's weak presentation. Nevertheless, at one point he interrupted McConnell's cross-examination of Garland's representative, stating: "I don't think the jury knows what you are talking about. They can't see that exhibit and this conversation you are having doesn't have any meaning." The written record is extremely confusing. Despite the jurors' ability to observe exhibits during the testimony, they were probably puzzled over several issues. Plaintiffs' case omitted and distorted essential facts. Additionally, McConnell's form of questioning was often unclear, as were Willie's responses. Defendant's strategy, to challenge the

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123 This appears to be a pro forma conclusion without serious consideration of the legal issues and facts in the case. The tort claim for blasting damages explicitly raises negligence issues, as then required by Oklahoma law. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 78, at 548-51 (5th ed. 1984) (recognizing that Oklahoma rejected Rylands v. Fletcher, L.R. 3 H.L. 330 (1868), which imposed strict liability for abnormally dangerous activities). But cf., Keck v. Bruster, 368 P.2d 1003, 1005-06 (Okla. 1962) (involving explosives that permanently damaged house; damages allowed for cost of repair, or if permanent, for actual cash value less salvage, depreciation, and deterioration; decision silent on finding of negligence). Nothing in the sparse pretrial record raises the damages question for which the case is known.

124 The trial was held October 17-18, 1960. See Record, supra note 6, at 178.

125 Interview with Gomer Smith, Jr., Oklahoma City attorney, in Oklahoma City, Okla. (June 17, 1992). Prior to serving on the bench, Wallace was a state legislator and a law professor at Oklahoma City University. He served as district judge in the Oklahoma County trial courts from 1956-1965. Thereafter, he entered private practice with the law firm of Rainey, Welch, Wallace, Ross & Cooper. III MARTINDALE-HUBBELL LAW DIRECTORY 3279B (1973).


127 Record, supra note 6, at 128.

128 See infra text accompanying notes 130, 134-35.

129 It is easy to make such observations from a cold reading of the transcript. It ignores the practical difficulties a trial lawyer confronts when attempting to question a witness. The important point relates to legal education. Practical skills courses must train lawyers on how to make precise references to maps, charts, and aerial photos. Such references at trial are useless on appeal unless the record explicitly indicates to the reader the specific fact being testified about. In addition, students need training on fact-gathering, interviewing, and witness preparation skills. Like many laypersons, the Peevyhouses did not know what facts were relevant to the legal dispute. The lawyer must first identify what kinds of facts are central to the dispute and then continue probing until confident that the clients have fully disclosed the relevant information. In my several interviews with the Peevyhouses, I experienced first hand the difficulties in obtaining a full and accurate statement of the relevant facts. See also supra note 11.
functional utility of the promised fills, relied on its view of a disputed property line. This further obscured the facts.

(a) Plaintiffs’ case-in-chief.—The plaintiffs’ case focused almost exclusively on proving cost as the only possible damage measure and presented no alternative evidence to contest defendant’s low figures on diminution in value. This deliberate strategy choice guided McConnell in carefully limiting the evidence presented. McConnell and Hanson deemed irrelevant, and possibly prejudicial, the amount of royalties paid to the Peevyhouses. The record reflects neither that the Peevyhouses received $2500 in royalties nor that they gave up the $3000 customarily paid to cover surface damages in exchange for Garland’s promise of remedial work.\(^{130}\) As discussed in Part III below, these were material facts that should have changed the supreme court’s legal analysis.\(^{131}\)

Plaintiffs offered two witnesses: Willie Peevyhouse and Edward Glendening, an engineer who testified on the cost measure of damages. Willie gave background information on his occupation, family status, and residence. He testified that 90% of their 120 acres was pasture land. Watts then successfully objected because the complaint only identified the 60 acres leased to Garland and not the Peevyhouses’ entire tract.\(^{132}\) At that time, McConnell dropped the second tort claim for damage to the house and adjoining property.\(^{133}\)

\(^{130}\) Presumably they feared the jury would conclude that the plaintiffs already received their payoff from the lease. Unfortunately, this strategy excluded reference to the Peevyhouses’ explicit trade-off for remedial work instead of surface damages. This evidence would have established the materiality of the remedial work as part of the essential consideration given for the lease.

\(^{131}\) See infra text accompanying notes 335-64.

\(^{132}\) See Record, supra note 6, at 4.

\(^{133}\) Id. McConnell stated that he dropped the count because there was no damage to the house; he did not recall Willie mentioning damage to the water well. Interview with Woodrow McConnell, retired Oklahoma City attorney, in Oklahoma City, Okla. (May 31, 1989). The Peevyhouses state that the blasting cracked walls, broke windows, knocked doors out of alignment, and ruined their well. They had a new well dug for $1000 and personally repaired the damage to the house. They recall the property damage claim was withdrawn to avoid any references to value of the property. Interview with Willie and Lucille Peevyhouse, in Stigler, Okla. (May 4, 1990). Given McConnell’s successful litigation of Garland Coal & Mining Co. v. Few, No. 6982 (W.D. Okla.), aff’d, 267 F.2d 785 (10th Cir. 1959), this claim might have allowed for both compensatory and punitive damages for harm to land not covered by the lease. See supra note 101.

The applicable limitation period allowed two years from the date of injury for damage to property not under lease. Okla. Stat. tit. 12, § 95 (1935). Because suit was not filed until the lease expired, five years after the blasting occurred, the tort claim was time-barred. No tolling doctrine would allow delay until the lease on the adjacent land expired. Even if the Peevyhouses had known the effect of delay, they still reasonably might not have sued Garland in tort while it continued to mine their land under the lease.
After a sidebar conference, and at McConnell’s request, the parties stipulated “that all the terms and obligations of the lease have been complied with except . . . subparagraphs 7b, 7c, 7d and 7f.”

This stipulation, combined with a strict application of the parol evidence rule, effectively excluded any testimony on contract formation, the context giving rise to the remedial provisions, and the parties’ understanding on the scope of work. The only remaining issues were the measure and proof of damages.

Willie described the current condition of the leased property, including where the diverted creek flowed, the forty-five foot deep pit, and the intended locations for the levees, or fills that Garland agreed to make across the pit. The highwall area extends about one-third of a mile on to their property, with eight-by-twenty foot piles of shale and dirt clumps. The spoil banks are large piles of shale extending thirty-five feet high. In its present condition, the land is worthless, but would become excellent pasture land if leveled and seeded.

On cross-examination (and over McConnell’s objection), Willie tried to explain the purpose served for some items of remedial work. For example, he wanted the fills across the pit to be wide enough to build a fence so his livestock could safely travel to the land beyond the pit. He had no other access to about four acres of land north of the pit which was partly covered by spoil banks. Unless the fills were fenced, he feared cattle would go into the pit. He previously had removed trapped cattle from the water. Willie denied knowing the value of the mined acreage.

Glendening testified on damages. His staff had surveyed the Peevyhouse land and studied the topography to determine the work needed to comply with the remedial provisions. Glendening esti-

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134 Record, supra note 6, at 6-7.
135 Id.
136 Willie’s testimony referred to Plaintiffs’ Exhibit 2, a survey prepared by Glendening. That and other Plaintiffs’ exhibits were unavailable for inspection because McConnell, with court approval, removed them from court files. Pictures were used to help identify the intended creek locations; only illegible photocopies are available. Current photos taken at the same location show that remarkably little vegetation has grown in the last thirty years. See photo, infra p. 1377. (Photographs on file with author).
137 The distance was determined from my personal calculations. The record states that the strip along the highwall extended one and a quarter miles, which does not correspond to the actual distances involved. See Record, supra note 6, at 12.
138 See Record, supra note 6, at 9-15.
139 Id. at 18-19, 22-23.
140 Id. at 18-21. Garland leveled a portion of the spoil banks before leaving the site. Id. at 20. See also Detailed Site Map, supra note 54.
141 See Record, supra note 6, at 21.
142 He noted significant water drainage through the diversionary channel onto the Peevyhouse land. The channel washed out over some of the banks alongside the highwall.
mated that the required remedial work would cost at least $29,091.20. Because he lacked directly relevant experience, his cost

Eventually, he expected the water would completely erode the existing dike or fill placed across the pit by Garland. Id. at 30-31. Glendening's testimony is confusing and difficult to follow. He testified using a drawing. It is unclear whether he drew it while testifying and whether it was on paper or a blackboard. McConnell did not intervene with precise questions that would have helped to create a clear written record. Nor is there any evidence the drawing was preserved on hard copy and entered into the record. Id. 143

143 Id. at 32-41. Compliance with paragraphs 7b and 7d, constructing fills across the pit and protecting the fills from interference by the diverted creek, would cost $25,473. He proposed three fills and a diversionary channel to reroute the water so they would not be washed out. Id. at 32-38. One north-south and two east-west fills would be required, at cost of $4,889.60 and $5,611.40, respectively. The north-south fill would cross the pit on the Peevyhouse-Fowler northerly boundary line, providing access to the back acreage on the 20-acre parcel leased to Garland. One east-west fill would cross the pit along the Peevyhouse-Fowler easterly property line, providing access to the northeastern portion of the 60-acre Peevyhouse parcel leased to Garland. Because Plaintiffs' Exhibit 2 is unavailable, I cannot report the projected location of the third fill. The projected 10 foot deep diversionary channel would extend 50 feet. Id. at 36, 53-54. Watts claimed part of the channel would extend on another's property; if I understand the proposed work, Garland Coal Company owned that land. Id. at 36; see also supra text accompanying notes 52-53. Compliance with paragraph 7c, to smooth off the spoil banks, would cost $1386. Glendening proposed removing 8- to 10-feet of shale, trucking in dirt, and leveling the area enough for easy tractor access. Record, supra note 6, at 38-39, 51-53. Finally, he esti-
estimates were vulnerable to challenge.\textsuperscript{144} Consistent with McConnell's insistence upon cost as the only possible damage measure, plaintiffs presented no evidence relating to diminution in value. On cross-examination, Watts contested the accuracy of Glendening's survey and contended that Glendening's proposed scope of work was excessive.

\textit{(b) Garland's defense.}—An associate working on Garland's defense team recalls their collective perception that the plaintiffs were trying to gouge the company with an exorbitant damage claim.\textsuperscript{145} Watts' litigation strategy concentrated on three main points: (1) that plaintiffs' cost estimates were excessive and beyond the required scope of work; (2) that the estimates were based on an erroneous survey because fills built on the true boundary lines would join together in the water, and thus serve no useful purpose; and (3) that plaintiffs' damages were limited to the diminution in value caused by the breach because the cost to perform the remedial work far exceeded actual harm.\textsuperscript{146} Although one defense witness alluded to a possible impracticability defense, it was neither pled, supported by evidence, nor argued on the main appeal to the Oklahoma Supreme Court.

In contrast to the limited evidence supporting the plaintiffs' claim, Garland presented six witnesses. Four of these witnesses testified only on diminution in value. The leadoff witness for the defense was James Curry, a consulting engineer experienced with water and dams.\textsuperscript{147} Because a key defense strategy aimed to discredit the plaintiffs' inflated cost estimates by showing an error in Glendening's survey, Curry testified about his own survey and estimated cost to perform the promised remedial work. His survey showed the true property line about sixty-five feet north of the fence line relied on by the plaintiffs.\textsuperscript{148} Thus, fills placed along the true property lines, as called for in paragraph 7b, would intersect in the middle of the water-filled pit.\textsuperscript{149} Garland apparently contended it had no duty to extend the fill along the east-west property line so that it connected with land...
at the highwall area south of the pit. Assuming the fills would intersect in the water, and not provide access from the south, they would serve no useful purpose but would cost $8000. Curry contended that all reasonably necessary work could be done for $400, far less than the $29,090 claimed by the plaintiffs. On cross-examination, Curry conceded the diversionary ditch often flooded after heavy rains, which eroded the existing fill. Nevertheless, he insisted that his estimate complied with the lease provisions. Ranel Hanson, McConnell's co-counsel, challenged Curry's interpretation of paragraph 7d. Watts objected, successfully invoking the parol evidence rule.

Curry provided clarification on the amount of land to which plaintiffs lacked access without the fills Garland promised in paragraph 7b. The mining operations affected eleven of the back twenty acres, although Garland actually dug coal on just one acre of that land. The pit consumed some of the area; seven acres beyond the pit were damaged, with spoil banks spread over 2.38 acres. By inference, plaintiffs lacked access to 4.62 acres of good, unmined land. Had Garland leveled the spoil banks and constructed the fills the Peevyhouses would have regained use of seven acres of pasture.

Burl Cumpton, Garland's engineer who negotiated the lease, testified next. His testimony covered four issues: the survey, the cost and value of remedial work, the diversionary ditch, and Garland's reasons for leaving the site. Cumpton contended the company dealt fairly and honestly with the Peevyhouses, paying them appropriate royalties. His testimony supported Garland's position in the prop-

150 Id. at 68, 74-76. Compare these costs with Glendening's projected costs: $4889 for north-south dike (or fill), $5611 for east-west dike, and $14,972 for channel to protect the dikes.

151 Curry saw no need for fills or fencing alongside them. Id. at 66-67. Smoothing the spoil banks could be done for $250; he would not bother trucking in topsoil. Id. at 76. Compare Curry's estimate with Glendening's projected cost of $1386. His survey showed sufficient room to build a fence along an existing fill, thus permitting safe passage to the back acreage. He did not, however, examine the access point on the land. Id. at 66. The parties' vastly different cost estimates are summarized below:

<table>
<thead>
<tr>
<th>Work</th>
<th>Plaintiffs</th>
<th>Defendant</th>
</tr>
</thead>
<tbody>
<tr>
<td>7b fills</td>
<td>25,473</td>
<td>8000 (excluded)</td>
</tr>
<tr>
<td>7c spoil banks</td>
<td>1,386</td>
<td>250</td>
</tr>
<tr>
<td>7d protect fills</td>
<td>[included 7b]</td>
<td>0</td>
</tr>
<tr>
<td>7f shale, highwall</td>
<td>2,231</td>
<td>150</td>
</tr>
<tr>
<td>Total cost for work</td>
<td>$29,090</td>
<td>$400</td>
</tr>
</tbody>
</table>

152 Id. at 88-90.

153 Id. at 90-91. Hanson offered no counter-argument.

154 Id. at 94, 134.

155 Watts recalled Curry to confirm those figures. No precise testimony identified the acreage of affected area on plaintiffs' sixty acre parcel. Id. at 62-95, 134-35. From the survey dispute, we know that at least 66 feet of this land was mined. Id. at 109.

156 He had then worked eight years for Garland. Id. at 95.

157 But see note 38, where my projections calculate they possibly were owed $3182 in royalties. McConnell recalls avoiding testimony on the amount of royalty paid to the Peevyhouses.
erty line dispute, which allegedly rendered useless the promised fills across the pit. Cumpton directed Otis Scroggins, the County Surveyor, to prepare the mining operations map, which corresponded to Curry’s survey. He frankly acknowledged that mining causes substantial loss in land value, reducing the value of the disturbed Peevyhouse land from $50 per acre to between five and six dollars per acre. He denied that the promised remedial work would significantly increase the land’s value.

Cumpton’s testimony provides scant factual support for a possible defense based on impossibility doctrine. He said Garland did not fully strip the coal from the Peevyhouse site before it quit mining this segment in 1957 because the vein ran a bit thinner on their land, and Garland’s equipment was too small to continue mining at greater depths. Some modern contract scholars point to this testimony as support for the nascent defense:

Mr. Watts: Mr. Cumpton, did you strip all the coal from under that pit that you were able to get?
Mr. Cumpton: No, we didn’t.
Mr. Watts: Why?
Mr. Cumpton: Well, the machine, for one thing, was a little small for any deeper than we did go. And we ran into some thin coal on that southwest.
Mr. Watts: Down this area here?
Mr. Cumpton: There’s a fault in there.

and confronting the effect of coal depth on performance costs. He thought they would “have gone to great details if we had made royalties an issue that they only made less from this operation than they were paying him.” Interview with Woodrow McConnell, retired Oklahoma City attorney, in Oklahoma City, Okla. (May 31, 1989). He was “afraid they might” claim impossibility or a related excuse of nonperformance: “I tried to keep out any testimony that they had, that they might bring in that it was a loser on their part. I didn’t know whether it was or not.” Id. Hindsight is always better than foresight. Imagine the added strength to plaintiffs’ case if pretrial discovery produced reliable information on precontract cost estimates, sales and production costs, and on coal depths along the immediate area mined. This information was legally relevant under Oklahoma law. See infra text accompanying notes 203-07.

158 See infra text accompanying notes 380-408.

159 Garland paid the Peevyhouses royalties based on his survey, including the 65 feet at issue in the boundary dispute. See Record, supra note 6, at 107-09, 121.

160 Id. at 97-98.

161 Id. at 99. For example, the fills called for in paragraph 7b would not increase the land’s value at all. If the spoil banks were smoothed off, the land could be used for grazing cattle in six to eight years. Meanwhile, the leveling reared by paragraph 7c would increase the land’s value by only five to ten dollars an acre. Id. at 98-100. Paragraph 7d required no further work. In December of 1957, Garland bulldozed a fill across the diversionary ditch that is wide enough to build a fence and to drive a tractor across. Id. at 115, 122. While the diversionary channel had a comparable capacity to the original creek bed, the creek washed out the fill. Because water flowed into the head of the pit, the diversionary channel only carried water at flood levels. Id. at 124-31. The area alongside the diversionary ditch was covered with underbrush and could not be farmed. If $150 were spent to level the steep highwall area in accordance with paragraph 7f, the land value would only increase a dollar an acre. Id. at 122-23.
Mr. Watts: Did you go toward the southwest as far as, in this direction, as you officially could?
Mr. Cumpton: No. If this coal hadn't turned out thin on that 40 acres in the southwest-southwest, we would probably have made another pit or two in there.\footnote{Id. at 103-04, 122. The reference to a possible fault "has no bearing on the allegation that the coal was too deep to mine at that time." Friedman Letter, supra note 38. Thickness presents yet another issue; Dr. Friedman's work maps indicate the coal bed is 1.3 feet thick in the area of the Peevyhouse lease, although variations commonly occur throughout.}

On cross-examination, McConnell tried to establish that the Peevyhouses' insistence upon the remedial work influenced contract negotiations. He did not, however, ask whether Garland estimated the costs of completing the remedial work before entering the contract, or whether the claimed change in coal depth substantially increased those costs.\footnote{See infra text accompanying note 495.}

Mr. McConnell: Isn't it true Mr. Peevyhouse insisted upon those provisions being included in that lease?
Mr. Cumpton: That's true.
Mr. McConnell: Before he agreed to sign it?
Mr. Cumpton: That's right.
Mr. Watts: May I have the same objection?\footnote{See Record, supra note 6, at 106. In response to McConnell's prior question about contract negotiations, Watts objected "to its competency prior to the introduction." Id. at 5. The Court stated: "He didn't ask what they were; the objection will be overruled, exception allowed." Id. In context, the stated objection makes no sense; the coal lease was admitted into evidence as Plaintiffs' Exhibit 1 at the beginning of trial. The judge apparently treated it as a parol evidence rule objection. Id.}
The Court: The objection will be sustained in that connection. The contract speaks for itself.\footnote{McConnell did not seek to vary or contradict the terms of the written contract, but rather to determine materiality of the remedial provisions. As such, the evidence is admissible to explain the contract provisions in light of the surrounding circumstances. McConnell did not counter Watts' objection. Nevertheless, Cumpton answered the question. Although the court sustained the objection, in the supreme court proceeding, Justice Irwin's dissent referred to this testimony which establishes that the remedial provisions were not "merely incidental" to the contract's main purpose. See Peevyhouse, 382 P.2d at 114-16.}
Mr. McConnell: Mr. Cumpton, when you negotiated and obtained that lease from the Peevyhouses, did you intend to comply with the terms of that contract, those specific terms of the lease that are included in there?
Mr. Cumpton: Yes, we did.\footnote{Mr. Peevyhouse recalls this testimony as an admission by Cumpton that Garland agreed to do the work although it never intended to perform. Assuming the accuracy of the court transcript, this recollection is erroneous.}
Mr. McConnell: Your company hasn't complied with them?
Mr. Cumpton: No, that's right.
Mr. McConnell: Could you, with the equipment you have, could you have complied with those terms of that lease?
Mr. Cumpton: Yes, we could, but I want to qualify that statement.\footnote{See Record, supra note 6, at 106.}
Watts pursued the matter on redirect.

Mr. Watts: ... I will ask you if you had been able economically to mine further coal toward the southeast, would you have been able to establish that fence on the spoil bank?

Mr. Cumpton: Yes, we could have.

Mr. Watts: Having stopped when you ran out of coal down in here, can you now establish that fence line without putting in a very useless and expensive fill?

Mr. Cumpton: No.\footnote{168}

Had Garland completed the stripmining, Cumpton explained, the remedial provisions in the contract could have been performed without difficulty, involving little additional cost. At most, Garland expected to make one additional cut on the Peevyhouse land; this would have advanced the highwall to the northern boundary of the Peevyhouses' forty-acre parcel.

Garland presented four witnesses on diminution in value: a real estate appraiser, a banker, and two neighbors of the Peevyhouses. While they differed on specific values assigned to the land before and after mining, the witnesses generally agreed that the remedial work would add little value to plaintiffs' land.\footnote{169} Everett Nolen, who lived northwest of the Peevyhouses, testified that if given the choice, he would prefer to have the levees or fills built to allow transit across the pit.\footnote{170} The other neighbor, G.D. Fowler, disagreed: the proposed levees would neither serve any constructive purpose nor increase the land value.\footnote{171} On cross-examination, Nolen shed some light on the elusive property dispute. Garland placed a fill along the property line marking the south of his property and the north boundary of the Peevyhouses' twenty-acre parcel. Thereafter, he and Willie put in a fence to mark the boundary. Nolen believed that Garland paid him, and not the Peevyhouses, royalties for all coal stripped north of the fence.\footnote{172} Nolen's testimony apparently supports the property line asserted by plaintiffs. As such, it negates Garland's contention that a levee on the property line would be useless because it would intersect with the other fill in the middle of the pit.\footnote{173}

\footnote{168} Id. at 122.
\footnote{169} The pre-mining valuation ranged from $35 to $50 an acre; after mining was finished the land was worth from $10 to $15 an acre. If the remedial work were done, it would add somewhere between $3 and $8 per acre.
\footnote{170} See Record, supra note 6, at 140-46.
\footnote{171} Id. at 151-56.
\footnote{172} Id. at 146-49.
\footnote{173} McConnell recalled Willie, who testified that Otis Scroggins prepared the survey required by the lease for Garland. Willie was present during both the Scroggins and Glendening surveys, which he thought were in substantial agreement. On recross-examination, Willie conceded some difference between the surveys. During the Glendening survey, the crucial pin identifying the north-south property line was located in the water, four feet off the banks of the pit. I contend this difference is not material to the damages question. In promising to construct the fills along...
Given the importance of the property line to Garland's defense, Scroggins' failure to testify is significant. If the survey he prepared while acting as Garland's agent supported the defense's contention, one would expect him to have testified to that effect. The evidentiary concept of spoliation allows an inference that the absent witness' testimony would have been adverse to the principal.\textsuperscript{174}

(c) Closing arguments.—Closing arguments were omitted from the record. Based on the evidence each side presented, one could speculate about the respective arguments. McConnell probably made a strong, sympathetic appeal for the jury to enforce plaintiffs' bargain with a verdict awarding cost to complete. Arguing for diminution, Watts likely presented a more complex argument challenging plaintiffs' cost estimates; referring to the boundary dispute and futility of the proposed fills; and denouncing the unwarranted windfall plaintiffs sought for Garland's innocent breach.

(d) Instructions and verdict.—Their written requests for instructions further contrasts counsels' respective litigation styles. Implementing their single issue strategy, plaintiffs' counsel asked only for instructions on the cost measure.\textsuperscript{175} Garland's more sophisticated strategy again hedged its bets, requesting instructions that ranged from granting the defense a directed verdict to admitting breach and offering various expressions for the diminution measure.\textsuperscript{176}

property lines determined by its survey, Garland assumed the risk of additional increased costs resulting from minor inaccuracies. The cost of extending a fill by four feet was relatively minor in relation to the distance across the pit.

\textsuperscript{174} See Record, \textit{supra} note 6, at 161. Arguably a spoliation argument could be made against Garland. The principle of spoliation rests on the presumption that parties do not, as a rule, withhold from a tribunal facts beneficial to themselves. This presumption is not conclusive and may be rebutted by evidence establishing facts contrary to those inferred. See 2 \textsc{John H. Wigm}ore, \textsc{Evidence in Trials at Common Law} \S 278 (Chadbourn rev. 1979). One could reasonably expect Scroggins to appear and testify on the property lines drawn in the original survey if they matched that in Curry's survey. Scroggins's failure to appear then suggests his testimony would go against Curry's survey.

\textsuperscript{175} Plaintiffs' Requested Instructions, \textit{Peeyhouse} (No. 149,243) (on file with author). The request limited recovery to the amount sued for, "to-wit, $27,500." \textit{Id}. Judge Wallace gave a modified form of the requested instruction and the plaintiffs took exception.

\textsuperscript{176} One focused solely on the difference in land value with and without the remedial work as determined on the open market. Another provided that defendant was not liable for the costs of remedial work if it exceeded the decreased land value caused by nonperformance. Defendant's Requested Instruction No. 4 provided, in relevant part:

the defendant is not liable to the plaintiff for the cost [of itemized remedial work], if the reasonable cost of such work exceeds the decrease in value of plaintiff's property by reason of defendant's failure to comply with the terms of the lease; and, in arriving at your verdict in this case, you must ascertain the reasonable cost of performing the obligations set forth in the coal lease; and you must then ascertain the value of plaintiff's property \textit{as of the time that the requirement should have been complied with}, and compare such value with the reasonable market value that the property would have had, if defendant had complied with the requirements of the lease. The difference between these two figures will represent the
Judge Wallace's instructions were to the point: because the parties stipulated that the defendant had not performed the remedial work, the jury was required to find for plaintiffs. By what measure should damages have been fixed? He refused to decide this question of law. Two charges guided the jury. One, favoring plaintiffs, mentioned specifically only the cost measure. The other, requested by the defense, recited statutory limits on recoverable damages. In determining what sum would reasonably compensate plaintiffs, the jury could consider the costs of doing each item of remedial work, "together with all of the evidence" offered by either party. The instructions were as follows:

No. 3. You are further instructed that in assessing the amount of damages sustained by the plaintiff by virtue of the failure of the defendant to perform paragraphs 7-b, 7-c, 7-d, and 7-f of the lease contract, you are entitled to take into consideration the reasonable cost of the repairs and/or improvements defendant agreed to make, together with all of the evidence offered on behalf of either party.

You are, therefore, entitled to take into consideration the reasonable cost of making the fills in pits dug on plaintiffs' premises along the property lines, in such manner that fences can be placed thereon and access had to opposite side of the pits; to smooth off the top of the spoil banks on plaintiffs' premises; to restore the creek crossing plaintiffs' premises to such condition that it will not interfere with the crossings to be made in pits on the property lines of plaintiffs' premises; remove the shale and dirt on the highwall side of the pits constructed upon plaintiffs' premises;

And return such verdict as you find will reasonably compensate plaintiffs' for defendant's failure to perform the aforesaid condi-

dimination in value of plaintiff's property and detriment suffered by plaintiff as a proximate cause of defendant's failure to comply with the terms of the lease.

Defendant's Requested Jury Instructions, Peevyhouse (No. 149,243) (emphasis added) (on file with author). After comparing the cost and diminution, the jury was to return a verdict for the smaller amount. The defendant's proposed formulation excluded any future appreciation, before or after trial. There was no evidence indicating the parties intended their duties to be affected by fluctuations in the real estate market. Even assuming that diminution was the correct measure, it seems unduly harsh to exclude any recovery for future appreciation. This requested instruction resembles Professor Barrow's folklore, speculating the company's lawyer cynically approved the remedial provisions against a manager's cost objections: "You don't have to restore the land. Economic waste — just pay them the value of the land as it would be now if it had been restored. And that pasture land isn't worth much on the market today." See Barrow, supra note 2. That is, promise the Peevyhouses anything, and give them diminution. If such a conversation occurred before the contract, it would be evidence of fraud in the inducement. I have seen no such evidence. If this statement expressed prevailing law, however, one can imagine the undertaking of many obligations, with diminution as the expected cost of electing against their performance. See Oliver W. Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 459 (1897) (discussing bad man's theory).

177 See supra notes 175-76.
tions of the lease between the two parties, which must, in no event, exceed the amount sued for, to wit, $25,000.178

No. 4. You are further instructed that the Statutes of The State of Oklahoma provide that no person can recover a greater amount in damages for the breach of an obligation than he could have gained by the full performance thereof on both sides, and that damages must in all cases be reasonable, and where an obligation of any kind appears to create a right to unconscionable and grossly oppressive damages contrary to substantial justice, no more than reasonable damages can be recovered.179

Academics hold contrasting views on their interpretation of these instructions. If one believes jury deliberations produce a superior, collective wisdom, then Judge Wallace properly vested the jury with discretion to moderate between the extreme damage alternatives. Given the severe undercompensation from diminution and the possible windfall from cost, the instruction empowered the jury to act with the wisdom of Solomon.180 However, if one distrusts the jury process as arbitrary and inefficient, then Judge Wallace abdicated responsibility to guide and limit its discretion in fixing damages.181

Why did the judge refuse to select one measure? Perhaps the answer relates to his pragmatism as a trial judge. The pretrial conference reflects his view that the case did not involve any novel question of law, but was a simple, low stakes contracts dispute.182 To select either extreme damage measure put him at risk of reversal on appeal. If instead the jury verdict fairly mediated between the extreme alternatives, the parties might not bother with an appeal. Judge Wallace apparently did not factor in McConnell's determination.

The jury deliberated briefly before returning a verdict for $5000.183 Considering Garland's potential liability, defense counsel

178 Jury Instructions, Peevyhouse (No. 149,243) (emphasis handwritten on archive copy) (on file with author). As customary, plaintiffs' damages were limited to the original demand. Both parties excepted to this instruction, reflecting their respective absolutist positions on the proper measure.

Some commentators have applauded the flexibility given to the jury with this instruction. See, e.g., E. Allan Farnsworth, Legal Remedies for Breach of Contract, 70 Colum. L. Rev. 1145, 1160-62 (1970); Peter Linzer, On the Amorality of Contract Remedies—Efficiency, Equity, and the Second Restatement, 81 Colum. L. Rev. 111, 134-38 (1981); Comment, Damages—Measure of Damages—Cost of Performance Versus Diminution in Value for Breach of a Stripmining Lease, 49 Iowa L. Rev. 597, 597-601 (1964). Essentially, it avoids ultimate policy questions in choosing between the extreme measures, and partisan evidence putting extreme values on each measure. Instead, the jury is given latitude to discount the extremes on both sides, weigh the equities, and come out with an amount it deems fair.

179 The Oklahoma Supreme Court partly based its decision on this statutory provision. See 1 Kings 3:16-28; see also Farnsworth, supra note 178, at 1160-62.


181 Pretrial Conference Order, Peevyhouse (No. 149,243) [hereinafter Order] (on file with author).

182 The trial took less than two days and the jury's verdict was docketed on October 18. The verdict was not unanimous; two jurors did not join the majority (on file with author).
viewed the low sum as a victory.\textsuperscript{184} As such, Garland's subsequent litigation moves were precautionary, guarding against the downside risk that the plaintiff might prevail on appeal. Both sides filed motions for new trial, which, after argument and briefs, were overruled in December 1960.\textsuperscript{185} Garland claimed an emotional outburst by Lucille Peevyhouse denied it a fair trial by evoking jury sympathy to award excessive damages.\textsuperscript{186} Plaintiffs claimed the verdict was less than the proven damages, and that the court erroneously admitted evidence and instructed the jury on the diminution measure.\textsuperscript{187}

4. Appeal.—Although both parties filed appeals, dissatisfaction on the plaintiffs' side is what propelled the case forward to the Oklahoma Supreme Court.\textsuperscript{188} Kenny Rogers' song, "The Gambler," offers litigants such as the Peevyhouses wise counsel: "You've got to know when to hold them, [and] know when to fold them."\textsuperscript{189} After filing for appeal, the wheels of appellate justice turned slowly: initial

\begin{footnotesize}
\begin{enumerate}
\item Telephone Interview with Tom D. Capshaw, Administrative Law Judge, Social Security Administration (May 30, 1989). In 1989, Capshaw was honored for superior and ethical performance of his judicial duties. Capshaw has taught trial advocacy at the University of Louisville.
\item December 16, 1960 Order Overruling Plaintiffs [sic] and Defendant's Motions for New Trial, 
Peevyhouse (No. 149,243) [hereinafter Order Denying New Trial] (on file with author).
\item In support thereof, Watts filed an affidavit stating that during his closing argument she "conducted herself in such manner... designed to influence the jury and incite... sympathy... for the plaintiff... in making an open emotional outburst... ." Affidavit for New Trial Upon the Ground of Misconduct of the Prevailing Party, 
Peevyhouse (No. 149,243) (on file with author). Lucille and Willie did not recall any such outbursts. Interview with Willie and Lucille Peevyhouse, in Stigler, Okla. (Mar. 8, 1993).
\item Notably, this is the first reference in the record to Lucille, other than her name in the caption to the case. Virtually all trial testimony referring to plaintiffs mentioned only Willie. Her apparent invisibility—almost nonexistence—in both the underlying transaction and resulting litigation is telling. Given that feminine concerns may place stronger value on aesthetic issues, and that Lucille played a significant, albeit background role in contract negotiations, she might have testified persuasively as to their primary purpose in seeking the remedial provisions.
\item McConnell's motion claimed the court erred in giving defendant's requested instructions on "'before and after value' of plaintiffs [sic] property and in instructing the jury... [that it] could consider all of the evidence... concerning... damages." Plaintiff's Motion for New Trial, 
Peevyhouse (No. 149,243) (on file with author). The first assertion is clearly wrong; the court refused all defendant's requested instructions pertaining to market value or diminution. The instructions mention neither term.
\item Each side gave the trial court notice of its intention to appeal during arguments in support of motions for new trial. See Order Denying New Trial, supra note 185. While the docket sheet noted filing on Dec. 23, 1960, the record does not reflect who first filed formal notice of appeal. In all probability, Garland cross-appealed only to preserve its claim for diminution as the proper damages measure. Had plaintiffs not appealed first, Garland and defense counsel likely would have been satisfied with paying $5000. Telephone Interview with Tom D. Capshaw, Administrative Law Judge for the Social Security Administration (May 30, 1989).
\item See KENNY ROGERS, The Gambler, on KENNY ROGERS, GREATEST COUNTRY HITS (EMI Records 1990). Unless they predicted a high probability of recovering cost-based damages, plaintiffs should have folded, accepting the $5000 compromise verdict.
\end{enumerate}
\end{footnotesize}
briefing dragged on for sixteen months; the Oklahoma Supreme Court finally disposed of the case a year later.\textsuperscript{190} Such delays were then quite common, with lawyers routinely obtaining several extensions for the briefs.\textsuperscript{191} In many ways, the briefs are a study in contrasts: in technical writing style, polish, and rhetoric.

\textit{(a) Plaintiffs' brief.}—More than one-third of the plaintiffs' brief consisted of lengthy excerpted testimony from both sides. Some Oklahoma lawyers might have used this format to satisfy the appellate requirement for an abstract of record.\textsuperscript{192} Nonetheless, it was ineffective because it was verbose and enhanced testimony adverse to plaintiffs' substantive arguments.

While the order of arguments in a brief is always important, plentiful quotes heightened the impact of placement. For example, plaintiffs' first argument claimed the diminution evidence was wrongly admitted, but then showcased defense testimony indicating the breach caused little loss in value. Plaintiffs' crucial argument, that cost was the only proper damage measure, appeared second. It included extensive testimony on the materiality of the remedial provisions to the parties' agreement-in-fact: that the Peevyhouses insisted on the provisions, the cost of performance, and Garland's ability to perform.\textsuperscript{193} Finally, plaintiffs briefly argued trial court error in instructing the jury on the statutory damage limits.\textsuperscript{194}

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\textsuperscript{190} McConnell filed the Plaintiffs' Brief in Error in August, 1961. Brief of Plaintiffs in Error, \textit{Peevyhouse} (No. 149,243) [hereinafter Plaintiffs' Brief] (copy on file with author). In February, 1962, the Brief for Defendant in Error was filed by Looney, Watts. Brief of Defendant in Error, \textit{Peevyhouse} (No. 149,243) [hereinafter Defendant's Brief] (copy on file with author). Plaintiffs' Reply Brief was filed in April, 1962. Woodrow McConnell alone signed both plaintiffs' briefs, although one reflects a short-lived partnership with Ranel Hanson. See Plaintiffs' Brief, supra, at cover page. Tom Capshaw, a second year associate with the Looney, Nichols firm, wrote and signed Garland's brief. On the main brief, each party sought and was granted four time extensions, with an additional extension obtained by stipulation. Plaintiff obtained two extensions before filing the reply brief. See Oklahoma Supreme Court Docket entries (May-Nov. 1961; Jan.-Mar. 1962) (on file with author).

\textsuperscript{191} Telephone Interview with Roland Tague, Oklahoma City attorney (Jan. 8, 1995).

\textsuperscript{192} Oklahoma Supreme Court Rule 15 provided, in relevant part, that the brief of the moving party shall include:

an abstract of the record, setting forth the material parts of the pleadings, proceedings, facts and documents upon which the party relies, together with such other statements from the record as are necessary to a full understanding of the questions presented to this Court for decision, so that no examination of the record itself need be made by this Court.

\textit{OKLA. STAT. ANN. tit. 12, app. 1, Rule 15 (West 1961).} This was not, however, the customary practice. Interview with Ralph Newcombe, Oklahoma attorney, in Lawton, Okla. (June 19, 1992).

\textsuperscript{193} See Plaintiffs' Brief, supra note 190, at 20-34.

\textsuperscript{194} A fourth, but very minor proposition asserted that the supreme court was authorized to increase the judgment to $25,000. In effect, plaintiffs' argument amounted to a request for \textit{ad iditum}, which most state courts reject. See \textit{FREDENTHAL ET AL.}, supra note 181, at 556-57 (1985). Although Oklahoma courts had not yet confronted this issue, it had received some scholarly
The plaintiffs' brief addressed statutory limits too little and too late. Logically, questions on admissibility of diminution evidence were irrelevant unless the court ruled in favor of the cost measure. By placing the diminution argument first, plaintiffs' brief got off to a weak start from which it did not recover. The Peevyhouses' only basis for successful appeal depended upon persuading the court to adopt the cost measure of damages. They needed to convince the court that the statute prohibiting "unconscionable and grossly oppressive damages" did not preclude the cost measure. Ultimately, the court interpreted this as a mandatory, policy-based limit on recovery. The second issue might better have focused on Oklahoma's statutory framework for damages, developing the general policy to protect and limit recovery for breach of contract based on the expectation interest, including idiosyncratic values in property subject to contract.

Substantively, the plaintiffs' brief cited relevant, helpful precedent, but did not effectively use the cases to develop reasoned arguments. It made little of the policy issues that modern contracts scholars consider important, such as a plaintiff's personal and idiosyncratic values, and the undervaluing of such concerns by use of market values. For example, the last third of the brief relied heavily on Groves v. John Wunder Co. to support the cost measure of damages, characterized as "the majority rule ... unquestionably supported and followed in Oklahoma." The brief's strongest argument asserted that Garland's willful and bad faith breach "should not... be handsomely rewarded." If damages were limited to diminution in value, Garland "could enter into similar contracts, reap the benefits to

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196 Plaintiffs' brief aptly noted the statute "almost invariably" applied in tort cases, and quoted from Groves to refute the possibility of "unconscionable enrichment ... when the result is but to give one party to a contract only what the other has promised." Plaintiffs' Brief, supra note 190, at 46-47. As such, it implicitly suggested that a windfall from the cost measure was not barred by the statute.
197 This shortcoming, which could have distinguished the Peevyhouse facts from other cases, harmed plaintiffs' chances before the Oklahoma Supreme Court.
199 286 N.W. 235 (Minn. 1939).
200 Plaintiffs' Brief, supra note 190, at 42.
be realized from the mining operations by removing the mineral de-
posits, dispose of them and pocket the money, and then limit liability
by selecting their own method of compensation to the injured
party.”201 The consequence of assessing such nominal damages
“would open the door for the legal practice of fraud. . . .”202 While
forceful and articulate, this argument lost force from its location near
the end of the brief.

As Oklahoma precedent for the cost measure of damages, the
brief quoted extensively from Ardizonne v. Archer,203 involving a
breached agreement to drill a test well. Although lacking proof that
the well could produce oil, protection of the promisee’s subjective ex-
pectation interest dictated use of the cost measure:

It does not lie with the plaintiffs in error, who engaged and were
compensated for drilling the well, to say that their performance would
not be beneficial to the lessor. It has been held that loss may be sus-
tained in a legal sense for the breach of a contract, notwithstanding it
can be shown that the performance would have been a positive injury, as
in the case of a failure to erect a useless structure upon another’s
premises.204

Dictum in Ardizonne foreshadowed the significance the Peevyhouse
court would give to the main purpose of a contract. It stated that
contractual purpose is a fact question determined by the jury in decid-
ing whether the contract was substantially performed or breached.205

The Ardizonne court reviewed the jury finding using detailed informa-

201 Id. This argument paralleled Professor Barrow’s imagined scenario. See Barrow, supra
note 2. A ruling for defendant on diminution, it finally argued, would be “legal condonation of
fraudulent transactions.” Id.

202 Plaintiffs’ Brief, supra note 190, at 44.

203 178 P. 263 (Okla. 1919).

204 Id. at 266. Unfortunately, this language was buried in a much longer quote. The full
quote addressed and rejected the argument that the breach did not harm plaintiff unless the well
would have produced oil and gas: “The very purpose of drilling the test well was to ascertain
whether oil or gas could be found.” Plaintiffs’ Brief, supra note 190, at 37 (quoting Ardizonne,
178 P. at 266). The brief also quoted the classic language from the New York decision of Cham-
berlain v. Parker:

A man may do what he will with his own, . . . and if he chooses to erect a monument to his
caprice or folly on his premises and pays another to do it, it does not lie with the defendant
who has been so employed and paid for building it, to say that his own performance would
not be beneficial to the plaintiff.

Chamberlain v. Parker, 45 N.Y. 569, 572 (1871).

205 The Ardizonne court stated:

Whether there has been a compliance with, or breach of, the express covenants of an oil and
gas lease with reference to development when the object of the operation is to obtain a bene-
fit or profit for both lessor and lessee, is ordinarily a question of fact to be determined by the
court or jury in each particular case from all the facts and circumstances in evidence. The
judgment of the lessee although exercised in good faith, is not conclusive of the question.
178 P. at 264 (citations omitted) (emphasis added).
tion on drilling costs, payments to the lessor, the value of oil produced, and net profit received by the lessee.\textsuperscript{206}

This dictum represented a missed opportunity for the Peevyhouses to present evidence at trial establishing the economic realities of their lease with Garland Coal. Had accurate facts been presented and argued, the court could not have found the parties’ main purpose was mutually profitable extraction of coal. The Peevyhouses expressly gave up a $3000 advance payment for surface damages as consideration for Garland’s promised remedial work. They received only $2500 in royalties for the coal removed from their land. By contrast, Garland obtained increased mining efficiency, the right to divert a bothersome creek onto the Peevyhouse land, and up to $34,000 in profits from the sale of coal removed from their land.\textsuperscript{207} The plaintiffs’ first suggestion of this economic analysis came much later, in the reply brief.

(b) Defendant’s brief.—As a litigation defense firm, Looney, Watts could better afford to devote the time needed to prepare a high quality appellate brief. Tom Capshaw, a junior associate, wrote Garland’s initial brief to the supreme court. He was not generally familiar with the industry, practices, or standard contract provisions used in coal mining. During the preliminary research for the brief, Capshaw remembered being persuaded by an ALR annotation supporting the diminution measure and felt “completely comfortable” with the arguments made on Garland’s behalf. Given that the remedial work would have only increased the land value by $300, he viewed the proposed expenditure of $30,000 as “appalling social waste.” Capshaw was unaware that the standard contract omitted any reclamation work and thought it strange the contract placed no dollar limits on the remedial work. The Garland defense team thought the Peevyhouses were “trying to hold up” Garland, and doubted that restoration was “of real value to them,” because they had not sought specific performance.\textsuperscript{208}

The defendant’s brief was well written and persuasive. The Peevyhouse majority adopted both its version of facts and its analytical framework.\textsuperscript{209} Unfortunately, the legal argument mislabeled a valuation figure, which ultimately misled and confused the court. Because the plaintiffs refused to present their own valuation testimony, the error was perpetuated in the court’s opinion. Consequently, sound economic analysis of the case was hampered.

\textsuperscript{206} Id.
\textsuperscript{207} See supra notes 74-81 and accompanying text.
\textsuperscript{208} Telephone Interview with Tom D. Capshaw, Administrative Law Judge, Social Security Administration (May 30, 1989).
\textsuperscript{209} Peevyhouse, 382 P.2d at 110-14; Defendant’s Brief, supra note 190 at 4-19.
The statement of facts reviewed the testimony concisely and with reasonable accuracy. Garland conceded that it did not complete the promised remedial work and offered no legal justification to excuse the breach. The sole question on appeal concerned damages. It then summarized testimony relating to the loss in value caused by mining: before mining, the land was worth $60 per acre; after mining, the value dropped to $11 per acre. In parentheses, it calculated "(60 acres at $49.00 per acre is $2,940.00)." This sum represented the loss in value caused by the mining. Regarding diminution of value caused by the breach, the brief stated that if the repairs were done, the land value would have increased only by $2 to $5 an acre, or $300 for the leased acreage. Standing alone, each calculation accurately portrayed evidence presented at trial: the mining stripped $2940 in market value from the leased acreage, and the remedial work would increase the present value of that land by $300.

As developed in Garland's legal arguments, the brief erroneously characterized $2940 as representing either the pre-mining or the post-mining value of the leased acres (as opposed to the loss in value caused by the mining). The $2940 sum became central to Garland's main argument, that plaintiffs' recovery was limited to $300, representing the "total difference in the market value before and after the [promised remedial] work was performed." Both labels were wrong. Using Garland's figures, the pre-mining value of the leased

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210 Defendant's Brief, supra note 190, at 1-3.
211 Id. at 3.
212 Id.
213 Ironically, the $2940 representing the loss in value from stripmining is the approximate amount Garland would have paid the Peevyhouses under its standard arrangement with landowners.
214 Defendant's Brief, supra note 190, at 18. Plaintiffs should not be entitled to collect royalties and then recover "more than the total value of the property ($2,940.00) before the mining operations were commenced." Id.
215 In discussing economic waste, the defendant's brief stated that it can result in a number of ways. If the distinction were observed in this case, it would result in requiring the expenditure of $25,000.00 to restore a piece of property, which, in its restored state, would have a fair market value of $3,240.00 at the most. This case is no different from one in which a $10,000.00 structure would have to be demolished and replaced by a $12,000.00 structure which conformed to all of the contract specifications. The plaintiff in the Groves case was seeking to recover the cost of completion so that the land could be put in a useable condition. In the principal case, the plaintiffs are seeking $25,000.00 in damages so that he might fence in a piece of property which would be worth $2,940.00 at most and its value would be increased by only $300.00 if the fence were actually built. In other words, plaintiffs seek the cost of performance of a useless and futile act; and adoption of a measure of damages which would be unduly oppressive to the defendant.
Id. at 10-11 (emphasis added).
216 Id. at 4, 24. This argument is apparently an extension of the error in the Statement of the Case which assumes the land has a post-mining value of $49 per acre, or $2940, with the remedial work increasing the total value by $300 to $3240.
acreage was $3600;\textsuperscript{217} its post-mining value was $660.\textsuperscript{218} The promised remedial work would have increased the post-mining land value by almost 50%. When one considers that mining stripped $2940 in value from the land and other financial aspects of the bargain, the economic waste analysis appears quite different.

Defendant's brief provided the analytical framework for the Oklahoma Supreme Court's decision. It placed primary focus on formulating a balanced measure of damages. Conceding that cost of performance was the usual measure of damages for breached promises to restore land after mining, it argued that such recovery was limited to the amount by which the remedial work would increase the land's value.\textsuperscript{219} In that respect, \textit{Peevyhouse} presented a case of first impression because the cost of performance far exceeded the increased value to the property.\textsuperscript{220} The brief criticized the plurality opinion in \textit{Groves} for ignoring economic waste concerns, especially where the promised alterations were incidental to the parties' contract.\textsuperscript{221} \textit{Ardizonne} was distinguishable because the oil and gas lessor would obtain valuable knowledge from drilling the well, whether or not any production resulted.\textsuperscript{222} By contrast, plaintiffs would only benefit from the increased value produced by the remedial work. While Oklahoma courts usually applied Section 97\textsuperscript{223} to prevent unconscionable and grossly oppressive recovery in torts, the statutory language was not so limited. Indeed, a territorial court used the provision to deny recovery of liquidated damages for a construction delay that resulted in no actual harm.\textsuperscript{224} Because the statutes limited recovery to the amount plaintiffs could have gained from full performance, and never more than reasonable damages, defendant requested that the Oklahoma Supreme Court reverse and remand the judgment below with directions to grant remittitur for $4700.\textsuperscript{225}

\textit{(c) Plaintiffs' reply brief.}—The issues thus framed, plaintiffs' reply was more effective than their initial brief. It dismissed dim-

\textsuperscript{217} Sixty leased acres multiplied by $60 per acre equals $3600 pre-mining value. Using a $60 per acre market value, the entire 120 acres owned by Peevyhouses were worth $7200 in 1960.
\textsuperscript{218} The calculation is $3600 - $2940 = $660. This amount represents Garland's version of the post-mining market value for the leased acreage.
\textsuperscript{219} As articulated in defendant's first proposition: "The measure of damages for the breach of a mining lease covenant to make specified restorations in the surface of the land should be the cost of performance, limited, however, to the total difference in the market value before and after the work was performed." Defendant's Brief, \textit{supra} note 190, at 4.
\textsuperscript{220} \textit{Id.} at 6.
\textsuperscript{221} \textit{Id.} at 6-17.
\textsuperscript{222} \textit{Id.} at 14.
\textsuperscript{224} Defendant's Brief, \textit{supra} note 190, at 21-23; see also City of El Reno v. Cullinane, 46 P. 510 (Okla. 1896).
\textsuperscript{225} Defendant's Brief, \textit{supra} note 190, at 24-25.
inition precedent as both outmoded and distinguishable, involving immaterial and nonwillful breaches. Where the functional purpose of the breached terms relates to future utility and not merely value, the cost measure of damages applies. Plaintiffs insisted upon the remedial provisions in order to assure their continued right to the use of their land in connection with their stock farming operations. . . . Defendant's sole objective in obtaining a mining lease from plaintiffs was to enter, remove the coal deposits, sell them and pocket the money; this they did. They have received full payment from plaintiffs but have not accorded plaintiffs full payment in return. Plaintiffs paid a valuable consideration for defendant's promise to restore; they gave up the coal deposits in consideration for defendant's promise that it would perform a condition that plaintiffs believed was an economic benefit to them; namely, the continued uninterrupted use of their lands for the purpose of gaining a livelihood from it.

Finally, plaintiffs set forth their economic analysis of the transaction. The Peevyhouses received minimal royalty payments compared to an estimated half million dollars of gross sales derived from the coal Garland removed from their land. This analysis supported

\[226\] For example, in Sandy Valley & E. Ry. v. Hughes, 188 S.W. 894 (Ky. 1916), the remedial duties were conditioned upon occurrence of an event, i.e., the railroad's election to remove gravel. By contrast, the Peevyhouses insisted upon the remedial provisions as a condition of entering the lease. Reply Brief of Plaintiffs in Error at 2-3, Peevyhouse (No. 149,243) [hereinafter Plaintiffs' Reply Brief]; see also Jacob & Youngs v. Kent, 129 N.E. 889, 891 (N.Y. 1921) (limiting damages to the diminution measure for trivial, unintentional breaches only). By contrast, the plaintiffs' argued that Garland's breach was

[admittedly willful, deliberate and intentional. . . . Surely it should not be permitted to profit by such conduct and mitigate its obligations to plaintiffs in error; especially where it would never have been permitted to enter upon the plaintiffs' lands and reap the benefits of its bargain but for the specific obligations that it accepted in exchange for these rights. Plaintiffs' Reply Brief, supra, at 4-5. Of course, both cases raised critical issues of materiality and willful breach. Plaintiffs' brief did not recognize the theoretical link: a breaching party can only recover under substantial performance doctrine if the breaches are non-material (i.e., plaintiff essentially received what was bargained for) and unintentional (i.e., in good faith, inadvertent). From a practical skills perspective, this exemplifies why students must learn theory. If the Peevyhouses' counsel understood this fundamental contract theory from the outset, the trial record and appellate briefs would have consistently pursued this theme. The Peevyhouses were entitled to recover the cost measure because Garland committed a material breach, leaving undone a substantial scope of work explicitly bargained and paid for with separate consideration. The cost measure was essential to protecting plaintiffs' subjective expectation interest and the integrity of the underlying exchange.

\[227\] Plaintiffs' Reply Brief, supra note 226, at 5.

\[228\] Id. at 5-7.

\[229\] Id. at 8-10. The Oklahoma wrongful conversion statute measures damages by the value of property at the time of conversion. For example, if it were shown that Garland fraudulently induced the contract by promising remedial work without intending to perform, the Peevyhouses might have rescinded the contract and recovered a full range of damages in tort for the wrongful conversion.

\[230\] 'The Plaintiffs' Reply Brief stated:
their unusual request to amend the complaint, adding trespass and wrongful conversion claims. These tort claims for compensatory and punitive damages arose when plaintiffs learned of defendant's deliberate breach of contract.

E. Supreme Court Decision

1. The Original Opinion.

We picked a fine time to strip mine, Lucille.
Make no mistake, hon, we got a raw deal,
I never went to law school,
I didn't know the value rule,
I thought sure we'd win our appeal,
The Supreme Court done gyped us, Lucille.231

Eight months after the close of briefing, on December 11, 1962, the Oklahoma Supreme Court affirmed judgment on liability, but reduced plaintiffs' damages to $300. The slip opinion docketed with the clerk of court indicates the case was decided by a five-to-three vote with Justice Welch not participating.232 Justice Jackson wrote the majority opinion, joined by Justices Williams, Davison, Halley and Johnson.233 Justices Blackbird and Berry dissented, but did not join Justice Irwin's dissenting opinion.

This section briefly criticizes the opinion, apart from any possible question of taint by the Oklahoma Supreme Court scandal.234 By all accounts, Justice Jackson's integrity and legal ability were beyond reproach. Nevertheless, the majority opinion based its reasoning, statement, and application of the damages rule upon mistaken factual assumptions that ultimately affected the outcome.

The majority viewed Peevyhouse as a case of first impression. Ardizzone, awarding the cost measure of damages, was deemed inapplicable because drilling gives the landowner "valuable geological in-

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Although there is no evidence in this record as to the value of the coal deposits so removed, an amount sufficient to pay the plaintiffs in excess of $2,200.00 in royalties on the basis of 20¢ per ton was removed by defendant from the plaintiffs' premises. This would amount to in excess of 110,000 [sic] tons of high grade industrial coal. Placing a conservative estimate of $5.00 per ton that defendant received for the sale of this coal, the plaintiffs would be entitled to recover of defendant in excess of $550,000.00 [sic].

Id. at 9. The mathematical calculations were off by a factor of ten; using plaintiffs' formula, Garland's projected gross sales from Peevyhouse coal were only $55,000.

231 See Parody, supra note 1.


233 Slip Opinion, supra note 232. The vote reflected in the slip opinion is at odds with the five-to-four split indicated in the Pacific Reporter. The precise voting line-up becomes significant as one traces later developments following plaintiffs' rehearing motions.

234 See infra text accompanying notes 628-42.
formation, even if no oil or gas is found.”

By contrast, defendants persuasively argued that performance “will add at the most only a few hundred dollars” value to the farm, and that is “all plaintiffs have lost.”

The court accepted Garland’s view that harm to plaintiffs’ expectation interest could be determined by the effect of breach on current fair market value. Accordingly, the court did not consider future appreciation in value or potential land use that could occur only through performance of the remedial work.

In deciding how to evaluate the novel damages question, the “unrealistic fact situation” deeply troubled Justice Jackson. Indeed, the court’s opinion seemed focused on reaching a decision for the facts as stated by defendant, which the court deemed accurate, instead of examining the record for a more rational version of the facts.

It is highly unlikely that the ordinary property owner would agree to pay $29,000 (or its equivalent) for the construction of ‘improvements’ upon his property that would increase its value only about ($300) three hundred dollars. The result is that we are called upon to apply principles of law theoretically based upon reason and reality to a situation which is basically unreasonable and unrealistic.

Ordinarily, the expectation principle requires compensating the lessee for the reasonable cost of the work. In this case, however, where the breached provision was merely incidental to the main purpose in view, and where the economic benefit which would result to lessor by full performance of the work is grossly disproportionate to the cost of performance, the damages which lessor may recover are limited to the diminution in value resulting to the premises because of the non-performance.

Counsel’s filtering, shaping, and sometimes distorting the facts facilitated several mistaken assumptions by the court. The majority opinion assumed that the Peevyhouses leased their entire farm to Garland Coal and that after mining the farm was worth approximately $3000, which remedial work costing $29,000 would increase by $300. It assumed the damage estimates on both cost and diminution were reasonably accurate. Most critical, it assumed the parties’ primary purpose for the contract was mutually profitable recovery and sale of

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235 See Peevyhouse, 382 P.2d at 111; see also Ardizonne, 178 P. at 264-65.
236 Peevyhouse, 382 P.2d at 111.
237 Id. at 113.
238 Id. at 112.
239 Id. at 114.
240 See infra text accompanying notes 520-48 (discussing how the so-called litigation incapacities distorted accurate fact-finding in the Peevyhouse litigation).
241 The nature of the adversary process dictates such extremes. Plaintiffs’ damage estimates are predictably high and defendants’ predictably low. Accustomed to such partisan exaggeration, courts typically find the truth somewhere in between.
coal and that the remedial provisions were "merely incidental" to the main object involved.\textsuperscript{242}

Let us consider each mistaken assumption and its impact on the court's decision. Consider first the court's assumption that the Peevyhouses leased their entire farm for stripmining purposes. If that were the case, absent other evidence of a homestead's intrinsic value, one might cogently argue that diminution in value fairly represented value lost from the breached promise. The Peevyhouses could sell the farm, combine the proceeds with the diminution damages, and buy another farm of equivalent value. Ignoring the unique value of the homestead to plaintiffs, the court might have found that their insistence on the cost of completion represented an opportunistic bargaining position and thus limited damages to diminution.\textsuperscript{243} Had the court correctly understood that the leased acreage was on a parcel connected to the homestead, such economic analysis could not rationally apply. The value and future utility of the entire 120-acre farm was affected by the nonperformance of the remedial work. The diminished value evidence related only to the sixty leased acres and not to the entire farm's value as an operating entity.\textsuperscript{244} Because the $300 did not purport to compensate the Peevyhouses for the loss in value to the sixty personal acres, the damage award would not enable them to buy 120 acres of comparable land.

In limiting damages to diminution, the majority opinion found important the farm's total value, although it never stated a definite figure. The $5000 jury verdict, it noted, is "more than the total value of the farm even after the remedial work is done."\textsuperscript{245} In contrast, if the cost measure applied, "plaintiffs might recover an amount about nine times the total value of their farm."\textsuperscript{246} Justice Jackson's initial opinion apparently relied on the $2940 figure from defendant's brief to find that the cost to complete was nine times the (60 acre) farm's total value after mining, and hence clearly disproportionate to the end to

\textsuperscript{242} Peevyhouse, 382 P.2d at 112, 114.
\textsuperscript{243} See, e.g., Charles J. Goetz & Robert E. Scott, The Mitigation Principle: Toward a General Theory of Contractual Obligation, 69 VA. L. REV. 967, 1003-04 (1983) (stating that "a carefully conditioned right of specific performance . . . selectively filters the potentially opportunistic cases where the obligor's cost of performance is substantially greater than the market value of performance"). In fact, some members of the court may have perceived opportunistic bargaining on the part of the Peevyhouses. Professor Eugene Kuntz recalled debating with Justice Jackson after the decision was rendered. Justice Jackson indicated that during oral argument, the court asked their lawyer whether, if awarded the cost measure, they would use the money to restore the land. Counsel gave a negative response. Telephone Interview with Eugene Kuntz, Professor Emeritus, University of Oklahoma, College of Law (June 15, 1992).
\textsuperscript{244} Going concern value of a business operation is generally greater than the liquidation value of the individual components. See Chaim J. Fortgang & Thomas M. Mayer, Valuation in Bankruptcy, 32 UCLA L. REV. 1061, 1064 (1985).
\textsuperscript{245} Peevyhouse, 382 P.2d at 111.
\textsuperscript{246} Id. at 113.
be attained. Assuming a $300 increase in value from the remedial work, the resulting disparity between cost and benefit to be obtained rendered the usual cost remedy inapplicable as being unconscionable and grossly oppressive.

For purposes of contrasting cost and diminution, the majority incorrectly fixed the cost measure at $29,000, although plaintiffs' recovery was limited to the $25,000 prayer for relief. It ignored testimony of defendant's expert challenging that sum as exorbitant and including unnecessary work, and made no effort to assess realistically the fair and reasonable costs of completion. It appears that Justice Jackson used the embellished cost figure to make more stark the contrast between cost and diminution. Why would he do so? In conversations after the decision, Justice Jackson defended his opinion: contract damages must be reasonable; the cost measure would have given the plaintiffs an unreasonable windfall.

The distorted facts undoubtedly present a more compelling case for limiting damages to diminution. Suppose instead that the court tried to set realistic figures on both cost and value. A reasonable cost

247 Id. at 113-14; see supra notes 210-19 and accompanying text. I believe the court valued the farm at $3000, reasoning as follows: Plaintiffs' prayer for relief limited them to $25,000 damages based on cost; defendant's brief suggests that the 60 acres were worth $2940; $2940 \times 9 = $26,460, and thus the cost measure was nine times the farm's total value.

248 Using my figures, the $25,000 cost measure was four and one-half times the total value of the property.

249 See Peevyhouse, 382 P.2d at 111 (discussing expert witnesses' estimated cost of remedial work at $29,000).

250 See supra notes 147-53. Plaintiffs commonly present their highest estimates, reasonably anticipating defendants will counter with lowball estimates. See, e.g., Thomas Ulen, The Efficiency of Specific Performance: Towards a Unified Theory of Contract Remedies, 83 Mich. L. Rev. 341, 383-85 (1984) (arguing for specific performance, in part because of the extreme informational demands for a court to determine an efficient level of damages; to insure seller's Pareto-efficient breach, buyer must receive damages for the difference between buyer's reservation price for the performance and the contract price; "at trial, the buyer has every incentive to exaggerate his reservation price"). Oklahoma mining disputes were no exception to the commonplace exaggeration. See, e.g., Garland Coal & Mining Co. v. Black Crystal Coal Co., No. 4254 (E.D. Okla. Oct. 3, 1958), aff'd, 267 F.2d 569 (10th Cir. 1959) (where court rejected both parties' accounting methods and fixed damages between their extremes).

251 Some legal scholars view a judge's crafting of an appellate opinion as the work of an artist who chooses from precedent, maxims, policies, economic knowledge, and "combines as one would in weaving a rug, in painting a picture from colours on a palate." The judge "must do the same with the facts so that they tell the story in his way." See Beryl H. Levy, Cardozo and Frontiers of Legal Thinking 84 (Case Western Reserve Univ. Press 1969) (1938).

252 Telephone Interview with Eugene Kuntz, Professor Emeritus, University of Oklahoma, College of Law (June 15, 1992); Telephone Interview with Marian Opala, Oklahoma Supreme Court Justice (May 1, 1989). Mr. Opala was, at the time, the court's administrator and an adjunct contracts professor at Oklahoma City University. From all accounts, Justice Jackson was firmly convinced that the majority reached the correct result, based largely on economic considerations.
figure is perhaps $18,000. After mining, the entire 120-acre farm, based on record evidence, was probably worth $4260. This would produce a cost-to-value ratio of 3.75:1, rather than 9:1 as stated by the court. While this disparity still is cause for concern, it is far less jarring than the exaggerated figures used by the court.

Justice Jackson further shaded the facts to conclude that the remedial work was merely incidental to the primary purpose, the "economic recovery and marketing of coal from the premises, to the profit of all parties." The majority opinion deftly avoided scrutiny of the written contract and its remedial provisions: "It is unnecessary to set out the details of the work to be done, other than to say that it would involve the moving of many thousands of cubic yards of dirt, at a cost estimated by expert witnesses at about $29,000.00."

Justice Jackson’s view of the "unrealistic fact situation" propelled him to consider the "relative economic benefit" to be gained from performing the work as relevant to statutory damage limits. He interpreted the statutory damage provisions as limiting recovery to "a reasonable amount not ‘contrary to substantial justice’" and "in spite of" the parties’ agreement. Allowing plaintiffs’ recovery of costs, at nine times the farm’s total value, "would seem to be ‘unconscionable and grossly oppressive damages, contrary to substantial justice’ within the meaning of the statute. Also, . . . plaintiffs . . . will receive a greater benefit from the breach than could be gained from full performance, contrary to the provisions of Sec. 96."

Arguably, the ma-

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253 See supra notes 150-51 and accompanying text.
254 This figure is the aggregate of 60 mined acres at $11 and 60 unmined acres at $60. The total is $4260.
255 Peevyhouse, 382 P.2d at 112.
256 Id. at 111.
257 Id. at 113.
258 OKLA. STAT. tit. 23, §§ 96-97 (1935). Section 97 imposes a limitation on the amount of damages and provides:
Notwithstanding the provisions of this chapter, no person can recover a greater amount in damages for the breach of an obligation than he could have gained by the full performance thereof on both sides, except in cases where recovery may be for exemplary damages and penal damages, and in Sections 2871 and 2878.
Section 97 requires that damages be reasonable and states:
Damages must, in all cases, be reasonable, and where an obligation of any kind appears to create a right to unconscionable and grossly oppressive damages, contrary to substantial justice, no more than reasonable damages can be recovered.
259 Peevyhouse, 382 P.2d at 113 (viewing statute as analogous to statutory limits on liquidated damages); see also Margaret N. Kniffin, A Newly Identified Contract Unconscionability: Unconscionability of Remedy, 63 NOTRE DAME L. REV. 247 (1988) (arguing that courts candidly limit contract damages that are unconscionably disproportionate to the underlying consideration).
260 Peevyhouse, 382 P.2d at 113.
majority opinion mistakenly interpreted these provisions as a mandatory ceiling on plaintiff's recovery.\textsuperscript{261}

As is often the case, one must study the dissent to learn important facts omitted from the majority opinion. Justice Irwin's dissenting opinion more accurately characterized the exchange and the underlying economic considerations.\textsuperscript{262} It quoted in full the remedial provisions. Upon examining the record, Justice Irwin found the remedial work a material part of the consideration promised to plaintiffs, in addition to royalties. Defendant admitted that plaintiffs insisted on the provisions and would not otherwise agree to the lease. In return for those promises, defendant received its share of the coal, and the "right to use plaintiffs' land in the furtherance of its mining operations."\textsuperscript{263} Garland could estimate its performance costs before contracting, and thus had knowledge that the cost "might be disproportionate to the value or benefits received by plaintiff[s] for the performance."\textsuperscript{264} Garland received what it bargained for and offered no excuse for failing to perform its obligations. In Justice Irwin's opinion, the breach was willful and not in good faith.

2. Petitions for Rehearing.

(a) First petition.—Word of the Peevyhouse decision spread quickly through the Oklahoma legal community. Many prominent lawyers thought it was wrongly decided and found ways to communicate their disagreement with members of the court. Distinguished University of Oklahoma Law Professor, Eugene Kuntz, debated the case over coffee with Justice Jackson. Oklahoma City University Professor (and now Oklahoma Supreme Court Justice), Marian Opala,
invited Justice Jackson to defend the decision before his contracts class.\textsuperscript{265} On February 1, 1963, seven weeks after the initial decision, ten highly regarded local attorneys and academics filed an amicus brief urging the court to reconsider and award plaintiffs the cost measure.\textsuperscript{266} They claimed to represent clients who enter contracts with comparable risks projected into the future and their concern with proper legal development. In three short pages, the amicus forcefully argued for the sanctity of contracts.

\begin{quote}
\textit{[A]t the very least, the express and unambiguous terms of contracts entered into by private individuals . . . cannot constitutionally be abrogated by it. Moreover, short of the wall of impossibility of performance, when contractual promises are broken, this Court should lend its aid to promisees relying on the promises of competent promisors, and lend its most vigorous sanction, to insure to future promisees that the aid of this Court is certain and unwavering, particularly being mindful of the interests sought to be safeguarded by the promisee in stipulating for terms, and not alone the objective of the promisor.}\textsuperscript{267}
\end{quote}

Days later, the plaintiffs petitioned for rehearing and oral argument. McConnell's brief was verbose, burying otherwise viable arguments in excess prose or in abrasive attacks on the court. Substantively, it addressed the factual errors arising from the deficient record, such as the excluded evidence of plaintiffs’ personal acreage, and sought remand for full hearing on the lost value to plaintiffs in view of the economic benefits they expected from the remedial

\textsuperscript{265} Telephone Interview with Marian Opala, Oklahoma Supreme Court Justice (May 1, 1989).
\textsuperscript{266} Brief Amicus Curiae, Peevyhouse v. Garland Coal & Mining Co., 382 P.2d 109 (Okla. 1962) (No. 39,588), cert. denied, 375 U.S. 906 (1963) [hereinafter Amicus Brief] (on file with author). Fred Hoyt Jr. indicates the members were in general commercial practice, except for John Cheek, who did insurance defense work. Neil P. McInnis apparently organized the group. Telephone Interview with Fred Hoyt, Oklahoma City attorney (June 29, 1992). Bruno Miller was former president of the Oklahoma County Bar Association, and ran for governor in 1966. John G. Hervey was former law school dean at both Oklahoma City University and the University of Oklahoma. Maurice Merrill, a professor at the University of Oklahoma College of Law, was respected for his work on municipal law. Elbridge Phelps taught contracts at the University of Oklahoma; McConnell was a former student. Although his name and a signature appear, he did not recall participating in the brief, and denied that the signature was his. Interview with Elbridge Phelps, Professor Emeritus, University of Oklahoma, College of Law, in Norman, Okla. (Dec. 4, 1989).

John Cheek does not recall what prompted the brief, but firmly supported the cost measure both then and now:

\begin{quote}
\textit{[T]he “environment” has a superior level of priority over profit. If people continue to rape the environment, soon our future generations will be living in a dump . . . .}

Today, the present Corporation Commission requires oil operators to leave the premises as they found them, even at any cost. As a surface owner, I have several well sites that have been capped and I insist that the landscape appear on the land surface the same as it was accepted under the oil lease.
\end{quote}

Letter from John Cheek to author (June 19, 1992) (on file with author).

\textsuperscript{267} Amicus Brief, \textit{supra} note 266, at 3-4.
work. Toward the end, the petition challenged the court’s characterization of the remedial provisions as incidental. “Did this Court indeed treat . . . [the remedial provisions] as surplusage and not worthy of consideration?” If so, it “completely ignored” contracts law protecting the parties’ intent. A strong environmental policy argument came last. To award the cost of postmining remedial work is not unreasonable economic waste, but rather preserves “the greatest natural assets of this country for future generations.”

Given what came earlier, this argument likely fell on deaf ears.

Justice Williams was known on the court for perpetual indecision. A judicial colleague reports that he frequently changed his mind several times on a case during the court’s deliberations. The longer a case remained on the court’s docket and hence the subject of discussion, the greater opportunity for Justice Williams to change his mind. Originally Justice Williams voted with Justice Jackson’s five-to-three majority opinion. Conference minutes indicate that, when the court discussed the request for rehearing on February 25, Justice Williams switched his vote to the dissent. The amicus brief may have persuaded him that the case was wrongly decided. Justice Jackson may also have had second thoughts, for he passed on voting that day. Justice Welch, who did not vote on December 7, now voted to rule in favor of Garland. Because of the four-to-four stalemate, Peevyhouse was backlisted, to be reconsidered at a future conference.

When the court discussed Peevyhouse on March 15, Justice Jackson recommended and voted to deny rehearing. Neither Justice Williams nor Justice Welch voted. Once more, the case was backlisted. Finally, on March 25, with all nine justices voting, the court denied rehearing on a five-to-four vote. Justice Welch, who had not previously participated in a dispositive vote in this case, cast his vote for Garland Coal. Justice Williams remained with the dissent.

Justice Jackson’s published supplemental opinion on rehearing is an extended litany of errors by plaintiffs’ counsel during the trial and original appeal. One may not change the theory of a case upon ap-

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268 Petition for Rehearing of Plaintiffs in Error at 1-4, Peevyhouse (No. 39,588) (on file with author).
269 Id. at 10.
270 Id. at 14-15.
271 Interview with William Berry, retired Oklahoma Supreme Court Justice, in Oklahoma City, Okla. (Dec. 18, 1991).
272 Conference Minutes of Oklahoma Supreme Court (Feb. 25, 1963) (on file with author).
274 Conference Minutes of Oklahoma Supreme Court (Mar. 15, 1963) (on file with author).
275 Conference Minutes of Oklahoma Supreme Court (Oct. 1, 1962); Conference Minutes of Oklahoma Supreme Court (Mar. 25, 1963) (on file with author).
276 Conference Minutes of Oklahoma Supreme Court (Mar. 25, 1963).
Nor was the decision an unconstitutional impairment of contracts, as suggested by amicus.  

(b) Second petition: Fighting with windmills.—McConnell refused to accept defeat. On April 1, 1963, he filed a second petition for rehearing. Plaintiffs' supporting brief now fought to preserve the $5000 verdict. The Oklahoma Supreme Court erred in accepting verbatim defendant's diminution figure. The verdict was apparently based on diminution in value, but also considered plaintiffs' loss of use and permanent harm to the land. Again, it challenged the trial court's refusal to permit evidence on harm to the personal acreage.  

Rehearing petitions are usually like tilting at windmills—once a court commits itself to a decision, it is highly unlikely to change its mind. In this case, however, McConnell's persistence paid off. Before denying the second petition for rehearing, the court agreed to at least hear oral arguments in the case. No record preserves what transpired at the oral arguments. At the April 30, 1963 conference Justice Welch presented the second rehearing petition with a recommendation to deny. Only two justices agreed with him; four remained steadfast with the dissent. Two from the Peevyhouse majority, Justices Davison and Johnson, now passed on voting. Again the case was backlisted.  

On May 10, 1963, Watts filed a reply brief opposing plaintiffs' second petition for rehearing. For the first time in the litigation, Garland asserted impossibility as justification for the breach. Contrary to plaintiffs' assertions, Garland argued that its breach was not arbitrary and unreasonable. Rather, it claimed, Cumpton's testimony will indicate that the defendant, at time of execution of the contract, had good faith intention of complying with all of its terms; but, after partial performance, it became apparent that the amount of coal under the leased property was limited; and the operations were not extended far enough toward the southeastward to permit economic compliance with the terms of the lease requiring remedial work.  

From all the testimony . . . it is obvious that the Appellee, at the inception of the contract, intended to comply with the terms; but, after it became economically impossible to complete performance of mining operations across the entire tract of land, construction of dykes for erection

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277 Peevyhouse, 382 P.2d at 116-19.  
278 Id. at 119. The court's supplemental opinion noted that plaintiffs dismissed the count sounding in tort and did not object to the trial court's evidentiary ruling. Peevyhouse v. Garland Coal & Mining Co., No. 39,588 (Okla. Mar. 26, 1963) (describing second count as one "for damages to the water well and home"). McConnell explained that plaintiffs had to dismiss the tort count as time barred, but that their failure to formally object to the exclusion of evidence did not bar them from raising the issue on appeal. Interview with Willie and Lucille Peevyhouse, in Stigler, Okla. (May 4, 1990).  
279 Plaintiffs' Second Petition for Rehearing (April 1, 1963) (copy on file with author).  
280 Conference Minutes of Oklahoma Supreme Court (Apr. 30, 1963) (on file with author).
of fences became impracticable. Appellee went as far with performance of the remedial work as could reasonably be expected under the circumstances, without futile expenditure of money which would accomplish no constructive purpose.\(^{281}\)

This argument has achieved mythical status in *Peevyhouse* folklore, from which some casebooks suggest an impracticability defense. Few recognize that the issue was raised tardily, and with scant support in the record.\(^{282}\)

Two weeks after Garland's reply, on May 27, the court again discussed the case at conference. This time, all justices voted. The court split five-to-four, and followed Justice Jackson's recommendation to deny the second petition for rehearing.\(^{283}\)

Confidential court records demonstrate that this case, involving relatively low stakes, commanded unusual attention. *Peevyhouse* was discussed in conference eight times in as many months.\(^{284}\) This sharply contrasts with the typical case presented and finally decided in one court conference. Whatever the cause, it was a troublesome case for the court.


   (a) *[McConnell's continuing valiant efforts: Certiorari petition to the United States Supreme Court.]*—Soon Garland moved to close the case.\(^{285}\) McConnell would not give up. He filed a petition for writ of certiorari to the United States Supreme Court. He obtained assistance from Leslie Conner, an Oklahoma City lawyer with experience before the Supreme Court. To no avail, the certiorari petition asserted unconstitutional impairment of contract, due process, and equal protection violations.\(^{286}\) The United States Supreme Court denied certiorari November 12, 1963.\(^{287}\)

\(^{281}\) Reply Brief of Defendant in Error at 4-6, *Peevyhouse* (No. 39,588). See supra notes 87-90, 161-69 and accompanying text (discussing the lack of evidence sufficient to prove the impracticability excuse, and Watts' use of a leading question to include his desired version of facts into the record).

\(^{282}\) See, e.g., LON L. FULLER & MELVIN A. EISENBERG, BASIC CONTRACT LAW 218-19 (5th ed. 1990) (suggesting economic impossibility as a defense). The current Wisconsin materials more accurately reflect that this argument arose only on rehearing. See MACAULAY, supra note 16, at 184 (noting that this argument was used by defendant in its brief in opposition to rehearing).

\(^{283}\) Conference Minutes of Oklahoma Supreme Court (May 27, 1963) (on file with author).


\(^{285}\) Motion to Spread Mandate of Record, *Peevyhouse* (No. 149,243) (an Oklahoma closure procedure) (on file with author).

\(^{286}\) Only the notice of filing appears in the Oklahoma court records. The Conner and Little firm no longer has copies of the actual certiorari petition; Little surmised on the issues raised. Telephone Interview with James Little, Oklahoma City attorney (June 30, 1992).

(b) *A switch in time.*—While the petition for certiorari was pending, someone must have noticed a defect with the original December opinion of the Oklahoma Supreme Court. Welch had not voted. Because Williams had switched to the dissent, the court was evenly divided at four-to-four. The court needed another vote to break the tie and, after the expected denial of certiorari, close the case. Justice Welch filled the void. By order dated September 19, 1963, Justice Blackbird amended the original opinion to include Welch as voting for Garland, thus creating a majority vote:

> It appearing to this Court that the records in the office of the Clerk of this Court do not reflect the complete and correct votes of the Justices on the majority opinion heretofore promulgated herein on December 11, 1962, as said votes appear in this Court's conference minutes; and that said records should be corrected to speak the truth . . . .

This order misrepresents the typed conference minutes, which show that Justice Welch did not vote on the original opinion. Perhaps a handwritten set varies from the typed version. Perhaps Justice Blackbird signed the opinion based on the representation of another. Perhaps it was a sloppy, albeit accepted way of preserving the court's decision. Perhaps it is evidence of improper taint.

(c) *Tilting at windmills.*—Upon denial of certiorari, McConnell then sued in federal court, seeking specific performance, or in
the alternative, money damages. The district court granted summary judgment; res judicata barred any further action. In February 1966 the Tenth Circuit affirmed the dismissal. After six years in litigation, the case was finally over.

**View of pit along property line showing spoil banks and minimal vegetation thirty years after stripmining.**

**F. Epilogue**

1. **Current Condition of Land.**—Willie and Lucille Peevyhouse still live on the land located outside Stigler. The land they leased to Garland has changed little from when the mining stopped more than thirty-five years ago. The rough, rocky surface on the highwall and spoil banks is sparsely vegetated. About half of the leased acreage remains unusable. The diversion of Cedar Creek caused long-term harm. It eroded the makeshift fills and now flows into the abandoned mining pit instead of the diversionary channel. It carved a new path flowing out of the southeast portion of the pit. The renegade creek

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294 Peevyhouse v. Garland Coal & Mining Co., 356 F.2d 979 (10th Cir. 1966).
295 See Glossary, infra Appendix B.
296 A 1969 topographic map shows a four acre undisturbed area north of the relocated stream that contains approximately 9000 tons of coal. See Friedman Letter, supra note 38.
washed out a bridge on the property southwest of the Peevyhouses owned by Lucille’s parents. The dry diversionary channel is overgrown with weeds. Because the unmined area south of the pit often floods after heavy rains, it lies fallow and overgrown with scrub.297 Their adult son has begun clearing the area so the fertile land can again be used. Deep water-filled pits line the surrounding area. They can present serious safety hazards. Weeds grow at the edges, deceiving the unsuspecting traveler. State mining officials have corrected some especially dangerous pits close to high traffic areas. Nevertheless, tragedies and near misses still occur.298 In 1974, Charles Wheat, age fourteen, mistook a pit adjoining the Peevyhouse property for a small water hole. He and his horse drowned. The Peevyhouses’ granddaughter and a friend barely escaped a similar fate in 1986. The Peevyhouses worry, not only for the safety of others, but also about their risk of liability.

Lucille is bitter and distrustful of the legal system. She wants to move into the town of Stigler, leaving behind the scarred land and her memories of the legal dispute. Willie still wants the land fixed: “It’s just not right to do something with land that makes it useless for the future.”299 Local realtors estimate that the land could be worth between $200 and $375 per acre if minimal remedial work were done.300 Instead, approximately thirty acres are practically worthless to the Peevyhouses. An environmental engineer estimated that it would now cost between $52,000 and $96,000 to perform site reclamation work on the Peevyhouse property.301 Compared to the costs of other reclamation projects, he considered this sum quite reasonable.302

2. Garland Coal Company: Surplus after Involuntary Chapter 7 Bankruptcy.—The Porter family owned and operated Sallisaw Strip-
OVERGROWN DIVERSIONARY CHANNEL.

ping, or its successor, Garland Coal Company since the middle 1950s.\(^{303}\) An acrimonious strike produced ongoing labor disputes, ultimately prompting Garland’s president, J.F. Porter III,\(^{304}\) to sell the Haskell County operations to Alpine Construction Company around 1982. When Garland stopped mining, it incurred withdrawal liability to the United Mine Workers Trust Fund. Payment disputes caused the trust fund to file an involuntary Chapter 7\(^{305}\) bankruptcy petition against Garland in 1984. In 1986, the bankruptcy court found Garland was insolvent and entered an order for relief. Thereafter, Porter decided to liquidate the company and move on to other pursuits.\(^{306}\)

The case closed in 1993 after seven long years in bankruptcy. Fixing the debtor’s reclamation obligations with the various federal and state agencies was a major cause of the delay.\(^{307}\) Incredibly, the bankruptcy estate included sufficient assets for the trustee to pay in full all

\(^{303}\) Interview with James Cox, Garland’s trustee in bankruptcy, in Fort Smith, Ark. (Mar. 9, 1993); Telephone Interview with J.F. Porter III, President of Garland Coal (Mar. 9, 1993).

\(^{304}\) Porter graduated from Yale College (B.A. 1961) and Yale Law School (J.D. 1964). Telephone interview with Joanne Papavero, Registrar’s Office, Yale Law School (Jan. 3, 1995).


\(^{307}\) Interview with James Cox, Garland’s trustee in bankruptcy, in Fort Smith, Ark. (Mar. 9, 1993); Telephone Interview with J.F. Porter III, President of Garland Coal (Mar. 9, 1993).
allowed claims, and to distribute $1.4 million to Porter, his sister, and various trusts for their children.  

3. Changes in State and Federal Reclamation Laws.—*Peevyhouse* is symbolically important. Classical contract doctrine supports the view that parties can achieve any lawful purpose through private bargain. *Peevyhouse* belies the point. It casts serious doubt whether the legal system can relegate to "freedom of contract" the protection of property owners' interests in aesthetics and the long-term utility of land after stripmining. Public law has since intervened, with the federal and state governments attempting to protect the public welfare and minimize damage to the environment.  

Oklahoma adopted its first reclamation statute five years after the *Peevyhouse* decision. The Open Cut Land Reclamation Act of 1967[311] ("1967 Act") required operators to obtain a mining permit and post a bond equal to the lesser of $50 per acre or the assessed value of the land to be mined. Because the bonding requirement was set at an amount far below the probable reclamation costs, operators frequently would simply forfeit the bond instead of performing the work.  

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309 National Environmental Policy Act of 1969, 42 U.S.C. § 4331 (1977), declares federal policy, in cooperation with state and local governments:

(a) ... to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

(b) to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may —

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive, and aesthetically and culturally pleasing surroundings . . . .

Id.


312 See Todd S. Hageman, *Environmental Law: Comparing the Effectiveness of Oil and Gas with Coal Surface Damage Statutes in Oklahoma: Bonding Producers and Operators to Land Reclamation*, 46 Okla. L. Rev. 291, 293-308 (1993). Because tax assessments are notoriously low, the bond provided minimal protection for the property owner. Current Haskell County tax assessments for land in the mined area range from $10 to $80 per acre (on file with author). Had the statute applied in this case, Garland could have avoided performing the remedial work by forfeiting a maximum $3000 bond.
Brief experience revealed serious flaws with the 1967 Act, prompting its repeal and replacement with the Mining Lands Reclamation Act of 1971 (the 1971 Act).\textsuperscript{313} The 1971 Act increased the bond formula to require from $350 to $650 per acre of affected land, and set $5000 as the minimum bond. Operators had to submit proposed reclamation plans, but were allowed to determine the subsequent land use, choosing the least expensive type of reclamation regardless of the land's prior condition or use. The statute gave minimal oversight responsibility to the Oklahoma Department of Mines, but did not confer meaningful authority to increase bond amounts. Because the bond fixed the operator's maximum liability, operators continued to absorb the bond forfeiture in lieu of performing the reclamation work.\textsuperscript{314}

Oklahoma's dismal experience with enforcing reclamation obligations was mirrored nationwide.\textsuperscript{315} Accordingly, Congress passed the Surface Mining Control and Reclamation Act of 1977 (SMCRA),\textsuperscript{316} which established federal environmental performance standards, with a regulatory scheme that placed primary enforcement obligations on the states.\textsuperscript{317} If the Department of Interior Office of Surface Mining Reclamation and Enforcement determines a state enforcement program is inadequate, the federal office can take over enforcement responsibilities from the state.\textsuperscript{318} 

Section 6 of the Act specified the following reclamation requirements that corresponded to the remedial provisions in the Peevyhouse lease:

1. Grade to reduce peaks and ridges to a rolling topography. Strike off ridges of removed overburden to a width of ten feet at the top and grade peaks at the top to a minimum of fifteen feet.
2. Construct earth dams in final cuts to impound water.
3. . . .
4. On land which was to be seeded to pasture, strike off all peaks or ridges of removed overburden to a width of at least ten feet on top.

\textsuperscript{313} 1967 Okla. Sess. Law Serv. 186, 280 § 6 (West).
\textsuperscript{314} Evidently the increased statutory bond requirements were still unrealistic. Local reclamation costs in 1973 ranged from $380 to $5616 per acre, with $1457 as the weighted average cost per acre of land reclaimed. See Oklahoma Geological Survey, Special Pub. 74-2, An Investigation of the Coal Reserves in the Ozarks Section of Oklahoma and Their Potential Uses: Final Report to the Ozarks Regional Commission 71 (1974).
\textsuperscript{317} See, e.g., 30 U.S.C. § 1201(f) (1986) (assigning to states primary governmental responsibility for developing, authorizing, issuing, and enforcing surface mining and reclamation regulations).
\textsuperscript{318} See 30 U.S.C. § 1271(b) (1986). In 1984 the federal office found the Oklahoma enforcement program lacking and assumed responsibility until January 1986, when the enforcement...
Pursuant to its SMCRA obligations, Oklahoma adopted the Coal Reclamation Act of 1979, which established a four-pronged administrative procedure. First, as a condition of obtaining a mining permit, the operator must prepare and obtain approval of a detailed mining and reclamation plan that satisfies specified performance standards. Second, before the Department of Mines ("Department") can issue the permit, the operator must file a performance bond payable to the state in an amount "sufficient to assure the completion of the reclamation plan if the work had to be performed by the Department in the event of forfeiture." Third, the Department must regularly inspect the mining site and can require the operator to post an additional bond if the mining or reclamation operations deviate from the permit plan. Finally, the operator will forfeit the bond if the site is not fully reclaimed. Upon forfeiture, the Department may complete reclamation and recover from the operator costs in excess of the bond.

The current mechanism appears to work well; the Department regularly inspects mining sites and takes suitable enforcement action when violations are found. Although little mining now occurs in Oklahoma, the few active operators satisfactorily complete remediation as financially backed by adequate bond amounts.

Like Garland Coal Company, many operators dissolved in bankruptcy. The intersection of environmental and bankruptcy laws has blossomed in recent years. Bankruptcy treatment of environmental clean-up obligations involves extremely complex questions of policy, statutory interpretation, and strategic incentives far beyond the scope of this work. The current Oklahoma statute expressly permits the state to recover from a defaulting operator reclamation costs exceed-


321 See OKLA. STAT. ANN. tit. 45, § 745.6(A), (B) (West Supp. 1995).

322 Oklahoma Permanent Regulatory Program Regulations, § 842.11 (1990) [hereinafter OPRPR], requires partial inspections monthly, and at least one complete inspection per calendar quarter for both active and inactive sites. The Department must periodically review outstanding permits, and may require a revision or modification to the permit, again satisfying the reclamation and bond requirements. OKLA. STAT. ANN. tit. 45, § 745.10 (West 1994) (effective July 1, 1986 as amended).

323 The Oklahoma Department of Mines uses interim enforcement procedures to induce compliance with the reclamation plan. See OKLA. STAT. ANN. tit. 45, § 777 (West Supp. 1995); OPRPR, supra note 322, §§ 843.11-12.

324 See OPRPR, supra note 322, § 800.500(d)(1).

325 Telephone Interview with R. Steven Haught, Oklahoma City attorney (Feb. 4, 1994).

326 See generally KATHRYN R. HEIDT, ENVIRONMENTAL OBLIGATIONS IN BANKRUPTCY 3-1 to 3-68 (1994) (discussing two issues central to a determination of treatment of environmental obligations in bankruptcy: whether a "claim" exists and when the "claim" arose).
ing the forfeited bond. These reclamation obligations probably constitute a "claim" under the Bankruptcy Code.\textsuperscript{327} If the mining activity has ceased, and the resulting harm is complete, the right to payment for completing reclamation will probably be treated as a pre-petition claim for money damages and it will be subject to discharge.\textsuperscript{328} Garland's unusual bankruptcy liquidation resulted in full payment of all outstanding reclamation obligations. In the more common Chapter 7 liquidation, the environmental clean-up obligations will be paid pro rata as a general unsecured claim. If, however, the past mining activity involves ongoing, post-petition consequences, such as continuing contamination from toxic materials, the environmental agency may alternatively pursue the bankruptcy estate as current owner and recover the clean-up costs as post-petition administrative expenses.\textsuperscript{329}

### III. Legal Analysis

Part III addresses each of the legal issues presented by 

\textit{Peevyhouse} and how the unearthed facts presented in Part II would affect proper doctrinal analysis. Subpart A considers parol evidence rule objections, evidence of the parties’ intent and surrounding circumstances, and the resulting effect upon interpretive questions. In light of this compelling evidence, subpart B evaluates whether Garland's remedial failures were a material or minor breach and whether the court correctly invoked the substantial performance doctrine. Subpart C tests the possible mistake and impracticability doctrines alluded to in folklore against available evidence and concludes neither excuse was legally supportable. Finally, subpart D discusses various remedial possibilities in view of economic and other policy considerations.

The unearthed \textit{Peevyhouse} facts permit retrospective consideration on the wider range of legal issues relevant to the decision. The majority opinion focuses on the "main purpose" of the contract as central to determining the measure of damages. This Part evaluates how complete presentation of the facts should alter doctrinal and policy analysis. Besides the remedial questions, the facts developed in Part II influence analysis of three major issues: (1) interpretation of the agreement and what the parties sought to accomplish; (2) whether the nonperformance of the remedial work constituted a material breach, thus rendering inapplicable substantial performance doctrine;

\textsuperscript{327} \textit{Id.} at 3-15 to 3-36.

\textsuperscript{328} \textit{Id.} at 3-12 to 3-25. Compare this analysis with the recent treatment of reclamation duties under SMCRA, which does not expressly permit an alternative right to payment. \textit{See} United States v. Whizco, 841 F.2d 147 (6th Cir. 1990); United States v. Hubler, 117 B.R. 160 (Bankr. W.D. Pa. 1990).

\textsuperscript{329} \textit{See} \textit{Henry,} supra note 326, at 3-64. \textit{See also} United States v. LTV Corp. (\textit{In re} Chateau-gay Corp.), 944 F.2d 997 (2d Cir. 1992).
and (3) whether Garland's liability for breach was legally excused by mistake or impracticability doctrine. This analysis may aid integration of the newly developed facts into effective classroom discussion of the doctrinal issues.

A. Interpretation and Parol Evidence Rule

Freedom of contract means that the law will enforce a private bargain according to the parties' intent. Interpretation is the process used to determine whether the parties manifested contract intent and to ascertain the rights and duties created thereby.\textsuperscript{330} Accordingly, in any contracts litigation, the court's primary focus should be to determine the parties' intent—what they intended to accomplish through the agreement—as fundamental to ascribing the meaning given their words of agreement.\textsuperscript{331} Courts' standard interpretive process focuses on the words of agreement, particularly when contained in a writing. Evidence of the surrounding circumstances at the time and place of agreement provides context, so the court can view the transaction from the parties' perspective to better ascertain what they intended to accomplish with the agreement.\textsuperscript{332} Notwithstanding the parol evidence rule, the vast majority of courts will admit extrinsic evidence of surrounding circumstances to aid interpretation, particularly if there is an ambiguity in the contract.\textsuperscript{333} Lacking admissible evidence of the parties' intent, standard rules of interpretation provide convenient maxims to support judicial intuition.\textsuperscript{334}

In its haste to address the ultimate damages issue, the Peevyhouse majority opinion short-circuited the usual interpretive process. While acknowledging that Garland "specifically agreed"\textsuperscript{335} to perform certain remedial work, the opinion gave no particularized focus on the actual contract language or other evidence that might help determine what the parties sought to accomplish with their agreement. Instead, it treated contract purpose as an abstract finding that could be imputed to the parties, and not a factual question warranting closer ex-

\textsuperscript{330} See Restatement (Second) of Contracts § 200, cmt. b (1981). The comment provides: "Interpretation of a promise or agreement or a term thereof is the ascertainment of its meaning." Id.

\textsuperscript{331} See Arthur L. Corbin, The Interpretation of Words and the Parol Evidence Rule, 50 Cornell L. Rev. 161, 162 (1965) ("The cardinal rule which all interpretation begins is that its purpose is to ascertain the intention of the parties.").

\textsuperscript{332} See Arthur L. Corbin, Corbin on Contracts § 545, at 160-64 (1960).


\textsuperscript{334} See Farnsworth, supra note 103, § 7.11, at 495-97.

\textsuperscript{335} Peevyhouse, 382 P.2d at 111.
amination of the specifics.336 "The primary purpose of the lease contract . . . was merely to accomplish the economical recovery and marketing of coal from the premises to the profit of all parties. The special provisions of the lease contract pertaining to remedial work were incidental to the main object involved."337

The court found that mutually profitable extraction of mineral resources was so obviously the main purpose that it made no reference to the record or standard rules of interpretation. Before making this critical finding, the majority should have examined more closely the actual writing and the circumstances surrounding its execution. Its failure to do so violated accepted principles of interpretation.338 The court ignored conspicuous differences between the printed lease and the typewritten addendum and the interpretive maxim that places greater weight on individually negotiated remedial provisions. Despite reasonable inferences that Garland drafted the actual contract language, including the remedial provisions, the court made no mention of the usual interpretive guideline to construe ambiguities against the drafter. It ignored evidence of surrounding circumstances, including Garland’s admission that the Peevyhouses insisted upon the remedial provisions as a condition of entering the lease.339

The court’s holding, limiting recoverable damages to the diminution in value, is premised on its interpretation that the breached provisions were "merely incidental to the main purpose in view."340 The opinion seemingly recognized the property owner’s right [sic] to “do what he will with his own” . . . Where such result is in fact contemplated by the parties, and is a main or principal purpose of those contracting, it would seem that the measure of damages for breach would ordinarily be the cost of performance.341

By imputing contract intent without any individualized focus on the actual bargain or evidence of actual intent, the court’s opinion negates

336 See supra text accompanying notes 203-07, 235 (discussing Ardzonze v. Archer, 178 P. 263 (Okla. 1919)).
337 Peevyhouse, 382 P.2d at 112.
338 See ReSTATEMENT OF CONTRACTS §§ 235-36 (1932). Section 235(d) urges interpretation in light of circumstances accompanying the transaction. Section 236 enumerates the standard rules of interpretation: (b) places great weight on the “principal apparent purpose;” (c) in event of inconsistency between general and specific provisions, the specific ordinarily qualify the general; (d) and cmt. d, interpret ambiguous language more strongly against the drafter, favoring the promisee; (d) in case of inconsistencies, written provisions prevail over the printed. See also RESTATEMENT (SECOND) OF CONTRACTS §§ 202-03 (1981). Section 203(d) provides that “separately negotiated or added terms are given greater weight than standardized terms or other terms not separately negotiated.” Id.
339 See Peevyhouse, 382 P.2d at 115 (Irwin, J., dissenting); see also Record, supra note 6, at 106.
340 Peevyhouse, 382 P.2d at 114.
341 Id.
this passing nod to freedom of contract. Its interpretive efforts were pure abstractions without regard to the parties' contract intent.\textsuperscript{342}

Even on the scant record before it, the majority supplanted the parties' intent with its own views. Let us suppose that more complete information about the circumstances surrounding contract formation had been offered and admitted into evidence as relating to the main purpose of the contract. Professor Arthur Corbin recognized that the parties may, indeed, seek different objectives and thus he directs attention to "whose meaning and intention are in issue."\textsuperscript{343} As we shall see, that determination rests on the particular issue in dispute. For now, let us consider the main purpose from both sides of the transaction.

From the Peevyhouses' perspective, obtaining the promised remedial work was essential. Having observed the effects of stripmining under the standard arrangement, they agreed to forego immediate payment of $3000 in consideration for Garland's promises of basic reclamation. The leased acreage was part of their homestead estate and connected to the land on which they lived but refused to lease. When placed against this backdrop, it is clear that the Peevyhouses highly valued the future utility of the leased land. These fundamental facts relate to their main purpose, as evidence of the express bargained-for-exchange, with payment of separate valuable consideration for the remedial provisions.

From Garland Coal's perspective, the court's main purpose determination was fairly accurate. In order for the coal operator to mine efficiently and at a reasonable profit, it needed prompt and unimpeded access to the entire targeted coal bed. Because Cedar Creek impaired immediate access to the current mining site, its diversion onto Peevyhouse land was probably a strong incentive to promise whatever was necessary to obtain the lease. Careful analysis of the lease and operations map demonstrates that Garland expected to remove little coal from the Peevyhouse land, thus negating as its main purpose a profit motive to obtain maximum quantities of the Peevyhouses' coal.

The earlier trial account reflects that evidence of such issues was severely curtailed with exceptionally strict parol evidence rulings by the judge and strategic choices or incomplete fact-finding by plaintiffs' counsel. The court excluded any testimony of the personal acreage, the circumstances explaining why the remedial provisions were included, specifically what they were intended to accomplish, and the


\textsuperscript{343} See Corbin, supra note 332, § 536, at 34.
details on the intended scope of work. Although McConnell did not effectively counter Watts' objections, Judge Wallace's rulings were probably more a reflection of judicial self-interest in efficiency than a considered application of the parol evidence rule. McConnell consciously avoided any testimony about payments to the Peevyhouses and offered no evidence on either the surface damage trade-off for remedial promises or the creek diversion as Garland's primary purpose. One cannot know whether these omissions were strategic choices or inadequate understanding of the facts surrounding contract formation and performance.

Legally, this evidence could have been admitted as relevant to interpreting the parties' intent. Even under the strictest view of the parol evidence rule, it was "universally agreed" that the court should seek to put itself in the position of the parties, seeking the purpose they expected to realize through the agreement. Even Professor Williston would permit evidence of surrounding circumstances to aid interpretation, regardless of integration issues. Given the lack of a merger clause, the contract's relative informality, and the side agreement regarding surface damages, the written contract was only a partial integration. Moreover, the conflicting language in lease paragraphs 6 and 7 created a facial ambiguity that would support admission of extrinsic evidence to aid interpretation. The printed lease purported to indemnify Garland from any harm to the property

344 See Record, supra note 6, at 4-15. After the tort claim was dismissed as time barred, the judge refused any testimony pertaining to the personal acreage. He further truncated the trial by obtaining a stipulation on the fact of breach, thus limiting evidence to the question of damages. Ruling that the "contract speaks for itself," Judge Wallace would not allow Willie Peevyhouse to testify about what performance the parties expected from each remedial provision, and what it was intended to accomplish. Justice Irwin's dissent considered Cumpton's admission that the Peevyhouses insisted upon the remedial provisions despite the trial court's ruling excluding the testimony. Conceivably, the majority refused to consider this evidence because of the evidentiary ruling. See supra text accompanying notes 134-35, 164-65.

345 See Corbin, supra note 331, at 162 n.2.

346 See Williston, supra note 333, § 618, at 1198.

347 See Peevyhouse Coal Lease, infra Appendix C; see also Corbin, supra note 332, § 622, at 2; Farnsworth, supra note 103, § 7.12, at 502-06; Restatement (Second) of Contracts § 209 (1981); Restatement of Contracts § 228 (1932); Lawrence, supra note 333, at 1071. Empirical data shows that courts usually admit extrinsic evidence that aids interpretation, especially if there is an informal agreement where one party is relatively unsophisticated and the evidence helps explain the ambiguity rather than replace written provisions.

348 See Okla. Stat. Ann. tit. 15, §§ 152, 154, 155 (West 1966); see also Williston, supra note 333, § 627, at 1210-11; Restatement (Second) of Contracts § 212(b) (1981); see, e.g., Rush v. Champlin Refining Co., 321 P.2d 697, 700 (Okla. 1958) (holding that when a deed is ambiguous or uncertain on its face, parol evidence, admissions of parties, and other extraneous evidence may be used); Pollock Stores Co. v. Draper, 215 P.2d 843, 845 (Okla. 1950) (stating that where the meaning of an ambiguous written contract is in dispute, evidence of extrinsic facts "throwing light" on the intentions of the parties is admissible); Packard Motor Co. v. Funk, 245 P. 571, 574-75 (Okla. 1926) (holding that where the terms of a written instrument are ambiguous, parol evidence is admissible); Cohee v. Turner & Wiggins, 132 P. 1082, 1083 (Okla. 1913) (holding that
caused by the mining, yet the typewritten addendum explicitly promised specific work to remedy the harm. If it were also shown that Garland officials drafted the language of paragraph 7 pursuant to the parties’ negotiations, secondary rules of interpretation encourage the court to construe ambiguities or questions of interpretation against the drafter.\textsuperscript{349}

The written remedial provisions are open to varying interpretations that should have allowed for clarifying testimony. Paragraph 7b called for fills “in such manner that fences can be placed thereon and access had to opposite sides of the pits.” Paragraph 7d required leaving the creek crossings “in such a condition that it will not interfere with the crossings to be made in pits as set out in 7b.” By excluding the plaintiffs’ proffered testimony explaining the work contemplated, the engineers’ cost estimates could merely speculate on the required scope of work.

Had plaintiffs’ counsel better understood the parol evidence rule and its exceptions, they might have convinced the court to admit such evidence in aid of interpretation. However, the trial court’s evidentiary rulings bear witness to a deep-seated judicial reluctance to allow time-consuming evidence on extended background information. To the extent that courts generously admit contextual evidence to show the parties’ intent, they lose much control to streamline issues, to shape the law, and to determine outcome.

B. Material Breach or Substantial Performance?

Substantial performance is the constructive condition which, when met, entitles a service provider to recover the contract price.\textsuperscript{350} As formulated and applied, it contemplates an exchange where one party performs services to be compensated by the other. If the service provider completes performance but insignificant defects remain, it has fulfilled its essential contract duties and can recover the contract price less any damages the payor suffered from the breach.\textsuperscript{351} Equitable principles allow recovery notwithstanding the contractor’s breach.

parol evidence is admissible when there is doubt as to a written instrument’s requirements or parties’ intentions).

\textsuperscript{349} See Okla. Stat. Ann. tit. 15, § 170 (West 1966); see also Williston, supra note 333, § 621, at 1203-05; Restatement (Second) of Contracts § 206 (1981); see, e.g., Continental Oil Co. v. Fisher Oil Co., 55 F.2d 14, 16 (10th Cir. 1932) (stating an ambiguity should be resolved against drafting party); Thompson Drilling Co. v. Northern Ordinance, 73 F. Supp. 1, 2 (W.D. Okla. 1947); Bay Petroleum Corp. v. May, 286 P.2d 269, 271 (Okla. 1955); Moon Motor Car Co. v. State, 1 P.2d 358, 360 (Okla. 1931).

\textsuperscript{350} See Farnsworth, supra note 103, § 8.11, at 590-91; Restatement (Second) of Contracts § 237 (1981).

\textsuperscript{351} See, e.g., Jacob & Youngs v. Kent, 129 N.E. 889 (N.Y. 1921); Plante v. Jacobs, 103 N.W.2d 295 (Wis. 1960); see also Carol Chomsky, Of Spoil Pits and Swimming Pools: Reconsidering the Measure of Damages for Construction Contracts, 75 Minn. L. Rev. 1445, 1446-48 (1991).
Assuming substantial performance essentially fulfills the payor's principal purpose for the contract, the antiforfeiture doctrine protects the contractor's expectation interest.

Conversely, if the remaining work is significant, the defects serious, or the breach willful, courts may determine the breach was material. Material breach allows the other party to cancel the contract and seek damages. It also operates as non-occurrence of the constructive condition to payment under the contract. Accordingly, recovery by a materially breaching service provider is limited to restitution, as offset by the payor's recovery for the breach.

Substantial performance doctrine often applies to construction disputes, where the breaching contractor recovers the unpaid contract price less the amount offset to compensate the owner for incomplete work or immaterial defects. Usually the contractor's right to recover depends on a fact-specific inquiry as to whether the injured party received substantially what it sought to obtain in entering the contract, and whether its disappointed expectations can be compensated adequately with damages based on cost or diminution. Correct doctrinal application requires the court to interpret whether any of the breached provisions were material elements of the exchange that would defeat the injured party's intended purpose for the contract.

The Peevyhouse majority again glossed over interpretive questions to invoke the substantial performance damage formula. Its conclusory analysis—finding the breached provisions incidental—further enabled it to assume that Garland substantially performed. Citing Jacob & Youngs v. Kent and McCormick's damage treatise, the court used the doctrine as precedent for adopting a "relative economic test" to deny recovery for work costing an amount "grossly and unfairly out of proportion to the good to be attained." Once more, the court avoided any particularized focus on the actual bargain to determine whether the remedial provisions were material to the exchange.

352 See Farnsworth, supra note 103, § 8.12, at 590-92.
354 See Farnsworth, supra note 103, § 8.14, at 600-02.
355 Id. § 8.12, at 616-20.
356 Id. at 617-18; see also Restatement of Contracts § 275 (1932); Restatement (Second) of Contracts §§ 237, 241 (1981).
357 See Restatement (Second) of Contracts § 241(a) cmt. b (1981).
358 129 N.E. 889 (N.Y. 1921).
360 Peevyhouse, 382 P.2d at 113.
Peevyhouse is not a substantial performance case. It does not fit the pattern triggering the antiforfeiture doctrine. Garland had already received full performance from the Peevyhouses and was not at risk of forfeiting agreed compensation for work done under the contract. The parties “stipulated that all covenants and agreements in the lease contract had been fully carried out by both parties, except the remedial work mentioned above; defendant conceded that this work had not been done.”361 Instead, the Peevyhouses sought damages for their defeated contract expectations in not receiving a material part of the exchange. Garland materially breached by not performing the remedial work for which it received valuable consideration. Peevyhouse is analogous to a construction dispute where the contractor abandons without cause a half-completed building. No court would find this constitutes substantial performance and require the owner to pay the remaining contract price, less any diminution in value between the completed and half-completed structure. Unless the owner receives a substantially complete and serviceable building, substantial performance doctrine does not apply.362 Garland’s failure to perform essential duties deprived the Peevyhouses of the benefit they reasonably expected to obtain from the agreement. Other factors, including Garland’s willful breach and plaintiffs’ risk of undercompensation further warrant a finding that Garland materially breached.363 In this situation, the nonbreaching owner should recover the reasonable costs to complete. This amount is less than the owner’s probable losses from having an incomplete and unusable structure.364

C. Nonperformance Excused by Mistake or Impracticability

The record includes limited testimony and a brief but tardy appellate argument that impracticability excused Garland’s failure to complete the remedial work.365 Citing these excerpts, some commentators suggest that unexpected difficulties excused Garland’s liability for breach.366

361 Id. at 111.
362 See FARNSWORTH, supra note 103, § 8.12, at 590-93.
363 See RESTATEMENT (SECOND) OF CONTRACTS § 241(b), (c) (1981); see also FARNSWORTH, supra note 103, § 8.12, at 590-93.
364 See FARNSWORTH, supra note 103, § 12.12, at 906-07; see also Farnsworth, supra note 178, at 1145, 1160-75.
365 See supra text accompanying notes 161-69; see also supra notes 84-90 and accompanying text.
Contract duties are generally absolute, requiring that each party perform as promised or respond with damages. A contract assures the parties they will receive the bargained-for performance at the agreed price, or money damages as an adequate substitute for defeated expectations. Absent such a provision, the law of mistake or impracticability will occasionally excuse a party’s liability for breach of nonperformance. Modern commentators contend this excuse is rarely appropriate. To establish mistake or impracticability, the party claiming excuse must show that the mistake or supervening event went to a basic assumption of the contract, that it severely increased the burden of performing, and that the burdened party did not bear the risk of its occurrence. Excuse analysis focuses on access to information and other considerations relevant to the bargain when it was made. Upon evaluating the available data in light of applicable doctrine and policy considerations, there is no basis to excuse Garland from its liability for breach.

Two related factual matters might raise issues of mistake or impracticability to excuse Garland’s breach of the remedial provisions: (1) the presence and location of sufficient coal on Peevyhouse land; and (2) the location of the northern Peevyhouse boundary. At trial Garland presented meager evidence that could support a possible excuse, but it did not expressly assert this defense. Nor were the issues directly raised on appeal to the supreme court. Garland first alluded to impracticability after the court’s original decision, in its brief opposing plaintiffs’ second rehearing petition.

Cf. Richard A. Posner, Economic Analysis of Law 102-04 (4th ed. 1993) (making insurance analogy). Other commentators briefly consider and reject possible excuse. See, e.g., Chomsky, supra note 351, at 1500-01 (suggesting that increased cost of restoration was the result of error by Garland rather than the occurrence of unanticipated events); George Cohen, The Negligence-Opportunism Tradeoff in Contract Law, 20 Hofstra L. Rev. 941, 981-82 (1992) (arguing no relief for mistake because Garland was both the least-cost-avoider and the most-likely-opportunistic); David Schoenbrod, The Measure of an Injunction: A Principle to Replace Balancing the Equities and Tailoring the Remedy, 72 Minn. L. Rev. 627, 670 n.201 (1988) (rejecting equitable defense of mistake because Garland explicitly accepted the inconvenience of which it later complained).


See supra text accompanying notes 280-82.
When Garland prepared to quit the site, Burl Cumpton told Willie Peevyhouse that the coal depth dropped appreciably on his land and that current market prices would not cover the increased costs of removal. At trial, Cumpton testified that some of the coal was thin and along a fault. If it were not thin, Garland "probably" would have made at most two additional cuts on the Peevyhouse property. Garland had the equipment and ability to comply with the remedial provisions. Because, however, it could not economically continue mining on the Peevyhouses’ forty acres, Garland could not establish the required fence line “without putting in a very useless and expensive fill.”

The property line dispute first arose at trial. Garland contended that the northern Peevyhouse boundary abutting the Nolen land was sixty-five feet north of that claimed by plaintiffs. Because the mining stopped earlier than expected, the promised fills along the property lines would intersect in the water but would not provide the Peevyhouses with access to their land beyond the pit. Garland apparently interpreted paragraph 7b as requiring fills only to the point of intersection, so that the L-shaped levee would intersect in the water, but not connect with the land. Had it continued mining until the north side of the pit reached the property line, it could have established a fence line along the spoil bank without constructing a second fill. Garland narrowly interpreted the required scope of work and omitted from its estimates the $8000 cost for what it deemed a useless levy. By excluding the fills, Garland estimated it would cost $400 to grade the spoil banks and stabilize the highwalls, its only remedial duties. It offered no excuse for avoiding those obligations.

1. Basic Assumption to the Contract.—The claimed mistake of fact or changed circumstances must relate to a basic assumption on which the contract was formed. This elusive term considers

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372 See supra note 86 and accompanying text.
373 See supra text accompanying notes 168-69.
374 See supra text accompanying note 167.
375 See supra text accompanying note 168.
376 See supra text accompanying notes 148-49.
377 See supra text accompanying note 168. Although this would save Garland money, the contract clearly anticipated construction of two fills. Thus, any cost savings would benefit Garland beyond its initial expectations.
378 See supra text accompanying note 150.
379 See supra text accompanying note 151.
380 The mistake relates to a fundamental misunderstanding of an existing fact when the contract was made. See Farnsworth, supra note 103, § 9.1-9.2, at 94-100; Williston, supra note 333, § 1544, at 94-95. Impracticability doctrine may afford relief if a supervening event or contingency made the agreed performance impracticable where its non-occurrence was a basic assumption on which the contract was made. See U.C.C. § 2-615 (1978); Restatement (Second) of Contracts § 261 (1981).
whether the incomplete information so altered the essential nature of the bargain such that without the assumption, the parties would not have traded, even with a change in terms.\textsuperscript{381} That is, had perfect information on this issue been available at the time of contract, the parties would not have been able to reach mutually acceptable terms. Perfect information on the critical assumption would leave no positive gains to the trade.\textsuperscript{382} Was there a basic assumption that the Peevyhouse land would contain a minimum quantity of coal accessibly situated? If so, was that assumption mistaken? Did the parties further assume that Garland would continue mining until the spoil banks reached the northern property line, so Garland need only construct one fill? To each question, the answer is no.

Under the standard form lease, Garland had no duty to remove a minimum quantity of coal or pay a minimum royalty. It had few future obligations: pay royalties for coal removed beyond the $2000 advance, survey the land, and perform the remedial work. Only the remedial work remained unperformed and was the basis for liability. Established precedent found that either mistake or impracticability could excuse a lessee-mining operator from its payment obligation when the ore proved insufficient for commercially feasible mining. Courts granting relief construed the lease agreements as premised on an assumption that the land contained an adequate supply of accessible mineral deposits.\textsuperscript{383} Unless the operator was legally excused, contract enforcement would require the operator to pay the minimum royalty even though it could not remove the ore, and thus get nothing in return for the royalty. As a result, the mistaken assumption greatly increased one party’s burden of performance and conferred a relative gain on the other.

Because Garland owed no future payment except for actual coal removed, these cases are distinguishable. Garland had already mined a sufficient quantity of coal from the Peevyhouse land to recoup its $2000 advanced royalty. Excuse would relieve Garland from performing the remedial work, for which the Peevyhouses had effectively paid $3000 separate consideration. Although a shortage of accessible coal might have increased Garland’s cost to perform the remedial work, it would produce no correlative gain to the Peevyhouses. Suppose for

\textsuperscript{381} See RESTATEMENT (SECOND) OF CONTRACTS, Ch. 11 Introductory Note to impracticability sections: “Determining whether the non-occurrence of a particular event was... a basic assumption involves a judgment as to which party assumed the risk of its occurrence... The fact that the event was unforeseeable is significant as suggesting that its non-occurrence was a basic assumption.” See also Rasmusen & Ayres, supra note 369, at 323.

\textsuperscript{382} See Rasmusen & Ayres, supra note 369, at 323.

the moment that sufficient accessible coal was a basic assumption of
the contract. Analysis of test borings on Garland's operation map
shows no appreciable difference in the coal depth on the Peevyhouse
land as compared to other properties it mined more extensively. This
data casts serious doubt on whether there was any factual basis
for a mistake or impracticability claim. Cumpton's references to a
fault and coal thickness cannot now be assessed without drilling test
boreholes. Absent these problems, Cumpton stated they would
have made only another cut or two. Even assuming a shortage of ac-
cessible coal on the Peevyhouses' land, does this so alter the essential
exchange that the parties would not have made any agreement? Gar-
land probably signed the lease reasonably believing that it would mine
enough coal to recoup the advanced royalty and that it could divert
Cedar Creek onto Peevyhouse land. Garland got what it bargained
for.

Nor did the parties contract upon a basic assumption that Gar-
land would construct one fill, with the other fence built on the prop-
erty line alongside the spoil banks. Specific terms in the typewritten
addendum show that the parties were uncertain about the precise
boundaries; nevertheless, Garland promised to "make fills in the
pits dug on said premises on the property lines in such manner that
fences can be placed thereon and access had to opposite sides of the
pits." Paragraph 7d again refers to plural fills, requiring Garland to
"leave the creek crossing... in such a condition that it will not inter-
fere with the crossings [fills] to be made... [per] 7b." It appears
the parties had no clear sense how far Garland would mine the
Peevyhouse land, but they knew that one or more pits might cross the
property lines. These provisions define Garland's remedial obliga-
tions should that happen. Reasonably interpreted, they require Gar-
land to construct fills along each property line in order to allow access
to the land beyond and to contain the diverted creek so it does not
interfere with those fills. The language appears absolute, that the
number of fills and distance to be covered was not an essential under-
pinning for the exchange. Garland, which drafted the remedial provi-
sions, gave no indication that its promises were based on such a
limited scope of work.

2. Result: Material Effect on the Exchange.—Mistake and im-
practicability doctrines seldom excuse liability for breach. They are
limited exceptions to the maxim, pacta sunt servanda ("agreements

384 See supra notes 87-90 and accompanying text.
385 See Friedman Letter, supra note 38.
386 In paragraph 7h, Garland promises to have the land surveyed before beginning to dig coal.
387 See Peevyhouse Coal Lease, infra Appendix C (emphasis added).
388 Id.
are to be observed”). A mere increase in one party’s cost of performance will not suffice. The articulated standard varies by the specific excuse claimed.

The most common relief for mutual mistake requires “the resulting imbalance in the agreed exchange is so severe that [the burdened party] . . . can not fairly be required to carry it out.” For unilateral mistake, where the other party did not know of or cause the mistake, “the consequences must be so grave that enforcement of the contract would be unconscionable.” In the typical case of relievable mistake, the increased burden to one results in a corresponding gain to the other. Impracticability doctrine sets no clear standard on how much of increased cost or burden is needed for relief; judicial approaches vary widely. Some courts approach the question arithmetically, requiring cost increases several times over original projections. Other courts and commentators take guidance from the Uniform Commercial Code to assess whether the unforeseen disruptive event “alters the essential nature of the performance.” By considering the degree to which performance has been made different, courts can evaluate whether the disruptive event has rendered performance “so vitally different from what was anticipated that the contract cannot be reasonably thought to govern.”

For this analysis, let us assume: (1) that a mistake or destructive event defeated a basic assumption to the contract, (2) that the parties contracted assuming there was sufficient accessible coal that Garland could continue mining indefinitely, and (3) that inadequate access to coal forced Garland prematurely to stop mining because it could not economically continue.

Standing alone, this disruption would leave a smaller than expected amount of overburden for Garland’s use in constructing the

389 See Farnsworth, supra note 103, § 9.1 n.1, at 648.
390 Id. § 9.6, at 682 n.23.
391 See Restatement (Second) of Contracts § 152 cmt. c (1981).
392 Id. § 153 cmt. a.
393 Id. § 152 cmt. c. Unexpected burdens that do not produce a corresponding advantage are considered under impracticability doctrine. Id.
394 See Farnsworth, supra note 103, § 9.6(a); Halpern, supra note 369, at 1134-40.
395 See Mineral Park Land Co. v. Howard, 156 P. 458, 459 (Cal. 1916) (noting that further excavation was possible only at “prohibitive cost, that is, at an expense of ten or twelve times as much as the usual cost per yard”); see also Richard Speidel, Excusable Nonperformance in Sales Contracts: Some Thoughts About Risk Management, 32 S.C. L. Rev. 241, 267 (1980) (discussing cases “preoccupied with the arithmetic of loss”).
396 See U.C.C. § 2-615 cmt. 4 (1991); Halpern, supra note 369, at 1139; Speidel, supra note 395, at 266.
397 See Waldinger Corp. v. CRS Group Eng'rs, Inc., 775 F.2d 781, 786 (7th Cir. 1985) (quoting Eastern Airlines, Inc. v. McDonnell Douglas Corp., 532 F.2d 957, 991 (5th Cir. 1976)).
398 Whether called mistake or impracticability, factual similarities often blend the two doctrines.
promised fills. The record is silent on whether this affected the cost to perform. Because the pit represents the last cut, and presumably cuts are comparable in size, the precise location where the mining stops does not affect the distance across the pit. Had Garland made additional cuts, it would have had more overburden and spoil banks to grade. The reduction in available fill material would have been offset by the expanded scope of work required, and would have negligible effect on performance costs.

Garland's nascent impracticability defense must have focused on the increased costs of constructing fills along both property lines. The repeated contractual reference to plural fills rendered highly improbable a basic assumption that Garland would stop mining on the northern boundary so it needed to construct just one fill. A more reasonable interpretation would have required fills along any property lines that intersect a pit, for the full distance across the pit. Given where Garland stopped, performance would have required two fills, with that on the east-west property line to span the full distance across the pit.

Would the shortage of accessible coal increase Garland's cost to perform enough to warrant excuse? Garland estimated a cost of $8000 to construct fills along the property lines determined by its surveyor. Assume those lines are accurate; it would cost approximately twenty percent more, or $9600, to extend the east-west fill sixty-five feet, so it connects with land on the south. This minor price increase certainly would not qualify for excuse. Because Garland excluded any fills from its cost estimates, it also excluded any work necessary to protect fills from the diverted creek. By contrast, plaintiffs' expert estimated that constructing a channel to contain the diverted creek would cost about $15,000. There is no indication this amount would fluctuate based on the property line location. Thus, it was irrelevant to excuse analysis.

Garland's impracticability defense seems geared more to the loss of a wishful cost-savings, rather than a severe and unexpected increase in the cost to perform. Garland specifically promised to construct fills allowing access to land beyond the pit, and to take necessary measures to protect those fills from the diverted creek. It cannot later complain that a postulated shortage of accessible coal prevented it from saving the costs of constructing one fill. By contending that the L-shaped fill would be useless, and thereby justifying elimination of all work promised in paragraphs 7b and 7f, Garland's postbreach argument boldly sought to revise its original contract duties.

399 Garland did not plan to truck in any topsoil for regrading. See Record, supra note 6, at 76.
400 See supra text accompanying notes 65-66.
401 This item instead involves a question of contract interpretation.
3. Risk Allocation.—Excuse doctrine can excuse liability for breach only if the party did not bear the risk of mistake or the increased burden of performance caused by the disruptive event. Section 154 of the Restatement of Contracts (Second) provides:

A party bears the risk of mistake when

(a) the risk is allocated to him by agreement of the parties, or

(b) he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient, or

(c) the risk is allocated to him by the court on the ground that it is reasonable in the circumstances to do so.\[^{402}\]

Similarly, impracticability doctrine allocates risk based both on the express contract provisions and implied intent to perform when a disruptive event was foreseeable but not expressly excused.\[^{403}\] Where the obligor reasonably could foresee occurrence of a contingency that would substantially increase the cost of performance, but did not negotiate an escape provision to discharge obligations should it occur, one may infer the obligor assumed an absolute obligation to perform. Courts often allocate risk to the party who has agreed to perform and who generally is deemed the superior risk bearer.\[^{404}\] The obligor is often in a better position to project the estimated performance costs, the likelihood of encountering something that makes performance more difficult, and the magnitude of loss that could result if that risk materialized.\[^{405}\]

Even if a disruptive event is both unforeseen and unavoidable, courts may deny relief because the obligor is the cheaper insurer. By way of example, Judge Richard Posner evaluates a contract to drill for water. Although unexpected soil conditions make it impossible to perform at the projected cost, the contractor is not excused. Even if the difficult conditions could not be anticipated, the contractor is better able to predict the likelihood of subsoil conditions that will make performance more difficult. The contractor also may be able to self-insure at a lower cost because it engages in widespread drilling activities. By contrast, the obligee has concern only with drilling on this land and cannot match the obligor’s technical expertise and economical access to information on the likelihood of difficulties and possible effects on performance costs.\[^{406}\] Allocating to the contractor the risk of mistake or impracticability would also deter opportunistic behavior, where the contractor claims a feeble excuse as an attempt to rewrite

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\[^{402}\] See Restatement (Second) of Contracts § 154 (1981).

\[^{403}\] See Halpern, supra note 369, at 1140-44.

\[^{404}\] See Kronman & Posner, supra note 370, at 114-38; Posner, supra note 367, at 104-06.

\[^{405}\] See Posner, supra note 367, at 104-06.

\[^{406}\] Id. at 105.
what is now an unfavorable contract. A court would most likely find that Garland bore the risk of increased performance costs, both by contractual risk allocation and because it is the superior risk-bearer. By its terms, paragraph 7 is cast in absolute language, granting Garland no relief from its remedial obligations should the coal prove scarce. Although Garland apparently drafted the final language and reasonably could have determined whether its performance costs might dramatically increase if that occurred, Garland did not seek contractual relief from its obligations. Assuming Garland initially intended to perform the remedial work, it might have feared such a provision would kill the deal. Since the Peevyhouses insisted upon the remedial provisions, they probably would not easily agree to excuse Garland from performing.

Garland presumably calculated the projected costs of performance, as weighed against the benefits to be obtained. It avoided paying $3000 for surface damages, gained undetermined value from the creek diversion, and obtained unimpeded access to mine the area. Assuming that it originally intended to perform, one must infer that the estimated cost of the remedial work was less than the value of benefits Garland expected to obtained from the lease. That the agreement contemplated one or more pits would remain on the Peevyhouse land proves that Garland did not intend to mine all of the leased sixty acres. Assuming Garland projected that performance costs exceeded $3000, it could have decided the intangible benefits from creek diversion justified the expenditure. Garland should be assigned the risk of increased performance costs.

Without question, Garland was the more efficient insurer. As an experienced surface mining operator with widespread operations, technical skill, and equipment, it had the capability to predict the costs of performing the promised remedial work under the best and worst of possible coal conditions. Garland in fact conducted test borings to predict subsurface coal conditions. Only at far greater expense could the Peevyhouses obtain comparable information. Logically, they had no reason to care what it would cost Garland; from their perspective, this was a fixed price contract in which Garland assumed an absolute obligation to do the specified work.

D. Remedial Issues

As demonstrated thus far, one could use these materials to survey the landscape of contracts law, giving due regard to ethics and lawyering skills. Above all else, however, Peevyhouse is about remedies.

407 See Cohen, supra note 366, at 981.
408 See Area Mining Map, supra note 38. There is, however, no indication as to when this information was available relative to the beginning of operations. Funston Letter, supra note 49.
Remedial issues initially command our attention and spark debate on the policy and economic considerations underlying contract law. Working from the majority's abstract but erroneous statement of facts, *Peevyhouse* can generate lively classroom debate producing strong arguments for both sides that evenly divide the class. These classroom discussions might also serve a cynical purpose, to strip first-year students of their passionate nonlegal views that might be regarded as irrelevant, liberal, or left thinking.\(^{409}\)

This Article might be viewed as a spoiler, unearthing facts that depict instead a gross miscarriage of justice. Have I now rendered the case obsolete and uninteresting? Hopefully not. Instead, this Article seeks to enrich classroom instruction by merging abstract issues of doctrine, theory, and policy with complete textual analysis, also giving rise to practical questions about competent and effective representation.

The *Peevyhouse* majority limited damages to diminution by finding that the breached provisions were collateral to the contract and that the lessor's minimal economic benefit from full performance was grossly disproportionate to the cost of performance.\(^{410}\) For years commentators have “damned, praised and rationalized” this holding.\(^{411}\)

The court's holding, somewhat appealing in the abstract, bore little relation to reality. The causal factors are explored elsewhere.\(^{412}\) This subpart analyzes the remedial questions against the backdrop of traditional remedies doctrine as informed by contract and economic policy considerations. As a normative matter, what remedy best furthers the diverse contract policies of stability and efficiency? That remains an open question, with cost to complete, restitution, and specific performance the viable options. One thing is clear: the diminution measure is wrong. It creates incentives for parties to make bold promises, never intending to perform, and encourages cavalier decisions to breach whenever the promisor's actual performance would likely cost more than the economic benefit to the promisee. These incentives undercut fundamental contract policies promoting both the stability of contract expectations and economic efficiency of exchanges.

*Peevyhouse* critics abound, including some notable legal economists. Aside from questions of excuse, few commentators defend either the result or reasoning. Most rationalizations equivocate, tending to damn with faint praise. Factual explanations for the diminution measure point to uncertainties about the value of restoration to plain-


\(^{410}\) *Peevyhouse*, 382 P.2d at 114.

\(^{411}\) Linzer, *supra* note 178, at 135.

\(^{412}\) See *infra* text accompanying notes 520-48.
tiffs and suggest the court deemed their demand for the cost measure as evidence of opportunistic bargaining behavior. Indeed, awarding the cost measure gave no assurance it would be used to obtain substitute performance. The net recovery, after deducting attorneys' fees and costs, could not fund complete restoration. The Peevyhouses might instead use the money for a dream vacation to Hawaii. Apart from these plausible justifications for the decision, few commentators endorse the decision on policy grounds. Professor Margaret Kniffin proclaims it authority for limiting disproportionate or unconscionable recovery.

Meanwhile, many critics condemn both the result and the reasoning. Legal economists Robert Cooter and Thomas Ulen state that it is “difficult to imagine a more wrong-headed and outrageous opinion . . . . Clearly, the outcome is unfair, but it is also wildly inefficient. What is particularly galling is the majority’s inaccurate and pretentious use of economics to justify their outrageous result.” Stewart Macaulay described the “Wizard of Oz principle of jurisprudence” in which classical contract theory maintains an illusion of protecting contract expectations. In the real world, however, “courts frequently find that a stronger [party] has breached a contract, but so limit the remedy awarded the weaker that the victory is hollow.”

**1. Economics of the Exchange Then and Now.—**Ardizonne v. Archer foreshadowed the significance that the Oklahoma Supreme Court would place on relative economic benefits to the exchange.

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415 Kniffin, *supra* note 259, at 264-65 (indicating that, under same facts, Professor Kniffin would support restitution for the Peevyhouses).


419 Id.

420 178 P. 263 (Okla. 1919).

421 See *supra* text accompanying notes 203-06, 235-36.
Litigation deficiencies left the *Peevyhouse* court with an incomplete or inaccurate understanding of the parties' exchange. Suppose these matters were fully litigated. The economics to the exchange might be depicted as follows, allowing latitude for credibility judgments and valuation difficulties.

The Peevyhouses bought land in 1947 for $12 per acre; in 1954, when the parties entered the lease, each acre was worth $50. Accordingly, their 120-acre ranch was worth $6000 before the mining. The Peevyhouses' negotiation behavior in rejecting the customary advance surface damage payment signaled that they valued the sixty leased acres for more than its $3000 market value. Just how much more, in dollar terms, will remain a mystery. Nevertheless, the Peevyhouses clearly communicated their subjective (or idiosyncratic) values to Garland, which could somewhat anticipate their probable loss from breach and hence gauge appropriate breach precautions. Moreover, Garland representatives knew they were not rich and yet rejected a lucrative cash payment readily accepted by their neighbors. Because present cash is worth more to poorer persons, Garland must have known at the time of contracting that the Peevyhouses valued the future remedial performance at a sum much higher than $3000 in present value.

Let us assume that Garland bargained rationally and in good faith, fully intending to perform. Having estimated the restoration costs, Garland would enter the exchange only after concluding the net benefits outweighed the total performance costs. Theoretically, Garland was indifferent to paying the Peevyhouses at the time of contract formation an amount equal to the restoration costs discounted to present value, or to promise future performance and risk fluctuations in the actual cost. By promising to do the work, Garland avoided immediate cash outlay of $3000 for surface damages and deferred payment of the projected costs until expiration of the lease term. In return for Garland's promises and $2000 in advanced royalties, the Peevyhouses granted permission for creek diversion and coal removal.

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423 See A. MITCHELL POLINSKY, *AN INTRODUCTION TO LAW AND ECONOMICS* 124 (1983) (wealth effects occur when one places a high value relative to one's wealth on the loss or gain in question); see also Michael D. Belsley, *Peevyhouse v. Garland Coal & Mining Co.: Why the Court's Application of Economic Analysis was Fatally Flawed* 18 (Spring 1994) (unpublished manuscript prepared for Professor David Haddock's Advanced Law and Economics class, Northwestern University School of Law).
425 Belsley, *supra* note 423. After discounting the plaintiff's 1960 trial demand of $25,000 to its 1954 (present) value, Belsley concluded that Garland and the Peevyhouses would have settled upon immediate payment of $19,588 in lieu of Garland's restoration promises. The Peevyhouses would have been free to spend the money as they wished.
Under the terms of exchange, the Peevyhouses effectively paid in advance for the remedial work.

Consider next the relative economics when the lease expired. Garland removed at least 12,500 tons of coal, which it sold for an estimated net profit between $24,000 and $34,500.\textsuperscript{426} In exchange for the coal and valuable right of creek diversion, Garland paid the Peevyhouses a total of $2500 in royalties. Garland stood to gain handsomely from breach if it could both avoid doing the remedial work and paying the Peevyhouses the cash to obtain substitute performance. In postbreach negotiations, Garland essentially offered to pay $3000 in restitution for the foregone surface damage payment, thus leaving the Peevyhouses in a position comparable to their neighbors who accepted the standard default terms. The Oklahoma Supreme Court's diminution award conferred on Garland approximately $28,000 in unbargained-for gain representing avoided performance costs.\textsuperscript{427}

While Garland captured significant gains from its breach, the Peevyhouses' special bargaining efforts left them worse off than they would have been if they accepted the default provisions. Had they refused to bargain with Garland, their untouched 120 acres would have been valued at about $7200 in 1960.\textsuperscript{428} Instead, their total farm was worth perhaps $4260.\textsuperscript{429} If restored today, it could be worth around $45,000.\textsuperscript{430} The remedial work would cost somewhere between $52,000 and $96,000.\textsuperscript{431}

2. Doctrinal Structure for Protecting Contract Expectations with Money Damages.—A central tenet of contract doctrine aims to protect the injured party's defeated expectations with money damages as a substitute for the promised performance.\textsuperscript{432} That damage liability is typically the only legal consequence of breach reflects both amoral Holmesian positivism\textsuperscript{433} and a "materialistic society [that] considers money an acceptable substitute for most recognized interests."\textsuperscript{434}

\textsuperscript{426} See supra text accompanying note 81.
\textsuperscript{427} Belsley, supra note 423, at 18-19. Based on estimated $25,000 restoration costs and $3000 surface damage payment. Garland's defense costs somewhat lessened its total gain from breach.
\textsuperscript{428} Using Garland's damage figures, undisturbed land was then valued at $60 per acre.
\textsuperscript{429} Because mining stripped $49 per acre, it left $11 per acre value in the leased property, or $660 market value. In theory, the Peevyhouses' 60 personal acres retained its full value and was then worth $3600.
\textsuperscript{430} See supra note 300 and accompanying text.
\textsuperscript{431} See supra text accompanying note 301.
\textsuperscript{432} RESTATEMENT (SECOND) OF CONTRACTS § 347(a) (1981).
\textsuperscript{433} See supra text accompanying note 176.
Traditional rubric states that, where money damages are deemed adequate, equity cannot intervene to grant specific performance.\textsuperscript{435}

The Second Restatement creates a hierarchy of remedial options designed to protect the expectation interest. This primary remedial goal seeks to protect the injured party's benefit of the bargain with "a sum of money that will, to the extent possible, put [it] in as good a position as [it] would have been in had the contract been performed."\textsuperscript{436} Since defendant's breach deprived plaintiff of the actual bargained for performance, money damages theoretically aim to substitute for the "pinnacle of achievement" plaintiff would have obtained from the promised performance. Accordingly, the preferred expectation measure focuses on the injured party's subjective loss in value caused by the breach.\textsuperscript{437} Commentary directs focus on the injured party's "particular circumstances" to determine the actual lost value of performance. It explicitly rejects use of "some hypothetical reasonable person or on some market" as a yardstick.\textsuperscript{438} Because of the particularized focus and necessary guesswork involved, this supposedly preferred measure is also the most costly for courts to implement.\textsuperscript{439} A wealthy injured party can prove with certainty its subjective loss in value by purchasing substitute performance from a third person and presenting the bills in court. In cases like Peevyhouse, where plaintiffs do not (or cannot) purchase a comparable substitute, courts are left to speculate on their subjective loss in value.\textsuperscript{440}

\textsuperscript{435} See Douglas Laycock, The Death of the Irreparable Injury Rule 5 (1991) (arguing that courts "constantly manipulate" the definition of irreparable injury and adequacy of legal remedy to achieve sensible results). Laycock further seeks to refute the supposed preference for money damages, which he claims courts prefer only in limited categories where they are equivalent to specific relief, to replace fungible goods or routine services in an orderly market. Id. at 4-5.

\textsuperscript{436} Restatement (Second) of Contracts §§ 347 cmt. a, 344(a) (1981).

\textsuperscript{437} The general Restatement expectation provision is designed to approximate the effect of breach on plaintiff's actual post-breach circumstances as compared to what plaintiff expected to receive with full performance. Section 347 provides:

\textsuperscript{438} Id. § 347 cmt. b.

\textsuperscript{439} Polinsky, supra note 423, at 35.

\textsuperscript{440} Ulen, supra note 250, at 361 n.67. Douglas Laycock explains the problem by emphasizing the substitutionary nature of money damages: money is substituted for plaintiff's original entitlement to contract performance with the fact finder substituting its valuation for that of the plaintiff. Laycock, supra note 435, at 13-16.
While contract doctrine supposedly prefers to compensate plaintiffs' subjective loss in value, litigants can seldom prove this measure with the required certainty. Thus, they are relegated to cost or diminution as alternative measures to protect their lost expectancy. Lacking reasonably certain proof of subjective loss, Section 348(2) of the Second Restatement allows a plaintiff to recover at most the reasonable costs of repair or completion, or at least the diminution in market value caused by the breach.\textsuperscript{441} Both measures are imprecise. The cost measure might give the plaintiff a windfall exceeding actual loss, while punishing the defendant for what might have been an efficient breach.\textsuperscript{442} Diminution reverses the situation, risking undercompensation to the plaintiff while possibly rewarding the defendant's breach. The Restatement formulation prefers the cost measure, providing that sum "is not clearly disproportionate to the probable loss in value" to the injured party.\textsuperscript{443}

\emph{(a) Diminution in market value as token substitute for subjective loss in value.}—Damages for diminution in value are deemed adequate protection for defeated contract expectations. Diminution represents the lowest possible loss in value to the injured party who might not specially value the property but could sell it on the open market.\textsuperscript{444}

In theory, diminution fully protects the owner's expectation interest, measured with an objective market value, by combining proceeds from the sale of the defective property with damages for lost market value and obtaining an equivalent substitute on the open market. It adequately protects the expectation interest only in those rare instances where market value is a fair substitute for the owner's valuation, such as when the owner had imminent plans to sell the

\textsuperscript{441} Restatement (Second) of Contracts § 348(2) provides:

If a breach results in defective or unfinished construction and the loss in value to the injured party is not proved with sufficient certainty, he may recover damages based on

(a) the diminution in the market price of the property caused by the breach, or

(b) the reasonable cost of completing performance or of remedying the defects if that cost is not clearly disproportionate to the probable loss in value to him.

\textbf{Restatement (Second) of Contracts} § 348(2) (1981). Compare with Restatement of Contracts § 346(1)(a) which states:

\text{damage measure for builder's breach of construction contract awards cost to complete "if possible and does not involve unreasonable economic waste," and otherwise diminution in value.}

\textbf{Restatement of Contracts} § 346(1)(a) (1932).

\textsuperscript{442} That is, one where the breaching party can fully compensate the injured party for its defeated contract expectations and still achieve a net gain from the breach. \textit{Cooter & Ulen, supra} note 417, at 289-92.

\textsuperscript{443} \textbf{Restatement (Second) of Contracts} § 348(2)(b) (1981).

\textsuperscript{444} \textbf{Restatement (Second) of Contracts} § 348 cmt. c (1981).
The theoretical justification overlooks substantial transaction costs from both the sale and contract enforcement, not to mention the personal disruptions from changing one's homestead. Diminution persistently risks undercompensation whenever the injured party values performance at a price above market. The diminution measure may confer a windfall on breaching contractors, whose breaches are rewarded through avoided costs of performance.

The Restatement formulations theoretically prefer the cost measure over diminution except when it results in "unreasonable economic waste" or recovery "clearly disproportionate to the [injured party's] probable loss in value . . . ." This policy preference promotes contract stability, encouraging full performance on both sides. The diminution alternative directs courts to consider whether a plaintiff's likely subjective harm from breach is disproportionately small in relation to cost, to avoid punishing a defendant's breach with a windfall recovery for the plaintiff.

Theory notwithstanding, courts often conservatively limit plaintiff's recovery to diminution, making assumptions about (or distorting) the record to justify the result. The diminution measure is often merely a token remedy that preserves the illusion of protected expectations, while systematically undercompensating plaintiffs. Peevyhouse is such a case. The court conceded there was no economic waste, defined as the expense of tearing down and rebuilding a completed structure. Nevertheless, it constructed a new test of "relative economic benefit" and assumed facts necessary to limit the Peevyhouses' recovery to $300, the amount by which Garland's breach diminished the current market value of the leased acreage. Despite Garland's undisputed breach and the nominal Peevyhouse victory, the Peevyhouses received nothing after the litigation costs were deducted. Even with no enforcement costs, the diminution measure for sixty acres was inadequate to enable purchase of a comparable 120-acre homestead. Under the circumstances, any assertion that

445 See, e.g., Groves v. John Wunder Co., 286 N.W. 235, 241 (Minn. 1939) (Olson, J. dissenting) (stating that "it seems clear that what the parties contracted for was to put the property in shape for general sale").


447 See supra note 427 and accompanying text.


449 See 382 P.2d. at 113-14, interpreting OKLA. STAT. tit. 23, §§ 96-97 to "prevent plaintiffs from recovering a 'greater amount in damages for the breach of an obligation' than they would have 'gained by the full performance thereof.' " See also RESTATEMENT OF CONTRACTS § 346 cmt. b (1932).
the diminution measure adequately compensated for their defeated expectations is pure fiction.

In resorting to the diminution measure, the court ignored strong indications in the record of plaintiffs' higher subjective value for the land. It was evident the leased parcel joined land on which plaintiffs lived. Plaintiffs' complaint alleged the entire farm lost value from the mining. Willie Peevyhouse's testimony clearly identified the property's homestead character, which remained unaffected by the court's ruling limiting testimony to the leased acreage. Almost by definition, homestead property embodies personal, moral, and aesthetic concerns that distinguish it from real estate held for commercial purposes. From these two points, the court reasonably should have inferred that the mining impaired both the going concern value of the entire farm and the plaintiffs' personal valuation of their homestead. Finally, cursory review of the contract vividly showed that the parties specially bargained for the remedial provisions, rejecting the usual deal given to landowners. While deficiencies in the trial record concealed the underlying consideration and bargaining context, the record reasonably established that the Peevyhouses rejected the standard or "off the rack" contractual arrangement, insisting upon remedial work that protected their idiosyncratic moral and aesthetic values. A political cynic might argue that such manipulation of the record occurs regularly when needed to protect the economic interests of important state industries.

As an objective, market-based measure compensating for defeated expectations, diminution consistently undercompensates most landowners. Traditional principles of valuation dictate that courts focus on value to the specific individuals whose interests were harmed. Where general legal doctrine seeks to indemnify a claimant for harm to property, equating the owner's value with market price does violence to the concept of value. Too often, courts' judgment on what counts as value heavily discounts those personal, moral,

450 See, e.g., OKLA. STAT. ANN. tit. 31, § 1 (West 1991), which is typical of the generous protection western states' exemption statutes confer on real property used as personal residence and adjoining farm or ranch land. See also Chomsky, supra note 351, at 1462-63; Richard Schepp, Note, A Call for Recognition of Owners' Subjective Valuations in Residential Construction Defect Cases, 1989 Wis. L. Rev. 1139.

451 JAMES BONBRIGH, THE VALUATION OF PROPERTY 76 (1937) (noting that value of organic whole is greater than the sum value of parts disconnected from whole); Fortgang & Mayer, supra note 244.

452 See generally Goetz & Scott, supra note 243 (discussing "off the rack" or default rules and noting opportunity for atypical parties to bargain for customized provisions that further idiosyncratic values).

453 BONBRIGH, supra note 451, at 15.

454 Id. at 16, 84.
and aesthetic interests important to individuals entering a market exchange.\textsuperscript{455}

Moreover, the diminution measure considers only the effect on current market value, ignoring the potential for future use and appreciation that plaintiffs would gain from full performance. It is possible that the restoration might only have increased the then-present market value of the leased acreage by $300. Because the Peevyhouses planned to keep the land, they would also have obtained increased productivity and future appreciation from the improved condition. The diminution measure eliminated the value of such ongoing and future benefits expected from contract performance.

\textbf{(b) Cost to complete: Sometimes risk of overcompensation.}—In theory, courts use the cost or diminution measures only when the injured party cannot adequately prove the money equivalent of subjective loss in value caused by the breach. Both alternative measures are inaccurate. The diminution measure risks undercompensating the injured party while conferring an unbargained-for gain on the breacher who avoided the expected cost of performance. By contrast, the cost measure overcompensates the injured party who does not purchase substitute performance, but instead pockets the recovery of a sum that exceeds subjective loss in value. In this case, the cost measure inflicts punishment for the breach equal to the surplus between plaintiff's real loss and cost.

Numerous policy reasons support the preference for the cost measure, despite the possibility of windfall to the injured party.\textsuperscript{456} Damages based on cost better fit the expectation principle, which theoretically enables the injured party to buy equivalent performance. Because cost is usually less than the injured party's subjective loss in value, the mitigation principle limits recovery to the cost of obtaining substitute performance.\textsuperscript{457} Moreover, it deters inefficient breaches prompted only by a party's interest in avoiding the costs of perform-

\textsuperscript{455} Angela P. Harris & Marjorie M. Shultz, "A(nother) Critique of Pure Reason": Toward Civic Virtue in Legal Education, 45 STAN. L. REV. 1773 (1993) (arguing that separation and elevation of reason over emotion is artificial and detrimental to the quality of legal thought in the classroom thus falling short of ideal integration of wisdom and justice); Marjorie M. Shultz, The Gendered Curriculum of Contracts and Careers, 77 IOWA L. REV. 55, 64-65 (1991) (distinguishing between the pure objective approach that focuses on abstract notions of reasonableness and the modern objective approach which gives focus to individual expectations and noting that the law values as "nothing" many expectations and reciprocities that are at the core of women's lives and relationships).

\textsuperscript{456} See RESTATEMENT (SECOND) OF CONTRACTS § 348 cmt. c (1981) (noting that although cost measure may allow recovery "somewhat in excess of the loss in value to him, it is better that [the injured party] receive a small windfall than that he be undercompensated" based on the diminution in market price).

\textsuperscript{457} Id.
Stability and confidence in the enforceability of contracts supports breach deterrence as a secondary remedial goal that should properly guide judicial selection among the remedial alternatives.

By contrast, the diminution measure rewards the breaching party who is allowed to retain the surplus performance costs. When property owners like the Peevyhouses contract for specific improvements, they seek (and pay for) actual performance and not merely an increase in market value. Consider the amounts homeowners spend on landscaping, remodeling, and other long-term improvements that enhance their quality of life but do not necessarily produce corresponding increased values. A contractor's material breach deprives these property owners of the benefit of their bargain unless they are compensated for what it costs to obtain substitute performance.

Serious objections to the cost measure arise when the injured party's windfall becomes substantial. If the cost to complete far exceeds (that is, is "clearly disproportionate to") the injured party's probable loss in value from the breach, recovery will be limited to the diminution in market value caused by the breach. The essential difficulty lies in determining when cost confers an intolerable windfall. While wealthy plaintiffs can prove their loss by purchasing substitute performance, those lacking financial resources cannot. Courts guess (or project their own preferences) how much the cost measure exceeds plaintiff's subjective loss in value. Thomas Ulen identifies Peevyhouse as the "most notorious example of how wrong those guesses can be." Unequivocal evidence definitely proving a plaintiff's subjective loss of value seldom exists. Nevertheless, courts can properly evaluate certain factors indicative of a plaintiff's higher preference in obtaining the promised performance relative to market value. Thus, where a property owner contracts for improvements to one's homestead property, on matters affecting aesthetics, long-term utility, or personal or moral values, a strong presumption should favor the cost measure of damages as a remedy for the contractor's material breach. While classification problems would remain in distinguishing between minor and material defects, such a presumption would

458 See infra text accompanying notes 493-95.
460 Id.
462 Ulen, supra note 250, at 361 n.67.
463 See Yorio, supra note 459, at 328; Edward Yorio, In Defense of Money Damages for Breach of Contract, 82 COLUM. L. REV. 1365, 1404-05 (1982) [hereinafter Yorio, In Defense of Money Damages]. See generally Chomsky, supra note 351 (discussing choice between "cost to complete" and "diminution in value" recovery under relevant case law and proposing alternative approach of awarding cost to complete whenever the owner intends to use the award to complete the contract, unless such award would have an unreasonably harsh impact on the contrac-
help insure that the property owner received the essential, bargained-for performance. A contractor could rebut the presumption with evidence that the owners sought the specific improvement primarily to enhance market value,\(^{464}\) that their insistence on cost reflected opportunistic bargaining,\(^{465}\) or that the cost measure otherwise greatly exceeded the owner's probable subjective loss in value. Besides providing guidance for courts, the cost presumption would also guard against systematically undercompensating poorer litigants who can neither afford to purchase substitute performance nor otherwise prove their loss in value from the breach.

Suppose a plaintiff admits in court that the cost-based recovery will not be used to obtain substitute performance.\(^{466}\) Is this relevant to prove that cost greatly exceeds the real loss? No, for two reasons. First, the net recovery after deducting enforcement costs will always be less than the cost to complete, as determined by the court. This reality undoubtedly encourages the use of inflated cost estimates in court. Even then, the plaintiff must achieve substantial savings to complete the work following recovery, whether accomplished by finding a bargain, narrowing the scope of work, or doing the work itself. Such post-breach cost savings result from the plaintiff's efforts and should not benefit the breaching defendant. Second, an injured party's preferences for obtaining performance may have changed between the time of contracting and post-breach payment of damages. By definition, the expectation principle looks forward, to replace with damages the performance sought to be gained through the bargain. The price terms were determined when the contract was formed, based on each party's future expectations.\(^{467}\) When a breach leaves substantially changed circumstances, an injured party should be free to re-assess whether to use the net proceeds to obtain substitute performance. Contract policy, relating to private exchanges, has no cause to complain. Nevertheless, environmental concerns remain unsatisfied unless the work is completed. As Peevyhouse amply demonstrates, private contract law cannot be relied upon to protect such


\(^{465}\) Goetz & Scott, supra note 243, at 1004 n.97.

\(^{466}\) Perhaps McConnell so conceded during oral argument. See supra text accompanying note 244.

\(^{467}\) See Belsley, supra note 423, at 8 (analyzing the issue from the perspective of a hypothetical bargain). If, for example, the Peevyhouses had obtained an additional $25,000 rent instead of the remedial promises, they could freely choose how to spend the money. Because Garland's remedial promises were consideration for its leasehold rights, it was indifferent as to time of payment (discounted to present value). Regardless whether Garland paid up front or at the end of the lease, the Peevyhouses should be free to spend the money as they wished.
other interests. Public environmental law, with its enforcement powers and cost-shifting provisions, had to fill the gap.468

(c) Economic and policy considerations support cost measure.—Remedies, perhaps more than any other area of contract law, reflect the underlying policies that shape and define doctrine. The foundations were rooted in nineteenth-century common law, in which budding industrialization needed a legal regime that encouraged private exchange for future performances.469 Contract insured either the promised performance, or, in event of breach, money damages equivalent to the value of performance. Remedial protection of the expectation interest instilled confidence that contracting parties would receive the benefit of their bargain, thus promoting a stable system of exchange. Contract damages were primarily compensatory, not punitive. Concerns for exorbitant, unreasonable, or speculative damages gave rise to important limitations on protection of the expectation interest.470

Since then, economic theory has played an increasingly important role in formulating contract doctrine. For many years it operated in the background, to support or criticize specific legal rules. It is now becoming central to the law of contracts.471 Economic analysis seeks to improve the efficiency of private exchange through legal rules.472 In a perfectly competitive market economy, contracts are efficient when strictly enforced according to their terms.473 Thus, as a normative matter, economists evaluate legal rules by whether they maximize efficiency.474

A key insight of microeconomics is that free exchange encourages the highest and best use of resources, in which the resource allocation is said to be Pareto efficient.475 Coase’s Theorem states several propositions regarding exchange of legal entitlements. One proposition holds that “initial allocation of legal entitlements does not matter from an efficiency perspective so long as they can be freely ex-

468 See supra text accompanying notes 309-29.
469 See generally DANZIG, supra note 13, at 76-105 (Hadley v. Baxendale ruling makes damage claims for breach more predictable, thus facilitating commercial development); FARNSWORTH, supra note 103, § 12.8, at 873 n.10.
470 See generally FARNSWORTH, supra note 103, §§ 12.12, 12.14-.15 (discussing mitigation, foreseeability, and certainty limitations).
472 COOTER & ULEN, supra note 417, at 228.
473 Id. at 232.
475 EATWELL, supra note 424, at 457 (Robert Cooter, on Coase Theorem).
changed." Where parties can freely contract around a legal rule, they will negotiate an efficient outcome, provided transaction costs are nil. Thus, it is thought that judicial error in selecting an inefficient solution is easily rectified by parties through future contract drafting.

Transaction costs exist, however, both in the bargaining and in the enforcement of contracts. Where the contract results in completed performance on both sides, with no need for judicial enforcement, the costs of bargaining can be relatively low. In that case, the private solution may approach an efficient outcome. Enforcement costs are quite another matter. If, despite the parties' express agreement around an inefficient legal rule, a recalcitrant party refuses to perform, the other must invoke enforcement mechanisms to obtain relief for the breach. Absent statutory provisions for fee-shifting, the American Rule dictates that each party bear its own litigation expenses, including attorneys' fees. Even if the court strictly enforces the parties' agreement and awards full expectation damages, the net recovery after enforcement costs will produce an inefficient solution, leaving plaintiff shortchanged.

In the real, imperfect world, legal rules matter. Although they only apply absent contrary agreement, default rules strongly influence incentives to bargain in good faith and actually perform as promised. Enforcement costs may grossly imbalance what seemed a perfect (and efficient) agreement, if voluntarily performed. Moreover, as Peevyhouse powerfully demonstrates, courts may not strictly enforce agreements even where parties have explicitly bargained around an existing legal rule to reach an efficient outcome reflecting their preferences. Legal rules should serve as disincentives to strategic or oppor-

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476 Stated another way, the Positive Coase Theorem provides that "when parties can bargain together and settle their disagreements by cooperation, their behavior will be efficient regardless of the underlying rule of law." Cooter & Ulen, supra note 417, at 105. Through the bargaining process, the parties will find an optimal solution that best satisfies their respective preferences, allowing for the efficient use of resources.

477 See Polinsky, supra note 423, at 12.

478 Posner, supra note 367, at 95-96.

479 See id. at 95 (stating that contract settling involves low transaction costs). These costs include the actual costs of bargaining as well as the costs of identifying necessary parties, conferring with these parties, and enforcing any bargain reached. Polinsky, supra note 423, at 12.

480 See, e.g., Farnsworth, supra note 103, § 12.8, at 871 n.3. Statutory provisions for awarding attorneys fees apply to limited situations. See, e.g., Okla. Stat. Ann. tit. 12, § 936 (West 1988), in which the prevailing party's attorneys fees are taxed as costs in actions on certain accounts, bills and contracts. The statutory language includes civil actions “to recover on . . . [a] . . . contract relating to the purchase or sale of goods, . . . or for labor or services. . . .” As interpreted, the latter phrase applies only to actions recovering for labor or services rendered. See Hamilton v. Mueller, 876 P.2d 309, 310 (Okla. Ct. App. 1994) (applying Russell v. Flanagan, 544 P.2d. 510 (Okla. 1975)). Plaintiffs like the Peevyhouses who recover damages for defective or incomplete performance must still pay their own attorneys fees.
tunistic behavior. Judge Richard Posner asserts "the fundamental function of contract law . . . is to deter people from behaving opportunistically toward their contracting parties, in order to encourage the optimal timing of economic activity and . . . obviate costly self-protective measures." Where parties bargain in the shadow of law that encourages performance except when breach is truly efficient, most contracts are fully performed. After all, if the legal consequence of breach is liability to compensate fully the injured party for any gains it expected from performance, the promisor frequently stands to gain nothing from breach. An inefficient default rule can reverse the situation, providing strong incentives to breach.

Ian Ayres and Robert Gertner have rekindled the normative interest of legal economists in constructing a theory of default choice: "By changing the default rules of the game, lawmakers can . . . reduce the opportunities for this rent-seeking, strategic behavior." For example, a contract may be incomplete because "[o]ne party might strategically withhold information that would increase the total gains from contracting . . . in order to increase her private share of the gains . . . ." Courts, which are publicly subsidized, should give parties incentives to negotiate ex ante by penalizing them for inefficient gaps. A penalty default rule would give the better informed party an incentive to reveal information to the less informed party during the bargaining process. By purposely setting the default at what the better informed party would not want, that party is forced to share this information in order to negotiate an efficient solution. Instead, lawmakers might adopt an immutable rule—one that cannot be varied by agreement to avoid social harm in situations where those affected cannot adequately protect themselves. Should the transaction costs in negotiating around a default rule become extremely large, the default mode appears immutable.

Ayres and Gertner contend that the Peevyhouse opinion disingenuously creates either an immutable rule or a strong default rule without adequate guidance on how parties could contract out of it. The resulting uncertainty undermines the stability and efficiency goals. The high transaction costs are likely to deter most contracting parties

481 POSNER, supra note 367, at 91.
482 Ayres & Gertner, supra note 342, at 94; see also Symposium on Default Rules and Contractual Consent 3 S. CAL. INTERDISCIP. L.J. 1 (1994).
483 Ayres & Gertner, supra note 342, at 94.
484 Id. at 93.
485 Id. at 97.
486 See, e.g., U.C.C. § 1-203 (1989) (obligation of good faith); Ayres & Gertner, supra note 342, at 87.
487 Ayres & Gertner, supra note 342, at 121.
488 Id. at 122-23.
from attempting a private bargain that better serves their preferred values.

As developed earlier, the actual bargain evolved when the Peevyhouses refused to accept the usual deal coal operators gave landowners. In foregoing a $3000 advance cash payment for surface damages, they demonstrated that the long-term results of the restoration work were worth far more to them. After *Peevyhouse*, given high bargaining and enforcement costs, few informed landowners would incur the downside risks of a special bargain.

Consider the effects of a strong, practically immutable default provision limiting to diminution the landowner's damages. Contrary to policies promoting stability and good faith in the formation and performance of contracts, the rule encourages operators to promise restoration work fraudulently, knowing that they would only be held liable for diminution. It is also inefficient. Cooter and Ulen predict that operators would readily agree to restoration regardless of intent to perform, with less of a discount on the lease price. After *Peevyhouse*, a coal company has "no compelling legal reason . . . not to promise to restore the land (regardless of cost) . . . even though the company had no intention whatsoever of doing it." By keeping this information secret from the landowners, operators would exact somewhat smaller price concessions from landowners, albeit still for empty promises. The resulting bargain is grossly inefficient. To the extent landowners give consideration for the remedial promises, they unwittingly give surplus benefits to the operators. The price concessions bear little relation to the operator's projected performance costs (minimal, absent intent to perform). Moreover, operators have no incentives to take reasonable precautions against events that could cause a breach.

In contrast, consider the incentives if operators knew that they were required to perform the restoration regardless of cost or be liable for expectation damages based on actual performance costs. The cost default rule places informational burdens on the better informed party, requiring that an operator first inform the landowners of their legal entitlement and then seek an exchange that efficiently reflects the parties' respective utilities for the land.

A perfect contract, that is, one in which the parties' bargain achieves an efficient outcome, will encourage the promisor to take efficient precautions against breach-causing events. "[T]he incentives for precaution by the promisor are usually efficient" when the promisor is liable to the promisee for full expectation damages in the event of

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489 See *supra* text accompanying notes 51-53.
491 Id.
492 Id. at 307-08.
breach. Where the remedy makes the breaching promisor liable for the full surplus that the promisee expected from performance, "the law induces the promisor to internalize the full surplus." Thus, before contracting, the operator would take precautions in estimating performance costs, including geological surveys and test boreholes to determine project feasibility. After contracting, the operator could take precautions against breach by retaining a landscape architect, buying topsoil, and taking other actions evidencing intent to perform.

For many strong policy reasons, courts should award the cost measure of damages in cases like Peevyhouse, where the contractor's incomplete or defective performance constitutes a material breach and where the owners lack sufficient proof of their subjective loss in value. The likelihood that diminution will both undercompensate the injured party and reward the breacher should discourage its use as token protection of the expectation interest.

While traditional contracts doctrine strongly prefers damages based on expectation, the Peevyhouse facts suggest restitution and specific performance as viable alternative forms of relief.

3. Restitution Alternative: Preventing Unjust Enrichment.—The Peevyhouses waived the usual surface damage payment of $3000 in consideration of Garland's remedial promises. If, as argued here, Garland's failure to perform this work constituted a material breach and was not substantial performance, then the Peevyhouses were entitled to treat the contract as discharged and to seek restitution for benefits conferred that would unjustly enrich Garland. Restitution could have provided an alternative to the nominal recovery for lost market value. Because Garland owed future duties of performance (and not merely the payment of money), the expectation principle would not limit the Peevyhouses' recovery.

Under the first theory, the Peevyhouses were entitled to recover, at a minimum, the $3000 they relinquished as advance payment for Garland's promised remedial work. Had they proven the true bargain and claimed restitution, basic equitable principles would have re-

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493 Id. at 309.
494 Id.
495 Id. at 612.
496 See supra text accompanying notes 51-53.
497 See supra text accompanying notes 355-56; see also United States v. Algernon Blair, Inc., 479 F.2d 638, 641 (4th Cir. 1973); Restatement (Second) of Contracts §§ 344(c), 345(d), 374(1) (1981); Farnsworth, supra note 103, at 947.
498 See Restatement (Second) of Contracts § 373(2) (1981).
quired Garland to disgorge this amount in light of its failure to perform.\(^499\)

Arguably, the Peevyhouses' recovery under the second restitution theory might have exceeded the cost of completion. If they could have shown that Garland had fraudulently induced the contract with false promises of remedial work, then they might have sought contract rescission. Because such fraud would vitiate contract consent, Garland's mining activities could support claims of tortious breach or wrongful conversion. Under such a theory, the Peevyhouses might have recovered the fair market value of the coal, less the value added by Garland's labor.\(^500\) As a condition to this relief, the injured party must return any benefit received under the contract.\(^501\)

Finally, under modern contract theory, the Peevyhouses of today might assert the disgorgement claim proposed by Allan Farnsworth to redress abuse of contract. Garland failed to perform the remedial work even though it received advance payment as consideration. It thereby realized a gain from its breach while leaving the Peevyhouses with defective performance. Because they had already fully performed their contract duties, they could not use the consideration paid Garland to obtain a substitute. Farnsworth asserts that disgorgement of gain resulting from such an abuse of contract is necessary to prevent undercompensating the injured party.\(^502\) If, during the bargaining process, Garland accurately estimated and reflected the cost to perform in the price terms, its breach could realize a gain equal to the avoided performance costs. Unless required to disgorge this sum, Garland is unfairly enriched while leaving the Peevyhouses badly undercompensated.\(^503\) Suppose instead that Garland's estimates were inaccurate; still, the breach saved it from costly performance or the cost of modifying the contract to buy out of the remedial provisions.\(^504\) Determining damages under Farnsworth's proposed standard could be burdensome because the damage liability is less than the cost measure. Nevertheless, this standard might be used by courts averse to the cost-based expectation measure.

\(^499\) Id. § 373 cmt. b.

\(^500\) Cf. Lauren v. De Carolis Constr. Co., 363 N.E.2d 675 (Mass. 1977) (remanding case for redetermination of damages to recapture wrongfully made profit where contractor who removed and sold gravel without authorization was held liable for breach with damages based on material's fair market value before value added by defendant's removal). There is no available information on the value of the coal in place, although it appears that Garland's sales profits from Peevyhouse coal ranged from $25,000-$35,000. See supra note 81.

\(^501\) After deducting the $2500 received in royalties, plaintiffs restitutionary recovery under this theory might reach $32,000.


\(^503\) Id. at 1385-86.

\(^504\) Id. at 1388-91.
4. Equitable Protection of Contract Expectations: Specific Performance.—The plaintiffs first suggested equitable relief on appeal; therefore, the issue was never litigated.\textsuperscript{505} Whether or not the choice to seek only damages was deliberate, it was probably correct. At the time, courts were likely to find damages an adequate legal remedy, thereby avoiding difficulties in fashioning an equitable remedy and in supervising its performance.\textsuperscript{506} Courts today might be persuaded by a recent wave of scholarship endorsing specific relief in cases like Peevyhouse.\textsuperscript{507} I join that chorus. Specific performance is preferable to the alternatives on both moral and economic grounds. It is the remedy best calculated to protect contract expectations through performance or post-breach settlement for an amount reflecting the injured party's lost value.

Holmes distinguished law from morality, interpreting contract duty only to impose liability for damages if the contract is not performed.\textsuperscript{508} This notion defies the common cultural understanding about the significance of promises deemed legally binding. When parties voluntarily commit themselves to a contractual undertaking, both sides develop reasonable expectations of either receiving the promised performance or having the promises enforced by courts.\textsuperscript{509} Douglas Laycock rejects Holmes's statement as "untrue," arguing that an essential point of positive law embodies replacement rules:

Money is an adequate remedy if, and only if, it can be used to replace the specific thing that was lost. That is to say, money is never an adequate remedy in itself. It is either a means to an end or an inadequate substitute that happens to be the best courts can do at reasonable cost. But the legal system's preference is to give plaintiff specific relief if she wants it — to replace her loss with as identical a substitute as possible.

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[When our legal system is viewed whole, the duty to keep a contract means a duty to deliver to plaintiff the specific thing she was promised or the means of acquiring it, if either is feasible. This duty is commuted into a duty to pay substitutionary damages only if plaintiff agrees or if there is some other substantial reason to deny specific relief.\textsuperscript{510}]

\textsuperscript{505} Second Petition for Rehearing at 5, Peevyhouse (No. 39,588) (copy on file with author).
\textsuperscript{506} Telephone Interview with Doug Rendleman, Huntly Professor of Law, Washington & Lee School of Law (Mar. 23, 1994).
\textsuperscript{508} See Holmes, \textit{supra} note 176.
\textsuperscript{509} See Linzer, \textit{supra} note 178, at 112.
\textsuperscript{510} See Laycock, \textit{supra} note 435, at 246.
Contractual promises have moral content deserving protection by the legal system. Where parties have reached a fair bargain, the law should hold them to their agreement. In the event of breach, justice demands that the injured party's reasonable expectations receive meaningful protection, whether legal or equitable in nature. If damages do not enable replacement performance and allow the breacher to save the costs of performance, the legal remedy upsets the previous contract balance. Where the contract called for Garland to perform remedial work, the Peevyhouses fairly expected to receive either performance or cost of obtaining comparable substitute performance. After deducting for enforcement costs, even the cost measure nets less than that needed to replace the breached services. Absent cost-shifting mechanisms, only specific relief can assure the replaceability of Garland's performance.

Specific performance would also squelch nagging concerns that the cost recovery confers a windfall far exceeding plaintiffs' subjective loss in value, which they would not use to obtain substitute performance. Were specific relief the routine—and not the extraordinary—remedy, it would promote efficient outcomes by directing the parties to bargain over their relative preferences. If the Peevyhouses valued restoration less than Garland's cost to perform, their postdecree bargaining would produce settlement that accurately reflected their subjective loss in value. If, however, the Peevyhouses subjectively valued performance higher than what it would cost Garland to do the work, they could prove this by terminating postjudgment negotiations and insisting on compliance with the court order. By exercising this exit option, persons like the Peevyhouses have the opportunity to prove with conduct their high utility for restoring the land.

511 See generally Charles Fried, Contract as Promise: A Theory of Contractual Obligation (1981) (arguing that the "contract" institution can be traced to and is determined by a small number of basic moral principles).
512 Linzer, supra note 178, at 113.
513 See also Laycock, supra note 435, at 252, 258 (asserting that judges who have a sense of plaintiff's moral entitlement are motivated to grant specific relief where money damages could not be exchanged for comparable performance).
514 See Baird et al., supra note 422, at 258-59; Linzer, supra note 178, at 137; Schwartz, supra note 507, at 284-91; Ulen, supra note 250, at 366 (postbreach bargaining). Cf. Goetz & Scott, supra note 243, at 1003-04 (carefully conditioned right of specific performance restrains evasion from contract duties and "selectively filters the potentially opportunistic cases where the obligor's cost of performance is substantially greater than the market value of performance;" the Peevyhouse court apparently concluded that plaintiffs' insistence on cost represented opportunistic bargaining position and not specialized value); Yorio, In Defense of Money Damages, supra note 463, at 1386-88, 1397-1401 (challenging efficiency of specific performance but guardedly supporting modified specific performance rule where surrogate does work).
515 Baird et al., supra note 422, at 258-59; Linzer, supra note 178, at 137.
516 See Patricia J. Williams, Alchemical Notes: Reconstructing Ideals From Deconstructed Rights, 22 Harv. C.R.-C.L. L. Rev. 401, 427 (1987) (contending that an expanded-frame-of-
Professor Edward Yorio voiced concern that if courts routinely grant specific performance during bitter postbreach negotiations, plaintiffs will spitefully insist that defendants perform, thus producing inefficient and wasteful outcomes. Moreover, he noted the considerable judicial resources that equitable relief would consume in tailoring decrees and supervising performance. These concerns should be weighed against the potential benefits from preferring specific relief over money damages. At least in the context of postmining restoration, specific relief protects the public interest in a manner comparable to environmental law. If coal operators can avoid reclamation obligations with damage payments, society’s long-term preservation interests remain unsatisfied. Federal and state statutes have already struck the balance, dictating that the work shall be done, with administrative enforcement mechanisms to handle supervisory burdens. Where a private breach of contract creates public risk of harm that may be remedied at public cost, the parties should not be allowed to relinquish reclamation obligations in exchange for payment to the landowners.

IV. STRAINS ON THE QUALITY OF JUSTICE

This Part evaluates what went wrong in *Peevyhouse* from a systems perspective. Subpart A considers structural constraints in litigation which may distort accurate outcomes, and links these capability problems to institutional questions affecting the integrity of the adversary system. Subpart B recognizes the realist view that court opinions necessarily approximate (and sometimes manipulate) fact findings as part of the historical reconstruction process. Subpart C examines particular litigation incapacities at work in *Peevyhouse* that produced a litigated outcome far different from what it should have been.

A. The Adversary System

The unearthed facts in *Peevyhouse* raise disturbing questions about the quality of justice. The Peevyhouses bargained effectively to obtain contractual protection of their legitimate interests. When Garland breached, they sought legal redress, but ultimately were denied meaningful contract enforcement. Meanwhile, the adversary system maintained the illusion that diminution damages protected their ex-

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rights reference supports theories of constantly returning cycles which underlie environmental reform and “which give ‘utility’ to maintaining the earth in an unexploited form”).

517 Yorio, *In Defense of Money Damages*, supra note 463, at 1398-1402. See also BAIRD ET AL., supra note 422, at 265-66 (noting that when only plaintiffs know their subjective valuation, there is a possibility of breakdown in postdecree bargaining which may result in the restoration of land when it is in no one’s interest).

518 Yorio, *supra* note 463, at 1386.

519 Cf. Linzer, *supra* note 178, at 137-38 (specific performance would eliminate the Peevyhouses’ subsidy to the company).
rections of contract performance. What went wrong? Is *Peevyhouse* an extreme example of the capability problem, where structural constraints inherent to litigation distort outcomes? Or are the distortions symptomatic of something deeper, relating to the institutional integrity of the adversary system?

Several factors combined to produce a legal ruling based on facts far removed from the truth. Richard Danzig's important work on litigation incapacities identifies structural constraints in the litigation system that influence and sometimes distort the presentation.\(^{520}\) Inaccuracies result from the formal rules of litigation, witnesses' varying abilities to testify clearly and credibly, and gaps in evidence leaving the fact-finder to fill in the blanks. In *Peevyhouse*, these constraints served to present an incomplete or inaccurate picture of the relevant facts. Evidentiary rulings excluded testimony about the entire affected land, the negotiation context, and the purpose for the remedial provisions. Garland's technical exhibits and better educated witnesses communicated its version of the facts more clearly and persuasively than did the plaintiffs' side. The analysis might stop there.

Upon further reflection, the structural and institutional issues are linked. The capability problem analysis observes litigation incapacities in specific cases. This microanalysis aids understanding of the adversary process, but does not extrapolate on its significance to the theory and justifications for the adversary system. Danzig suggested, but did not develop, the linkage: "Because we are not an inquisitorial system, judges are generally dependent on the differential capacities of the parties to themselves develop and present evidence."\(^{521}\) Instead, we subscribe to the sharp clash of partisan advocacy in the belief that it is more likely to produce an acceptable (true, fair, or rational) result than competing models. The underlying premise, however, is that the participants must each fulfill their designated institutional roles.\(^{522}\)

By definition, the adversary process requires partisan presentation of evidence and legal argument. Each side presents its strongest case under the facts and law and tries to rebut the opponent's contrary assertions. The impartial judge or fact-finder passively receives what is presented and, when thus informed by the parties, renders a considered judgment. Impartiality is an essential element, requiring both absence of bias and nonparticipation in presentation of the case.\(^{523}\) Justification for the adversary system assumes that each party can par-

\(^{520}\) See Danzig, *supra* note 13, at 1-2.
\(^{521}\) Id. at 133.
ticipate effectively, usually through counsel. It assumes that counsel are roughly equal in legal skill and dedication to their client’s cause and have equivalent resources to support the litigation.\(^{524}\) *Peevyhouse* illustrates how capability problems strain the quality of justice. Its teachings extend beyond the single case. If distortions from disparities in partisan capabilities are pervasive, then *Peevyhouse* also exemplifies the flawed assumptions underlying the adversary system.

**B. A Realist Caveat**

To some extent, the court’s opinion demonstrates the legal realist view that in litigation “facts” are a court’s guesses about what happened and often determine outcome.\(^{525}\) Most critical readers of court decisions understand that the stated facts reflect the court’s good faith distillation of disputed facts presented through the adversarial framework. The judge sifts through the evidence to determine the facts, which typically lie somewhere between the extreme views depicted by the parties. Also, judges often massage the facts, either to improve writing clarity, to enhance precedential value, or perhaps to conceal an improper basis for the decision.\(^{526}\) Sometimes a court selectively omits facts that make a case morally troublesome; that may explain why the *Peevyhouse* majority opinion did not recite the remedial provisions on which the damage claim was based.\(^{527}\)

**C. Litigation Incapacities in *Peevyhouse***

1. **Access to Dedicated Legal Counsel.**—Other scholars have probed the barriers to obtaining effective legal representation.\(^{528}\) In particular, persons who are poor or of moderate means may not seek legal redress because of cost fears and inadequate information about their primary selection criteria: integrity and quality of service.\(^{529}\) Given those marketplace deficiencies, such laypersons may have no

\(^{524}\) Id.

\(^{525}\) See FRANK, supra note 11, at 15.

\(^{526}\) See generally M.H. Hoeflich, *On Reading Cases: The Law Student in Wonderland*, 42 SYRACUSE L. REV. 1163 (1991) (discussing the extent to which a reported case does not represent a perfect view of the “reality” of the case).

\(^{527}\) Id. at 1168-74 (discussing Taft v. Hyatt, 180 P. 213, reh’g denied, 181 P. 561 (1919) (avoiding issues of race and meaningful access to counsel)).


\(^{529}\) See Christensen, supra note 528, at 41; Morton, supra note 528, at 290-92.
assurance that the lawyer once retained will be dedicated to their cause, free of self-interested conflicts.\textsuperscript{530} Translated into the ethical rules, dedication encompasses competent pursuit of a client's lawful objectives within legal bounds.\textsuperscript{531}

The client's financial resources, business and social connections, and prior experiences as a litigant influence who is retained as counsel and the fee arrangement. The fee arrangement, in turn, often affects the dedication and time counsel spends on the case. Lawyers paid on an hourly basis are far more willing to "leave no stone unturned," whereas counsel retained on a contingent basis or for a predetermined flat fee are conscious when their time investment exceeds expected return, which may cloud their professional judgment.\textsuperscript{532}

For one-time, individual litigants, the Peevyhouses knew a good bit about Woodrow McConnell before retaining him. While they knew of few lawyers, they were aware that he came from Stigler and that he had successfully prosecuted claims for neighbors against Garland. Like most occasional litigants (and some lawyers), they did not sufficiently appreciate the impact of doctrinal distinctions between tort and contract law. McConnell's accumulated legal knowledge and expertise concerned tort law, which did not translate to adequate knowledge of contract law.

While the Peevyhouses had only second-hand information on McConnell, Garland had first-hand experience with Looney, Watts, which had represented it in prior lawsuits. As a repeat litigation player, Garland could better evaluate whether the firm had the advocacy skills and legal knowledge and professional resources to mount an effective defense.

Billing records were unavailable. Looney, Watts typically billed clients for what it deemed a fair fee at the end of the case. It represented Garland with a steady aggressiveness as dictated by the posture of the case, but did not exhibit extraordinary devotion to Garland. McConnell represented the Peevyhouses and most of his clients on a

\textsuperscript{530} See Schwartz, \textit{supra} note 523, at 543, 547 (defining the "Postulate of Equal Adversariness" as "a shorthand way of saying that the opposing advocates should also be roughly equal in their dedication to the cause of their principals and in their opposition to the cause of their opponents").


contingent basis. This might have influenced the representation, both in terms of initial output of energy and in terms of the strategic choice to pursue cost damages as a means of producing a fund for the payment of fees. On appeal, McConnell demonstrated exceptional, at times quixotic, dedication to their cause, valiantly fighting a losing battle to reverse the court's initial decision. Sadly, the effort came too late. Had more time been spent gathering facts, researching, and preparing for trial, the record would not have left room for the grossly inaccurate assumptions made by the court. Pure adversary zeal will not insure balanced adversary competition. The Peevyhouses' limited resources and McConnell's legal skill, effort, and knowledge were no match for Garland's strong defense team.

This does not suggest that the Peevyhouses could have successfully asserted a malpractice claim against McConnell, nor that the bar would have disciplined him for inadequate representation. Little refined law at the time determined standards of professional conduct. Legal malpractice liability was rare. Older cases practically insulated litigators from malpractice risks by granting wide latitude to strategic and tactical decisions made in good faith. That safe haven is eroding.

If judged in light of today's standards of conduct, McConnell's representation of the Peevyhouses might risk malpractice or disciplinary liability. Unfortunately, it resembles the skill and effort of many lawyers representing individual claimants, both in 1960 and at present.

2. Disparate Skills, Effort, and Resources Impaired Partisan Presentations.—Premised as it is on partisan advocacy, the adversary system assumes a fair fight with litigants roughly balanced in their

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534 Professional discipline under the 1908 ABA Canons of Professional Ethics was reserved for cases that authorities perceived as egregious. Since then, the law of professional responsibility has flourished. In 1969 the ABA adopted the Code of Professional Responsibility, which spread like wildfire throughout the states. Oklahoma quickly adopted the Code, but omitted the Ethical Considerations and used the Canons like subject headings. Post-Watergate ruminations prompted movement towards the Model Rules, which the ABA adopted in 1983. States' extended deliberations and modifications to the Model Rules reflect the new effort to define professional standards as legal norms.

535 See Maute, supra note 532, at 1089-90; see also RESTATEMENT OF THE LAW GOVERNING LAWYERS § 74 cmt. b (Tentative Draft No. 7, 1994) [hereinafter TENTATIVE DRAFT OF LAW GOVERNING LAWYERS].

536 Pending drafts of the Restatement of Law Governing Lawyers further define the standard of care and would allow expert testimony to include discussion of ethical rule violations. See TENTATIVE DRAFT OF LAW GOVERNING LAWYERS, supra note 535, at § 74 cmts. b, f, g.

ability to present their sides effectively. Overall, a significant disparity in dedication, skills, and resources can tilt the outcome. Judged by modern standards of competence, McConnell’s representation fell short in three areas: fact-gathering, legal knowledge, and advocacy skills. A lack of financial and other resources to aid the litigation furthered the imbalance.

(a) Fact-gathering and legal knowledge: The road not taken.—The MacCrate Report reflects current efforts to define specific skills essential to competent lawyering. A competent litigator needs skills in interviewing, fact-gathering, theory development, legal research, trial techniques, legal analysis, and writing. In any given case, competence requires that the skilled and knowledgeable lawyer adequately prepare and provide such thorough representation as is reasonable considering the stakes involved.

From the outset, it appeared that McConnell lacked sufficient grasp of the relevant facts and law, both essential to theory development. The problem is circular: lacking adequate knowledge of the underlying applicable law, the advocate is unaware of factual matters germane to theory development and rebuttal to the opposition.

In *Peevyhouse*, for example, McConnell filed the initial complaint at the end of the five-year lease term, long after the blasting harmed the personal acreage not leased to Garland. If McConnell had understood that the Peevyhouses did not lease their personal acreage, he should have realized that the tort claim was time-barred. Although he could do nothing to revive the claim, he could have framed the pleadings more carefully to allege the breach caused lost utility and value to the entire farm including acreage not leased to Garland. In

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538 Justice Jackson’s supplemental opinion denying rehearing alludes to these deficiencies. See *Peevyhouse*, 382 P.2d at 117-19.


541 Landlord-tenant law holds the tenant responsible for damage to the property during the leasehold estate with the two-year limitations period starting to run upon expiration of the lease. McConnell’s assumption that Garland leased all the Peevyhouse land, if true, would justify the asserted tort claim. Conversation with Peter B. Kutner, University of Oklahoma professor (Jan. 11, 1995); see also Letter from Patrick H. Martin, Louisiana State University, Campanile Professor of Mineral Law (Nov. 10, 1994) (on file with author).

542 When McConnell dropped the tort count at trial, Judge Wallace limited testimony to the leased acreage. Only after losing in the supreme court did plaintiffs claim they were prejudiced from the trial court’s ruling that limited testimony to the leased acreage. Supplemental Opinion on Rehearing *Peevyhouse* (No. 39,588) (filed Mar. 26, 1963) (copy on file with author). Regardless of the court’s evidentiary ruling, plaintiffs’ counsel probably would not have presented evidence of the farm’s total value given the strategic decision to avoid all valuation evidence. In denying rehearing, Justice Jackson properly rebuffed the belated claim, for judicial efficiency forbids parties from changing the theory of the case on appeal. *Id.* at 119. The supplemental
any event, the complaint would have differentiated between the leased and unleased parcels and specifically alleged the separate consideration the Peevyhouses gave to obtain the remedial promises. This trade-off in lieu of payment for surface damages strongly related to contract interpretation and substantial performance doctrine. The competent advocate would have anticipated parol evidence objections and acquired mastery over the legal issues key to admission: nonintegration of the writing, the failure of consideration challenged the existence of a legally enforceable contract, and the general admissibility of evidence of surrounding circumstances to aid interpretation.

By contrast, Watts understood Garland's viewpoint enough to suggest the impracticability excuse and property line dispute, both of which triggered waste considerations and risk allocation. McConnell never stood "toe to toe" with Watts on these issues and failed to pierce the defense with demands for proof. If plaintiffs' side had adequately understood the law of impracticability and mistake, it could have gathered information before trial to defeat those claims. Instead, it fearfully avoided confronting issues. As a consequence, the defense obscured the litigation with meager suggestions of excuse.

As superior litigators know well, fact-gathering and legal research in advance of litigation are crucial to theory development and trial preparation. These time-consuming tasks may seem endless, with much time spent pursuing avenues that ultimately bear no fruit. Despite the frustrations, this time is not wasted. It enables the skilled advocate to discard weaker claims while developing a theory and presentation effectively supported by the evidence, law, and policy. Such efforts also prepare to rebut assertions taken by the opposition.

McConnell's Peevyhouse files have been destroyed, so it is impossible to reconstruct how much pretrial preparation occurred. Judging from the lack of discovery, record silence on factual matters key to sound contract analysis, and the overall trial record, it appears that relatively little advance fact-gathering or research took place. McConnell and Hanson were left vulnerable to Watts's aggressive defense strategy. Further research on contract law, damages, and policy would have helped them develop a coherent theory and trial plan to create a strong record and supporting legal arguments. The Peevyhouse opinion would be quite different if the trial record clearly established the parties' actual intent and revealed data showing the relative economic and other benefits sought to be achieved by the contract.

opinion made extended reference to the pleadings, testimony, and prior briefs to demonstrate possible strategic errors in plaintiffs' plan and theory at trial and on original appeal.

543 See supra text accompanying notes 84-90, 161-69, 365-408.

544 See supra text accompanying notes 203-06 (discussing relevance of such economic data under Oklahoma precedent); see also Recent Decisions, Groves v. John Wunder Co., 40 COLUM.
(b) Advocacy skills and resources.—Effective partisan presentation typically requires the services of a skilled advocate who is able to devote the time and resources as needed, starting with trial preparation and continuing through any resulting appeals. Competent litigators are skilled at how to plan and execute a deliberate trial strategy and how to obtain admissible evidence supporting the relevant legal questions.

Availability of adequate resources to support the litigation strongly affects the quality of representation. If a litigant cannot pay in advance for the services and costs, it must depend on counsel’s resources to pay or obtain credit. Lawyers’ time is the most basic resource, with vast disparities in time spent preparing for trial and drafting documents to be filed in court. Document and exhibit preparation, expert witnesses, and the sundry other litigation expenses are costly. Significant qualitative differences may exist between the low and high cost alternatives.

Garland and its defense firm clearly had superior resources devoted to the litigation as compared to plaintiffs. No clear distinction can be made between those quality differences affected by disparities in resources or legal skills. Garland’s professionally drawn maps and aerial photos were more helpful and persuasive than plaintiffs’ snapshots and sketch of the affected land.\textsuperscript{545} The defendant’s carefully crafted appellate briefs presented a comprehensive analysis based on facts, law, theory, and policy. By contrast, the plaintiffs’ briefs included lengthy quotes from testimony and legal authorities, many string cites, but little refined, reasoned argument. The defendant’s more polished presentations at trial and on appeal reflected extensive investments of professional time—by Watts and associates working behind the scenes and also by Cumpton and Curry, the engineers who testified. That time does not come cheaply and is not readily available to litigants short on resources.

One observer dubbed McConnell a “scuffling” kind of lawyer who “did the best he could with what he had.”\textsuperscript{546} That seems a fair characterization. He received neither a retainer from the Peevyhouses nor advance payment for any litigation expenses. Like most lawyers who represent occasional or “one-shot” litigants, McConnell probably developed systems for routine, orderly handling of

\textsuperscript{545} Plaintiffs’ Exhibit No. II, a sketched mock-up depicting the land, was unavailable for examination.

\textsuperscript{546} Interview with Gomer Smith, Jr., Oklahoma City attorney, in Oklahoma City, Okla. (June 17, 1992).
many similar claims.\textsuperscript{547} It appears he approached the Peevyhouse trial preparation as he did his tort cases: set the stage with plaintiffs' testimony and prove damages through an expert. The record does not reflect that plaintiffs' counsel had a strong foundation in contract law. Glendening, the civil engineer who served as plaintiffs' damages expert, was not a particularly strong witness. Because he lacked experience with dams and water control, his cost figures were vulnerable to challenge. Plaintiffs' counsel did not seek his aid in clarifying the boundary dispute, perhaps because he was absent the second day of trial.

There were significant disparities between the advocacy skills of the parties' respective counsel. Watts was well-prepared—he adeptly planned a trial strategy with supporting witnesses and documentation, knew the weaknesses in his case, and formulated a plan to limit unfavorable evidence. Watts litigated the case aggressively, demonstrating the killer instinct possessed by many successful litigators. He took control from the outset, battering McConnell's initial efforts with constant interruptions. In short time, Watts obtained dismissal of the tort claim and stipulations that limited evidence to proving damages to the leased acreage caused by the breach. He objected frequently, disrupting the flow of plaintiffs' case, avoiding attention to contract interpretation, and diverting attention from adverse testimony. He cross-examined effectively, anticipating the points he wanted made, and stopping when that was done. When presenting the defense, Watts asked his witnesses crisp, direct questions that usually elicited articulate and concise responses. They clearly understood their roles and performed well, likely the product of adept witness preparation. Sometimes he warned defense witnesses about dangerous territory with speaking objections.

Watts's aggressive tactical maneuvers may have blind-sided plaintiffs' counsel. By drastically limiting triable issues, perhaps he upset their trial strategy, leaving little to present. Both McConnell and Hanson were fairly skilled in questioning witnesses, despite occasional awkward or unclear questions.\textsuperscript{548} They seldom responded to Watts's frequent objections, even when strong contracts arguments supported admissibility. While Hanson effectively cross-examined Curry, McConnell's cross-examination of Cumpton seemed exploratory and obtained few concessions.

Overall, their litigation style seemed characteristic of lawyers who shoot from the hip. Litigators adopting this style develop an intuitive

\textsuperscript{547} See generally Galanter, \textit{supra} note 528, at 95-151 (discussing limits on the legal system as a means of redistributive change).

\textsuperscript{548} See, e.g., Record, \textit{supra} note 6, at 9-15 (testimony regarding specific locations on map or photos; follow-up questions did not consistently clarify location to aid comprehension). Compare this testimony with Watts's precise descriptions of aerial photos, \textit{id.} at 54-55.
sense about how the trial should proceed, formulate a general trial strategy, and obtain the necessary witnesses who receive limited preparation for their testimony. They defer most research until needed to prepare documents filed with the court. Those with great instincts may thrive without the painstaking efforts of their more compulsive colleagues. Many clients, however, bear the brunt of their lawyers’ lackluster preparation.

V. THE OKLAHOMA SUPREME COURT BRIbery SCANDAL: TANTALIZING SPECULATION QUESTIONING THE QUALITY OF JUSTICE

Part V evaluates whether Peevyhouse was a case tainted by the Oklahoma Supreme Court bribe scandal. Subpart A generally describes local history of political corruption and how long-standing speculation of judicial bribery finally became public. Subpart B relates events leading to the resignation or impeachment of three justices who were clearly implicated. Subpart C summarizes how the tale of political intrigue unraveled, while subpart D considers the investigative efforts of the state legislative and bar officials. Subpart E considers possible involvement of certain lawyers who might have been in the web of influence, including the senior partner at Garland’s defense firm. Subpart F evaluates suspicions related to Justice Welch who changed his vote in Peevyhouse and whose voting history indicates a noted favoritism toward clients represented by that firm on closely decided cases.

Some suspect that Peevyhouse is a tainted decision. In 1964 word broke of a bribery scandal involving several members of the Oklahoma Supreme Court, including two justices who voted with the Peevyhouse majority. Justice Corn, who was on senior status and did not participate in the case, pled guilty to tax evasion and gave a statement implicating three others: Johnson, Welch, and Bayless. Justice Johnson was impeached and convicted. Justice Welch resigned during impeachment proceedings. The court’s conference minutes raise questions about Justice Welch’s participation, particularly when viewed in the context of his voting behavior on closely decided cases involving the Looney, Watts law firm. This data might support an inference that Justice Welch loyally supported the interests represented


550 Justices Welch and Johnson voted for Garland Coal as part of the majority. Neither Corn nor Bayless was on the court at the time of the decision.

by the firm when his vote was needed to secure a favorable outcome or to show support for a losing cause by voting with the dissent.552

I do not believe that money changed hands to influence the outcome. I do, however, believe that Justice Welch’s vote may reflect improper judicial bias. That is a tangential issue. Proof of taint would allow one to dismiss the case as an aberration, an ugly but isolated flaw in the judicial system. Judicial corruption does not explain away the flawed decision made possible by the litigation incapacities.

A. Influence Peddling: An “Aroma in Oklahoma”

Democratic politics heavily dominated Oklahoma’s early history. In sixty years of statehood, government scandals were commonplace. Two successively elected governors had been impeached and removed from office, and impeachment proceedings were launched against other governors and state officials.553 Folklore persists that the federal government threatened to rescind statehood if a third governor were impeached.554 Despite its improbability, the folklore suggests the prevalence of backroom, often shady, political deals. More pointed were the observations of some national journalists referring to pervasive corruption, that at election time, there was always “an aroma in Oklahoma.”555 Nor was the judiciary isolated from politics. As one of the few remaining populist states with an elected judiciary,556 Oklahoma courts had a climate ripe for influence peddling. Ex parte communications between judges and lawyers appearing before them were common.557 Those with political influence would use it.558 For years, rumors persisted that several members of the Oklahoma Supreme Court were corrupt and accepted bribes.559 Although many attorneys suspected this, they reluctantly tolerated the situation,560

552 See infra text accompanying notes 634-42.
553 Telephone Interview with Danney Goble, Historian, Carl Albert Center, University of Oklahoma, Norman, Okla. (Oct. 12, 1993) [hereinafter Goble Interview].
554 Interview with John Long, Oklahoma City attorney and former reporter for The Daily Oklahoma, in Oklahoma City, Okla. (July 31, 1992); Goble Interview, supra note 553; David Zizzo, Three Strikes, You’re Out? Rumor’s Source Remains Unimpeachable, DAILY OKLAHOMAN, Nov. 7, 1993, at 1, col. 5.
555 See Aroma in Oklahoma, TIME, July 19, 1954, at 18.
557 Although prohibited by the Canons of Judicial Ethics, the ethical rules were not read and taken as seriously as they are today. Telephone Interview with Joseph Stamper, attorney, Antlers, Okla. (Oct. 5, 1993) [hereinafter Stamper Interview]. See CANONS OF JUDICIAL ETHICS Judicial Canon 16 (ABA 1936); CANONS OF JUDICIAL ETHICS Judicial Canon 17 (ABA 1957).
558 Stamper Interview, supra note 557.
559 Interview with Marvin Emerson, Executive Director, Oklahoma Bar Association, in Oklahoma City, Okla. (June 14, 1989).
560 For example, in 1958 John Cantrell told a bar committee on the judiciary which he chaired: “I know that bribes are being taken out there and I know who are taking the bribes but
lacking both hard proof and a forum to receive complaints of judicial misconduct.\textsuperscript{561}

Harlan Grimes, an especially blunt and outspoken lawyer, broke the silence. He loudly complained about twenty-five years of court corruption in which all Oklahoma Supreme Court judges allegedly took bribes. Grimes aired his views through pamphlets, radio talk shows, and litigation. Although he requested a hearing before the court, when invited, Grimes did not appear and provide evidence. In 1960 the Oklahoma Supreme Court disbarred him for making unsubstantiated allegations.\textsuperscript{562} The harsh sanction undoubtedly silenced other lawyers who also lacked hard evidence of bribery.\textsuperscript{563}

The bribery conspiracy began to unravel around \textit{Selected Investments Corp. v. Oklahoma Tax Commission}.\textsuperscript{564} Although this 1957 Oklahoma Supreme Court decision yielded substantial tax savings for the company, its continued financial difficulties led to the appointment of a receiver in bankruptcy. The bankruptcy judge allowed Luther Bohanon, counsel for the receiver, only a few minutes to question Hugh Carroll, the company president. Bohanon interrogated him about a large disbursement made shortly after the Oklahoma Supreme Court's decision; Carroll testified that he lent $150,000 in cash, with no supporting documentation, to Pierre Laval, a Canadian oil man with no known address. Incredulous, Bohanon forwarded the

\begin{quote}
I cannot get hold of the proof to sustain it."\hspace{1em}William R. Cook II, Justice for Sale 5 (Apr. 29, 1976) (unpublished manuscript, on file with author) [hereinafter Justice for Sale].
\end{quote}

\textsuperscript{561} Once the scandal broke, the Oklahoma Bar Association (OBA) appointed an Investigating Committee comprised of three past bar presidents and several lay members. Repeatedly, they asked witnesses: "Why didn't you speak out and make your complaint sooner?" The common reply countered: "To whom could we or should we have told it?" One important reform created a "Court of the Judiciary" delegated to receive complaints of judicial misconduct. \textit{See} \textit{Okla. Const.} art. VII-A, §§ 1-7; \textit{Okla. Stat. Ann.} tit. 5, ch. 1, app. 7, Rules 1-8 (West 1966).

\textsuperscript{562} Oklahoma Bar Ass'n v. Grimes, 354 P.2d 1080, 1085 (Okla. 1960). All current justices recused themselves, leaving the decision in the hands of a specially constituted court. Telephone Interview with Jim F. Gassaway, Tulsa Attorney (Oct. 6, 1993). The story of Harlan Grimes could itself fill a volume. Suffice it to say that he deeply offended bar leaders with his overbroad accusations. Had his language been more restrained and his allegations more focused, today his criticisms of the judiciary would likely be protected. Reluctantly, I agree that his inflammatory allegations properly subjected him to discipline. \textit{See}, \textit{e.g.}, Oklahoma Bar Ass'n v. Porter, 766 P.2d 958 (Okla. 1988) (holding that an honest statement of opinion with some factual basis is protected by the First Amendment and that such protection extended to an African-American lawyer who called federal judge a racist).

\textsuperscript{563} In 1967 the supreme court reconsidered Grimes's sanction in light of subsequent events. Grimes had made general allegations of corruption for eleven years without a disciplinary complaint. Ironically, the bar filed charges against him after he alleged bribery in Marshall v. Amos, 300 P.2d 990 (Okla. 1956), for which he had some documentary evidence. The later opinion took equitable consideration of these facts, to limit the disbarment to the six and one-half years already lapsed. Grimes could apply for reinstatement, but must make the customary showing of present qualifications for admission. Harlan Grimes had since moved to Texas and was never readmitted to the Oklahoma bar.

\textsuperscript{564} 309 P.2d 267 (Okla. 1957).
transcript of Carroll's testimony to the Internal Revenue Service criminal division, along with other evidence suggesting a connection with the Oklahoma Supreme Court.565

B. Judges Indicted and Convicted

On April 8, 1964, a federal grand jury indicted two Oklahoma Supreme Court justices, N.S. Corn and Earl Welch, for income tax evasion.566 The eighty-year-old Corn, semi-retired from active court service,567 pled nolo contendere and resigned from the court.568 He was sentenced to a fine and eighteen months imprisonment.569 Seventy-two-year-old Welch fought the charges. Welch had served on the court since his election in 1932, the longest tenure of any judge in the state.570 A member of the Chickasaw nation, he was active in tribal leadership571 and was the first enrolled member of a tribe to sit on the Oklahoma Supreme Court.572 Observers considered him very intelligent and a fine legal writer who could write a sound, convincing opinion on either side of an issue.573

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566 See Katherine Hatch, Judges Accused on Five Counts Each After Secret, 3-Day Grand Jury Session, DAILY OKLAHOMAN, Apr. 9, 1964, at 1.
567 Supernumerary status entitled a judge to retire from active supreme court duty, serve as trial judge on assignment, and receive $9000 a year in retirement pay.
568 See Bar Considers Action on Corn, DAILY OKLAHOMAN, July 5, 1964, at 1.
570 Welch defeated E.F. Lester, the incumbent Democrat on the court from that district, in the primary election on a vote of 23,142 to 21,088. Welch, Wayne Bayless, and Monroe Osborn successfully challenged the Democratic incumbent judges supported by Governor William Murray. Telephone Interview with Danney Goble, Carl Albert Center Historian, University of Oklahoma, Norman, Okla. (Aug. 3, 1992); Stamper Interview, supra note 557; Alan Curtis Durbin, The Election of Oklahoma Supreme Court Justices, 1907-1964, at 63 (1966) (unpublished master's thesis, on file with author). Even then, judicial campaign financing foreshadowed questions of bias. Lester's campaign advertisements asserted he would pay his own expenses: "It is his view that a candidate for this high judicial position should remain without obligation to anyone except to the people of this state as a whole . . . . Our courts must be maintained to do justice for all without fear or favor." Judge Lester, McAlester Democratic, June 30, 1932, at 6 (political advertisement).
571 Welch served as the first president of the Intertribal Council of the Five Civilized Tribes, 1950-51. See 30 OKLAHOMA HISTORICAL SOCIETY, CHRONICLES OF OKLAHOMA 347 (1953) [hereinafter CHRONICLES OF OKLAHOMA].
572 See LYLE H. BOREN & DALE BOREN, WHO IS WHO IN OKLAHOMA 521 (1935) (on file with author).
573 Telephone Interview with Charles Nesbitt, Oklahoma City attorney, former Oklahoma Attorney General (Aug. 5, 1992); see also Investigating Committee of Examiners, Final Report of Findings, 36 OKLA. B.J. 601, 603 (1965) [hereinafter Final Report] ("Welch was usually prepared, usually aggressive, and powerfully persuasive with them [Corn and Johnson] — as indeed he occasionally, but less frequently, appeared to be with other justices.").
deliberating less than two hours, a jury convicted him on five counts of income tax evasion. He was sentenced to three years in prison and a $13,500 fine. Welch continued to deny any wrongdoing until his death in 1969.

C. Unraveling the Tale of Intrigue

Corn purportedly was miffed that his co-conspirators on the bench did not quietly take their licks when the bribe scandal surfaced, as they had originally agreed. After Welch’s trial, Oklahoma County and federal prosecutors arranged for Corn’s immunity from further prosecution to obtain a sworn statement detailing the bribe conspiracy. On December 9, 1964, from a federal prison in Missouri, Corn spun a tale of intrigue, providing the first hard evidence that judges had accepted bribes.

In 1936 a prominent Oklahoma City attorney, O.A. Cargill, visited Corn at home to discuss “fine justice.” Cargill had built an impressive resume from fifty years in practice, having served as Oklahoma County attorney, Mayor of Oklahoma City, and one-time Democratic gubernatorial candidate. According to Corn, “Cargill agreed to finance my campaigns if I would go along as a sixth man on opinions in which he was interested,” including cases in which Cargill was attorney of record and many other cases. In 1955 they modified the agreement, with Cargill to pay a separate amount for favorable outcomes in specific cases, including Selected Investments.

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574 See Katherine Hatch, Jury Convicts State Justice On All Counts, DAILY OKLAHOMAN, Oct. 20, 1964, at 1. During the trial, Carroll repudiated the Pierre Laval story and confessed that he had given the money to Justice Corn. See Katherine Hatch, Witness Tells of Explaining Bribe Money, DAILY OKLAHOMAN, June 3, 1965, at 1. Corn was called to testify, but he repeatedly invoked the Fifth Amendment. See Katherine Hatch, Corn Refuses to Answer Any Questions at Welch Trial, DAILY OKLAHOMAN, Oct. 10, 1964, at 1. Oklahoma County District Attorney James Harrod observed Corn’s demeanor, concluded he was ready to talk, and then worked out an agreement for immunity in order to obtain Corn’s sworn statement for use in Cargill’s perjury trial. Telephone Interview with James F. Harrod, Oklahoma City Attorney (Oct. 6, 1993).

575 See Welch v. United States, 371 F.2d 287 (10th Cir.), cert. denied, 385 U.S. 876 (1966); see also CASEY, supra note 565, at 194-95.


577 Sworn Statement of N.S. Corn, (Dec. 9, 1964) at 61-68 (on file with author) [hereinafter Corn Statement].

578 Id. at 60. Corn was rewarded for his candor; nine days later he was paroled after serving less than six months. See ASHMAN, supra note 551, at 60.

579 Corn Statement, supra note 577, at 5.

580 See SCALES & GOBLE, supra note 556, at 136-38 (1926 Election Statistics). One lawyer recalls O.A. Cargill as a “fabulous” lawyer, among the “best lawyers he had ever seen.” Telephone Interview with D.C. Thomas, Oklahoma City attorney (Sept. 9, 1993).

581 Corn Statement, supra note 577, at 2.

582 309 P.2d 267 (Okla. 1957).
Marshall v. Amos,583 and Oklahoma Company v. O’Neil.584 For example, Corn described his dealings with N.B. Johnson and Earl Welch, who received $7500 for their votes in Selected Investments.585 Cargill fabricated the story of Pierre Laval to conceal the bribery payments.586

D. Legislative and Bar Association Activities

Meanwhile, the legislature sought to avoid the unpleasant task of impeachment, the only way to remove a sitting judge. The overwhelming Democratic majority was disinclined to impeach fellow Democrats. Some legislators anticipated problems establishing that federal income tax evasion constituted corruption in office.587 Therefore, the House of Representatives executive committee quickly investigated the bribery rumors and cleared both Welch and Johnson. This whitewash effort would not stick. On January 21, 1965, G.T. Blankenship, the Republican minority floor leader, took the floor on personal privilege, distributed Corn’s sworn statement, and pushed for a bona fide investigation into the charges.588 For the first time, strong evidence of bribery was made public.589

Welch nominally remained on the court, receiving salary and some assignments, until he resigned on March 22, 1965, within hours of the House beginning impeachment proceedings.590 True to his namesake, N.B. (Napoleon Bonaparte) Johnson fought impeachment to the bitter end. Johnson, a member of the Cherokee tribe, had also been an important leader in the Indian community.591 During the impeachment trial he called Corn “an evil old man” whose allegations against Johnson and Welch were motivated by deep-seated bias against Indians.592 After five weeks of hearings, the Senate im-

583 300 P.2d 990 (Okla. 1956).
584 333 P.2d 534 (Okla. 1958) (absolving Cargill’s daughter and son-in-law of fraud in business transaction). As part of post-scandal clean-up, a specially constituted supreme court vacated the decision and rescinded the contract induced by fraud. See Oklahoma Co. v. O’Neil, 440 P.2d 978 (Okla. 1968).
585 Corn Statement, supra note 577, at 20-22.
586 Id. at 28. Earlier, at Welch’s trial, Cargill repudiated the Laval story and admitted he paid $150,000 to Corn. His testimony occurred outside the jury’s presence and was ruled inadmissible. It was reported in the press. See Hugh Hall, Welch Retains His Post, OKLA. CITY TIMES, Oct. 20, 1964, at 1.
587 See Hall, supra note 586, at 1; see also Justice for Sale, supra note 560, at 8.
588 Interview with G.T. Blankenship, in Nichols Hills, Okla. (June 13, 1989).
589 See Justice for Sale, supra note 560, at 12.
590 See Culver, supra note 576, at 14.
591 Johnson served as Intertribal president in 1952, was a founder of the National Congress of American Indians, and was its president for eight terms. In 1955 he was chosen as the Outstanding American Indian of the Year. See CHRONICLES OF OKLAHOMA, supra note 571, at 140-48, 347; see also Impeached State Chief Justice Dies, OKLA. CITY TIMES, July 11, 1974, at 6.
592 See ASHMAN, supra note 551, at 64.
peached Johnson on May 13, 1965, with barely the two-thirds required majority vote.

Back in July 1964, after Corn pled nolo contendere, the Oklahoma Bar Association initiated its own investigation and appointed a blue ribbon panel of three past bar presidents to an Investigating Committee of Examiners. On March 26, 1965, after nine months of intensive work, the Committee issued its final report. The Committee unanimously found probable cause to support filing of disciplinary charges against Welch for accepting bribes in two cases. The Committee split two-to-one on the evidence concerning Johnson, whom Corn had implicated. Whether there was probable cause depended on the weight given to circumstantial evidence of bribery based on an alleged voting pattern. Additionally, it recommended investigation of alleged professional misconduct by other attorneys through the regular disciplinary process. Welch promptly resigned from the bar, still protesting his innocence.

E. Other Players in Web of Influence: “Dead Men, Cold Trails”

Bribery and other forms of influence peddling cannot be done alone. Typically, someone has to procure favorable treatment from a judge. According to rumor, the corruption was pervasive. Yet just one additional lawyer, Wayne Bayless, officially was implicated. Because the Oklahoma Bar Association conducted its investigation privately and did not publish the examiners’ complete findings, there is no public record concerning other lawyers who were under investigation. The Oklahoma Supreme Court and Bar Association have rebuf-

593 See Impeached State Chief Justice Dies, OKLA. CITY TIMES, July 11, 1974, at 6; see also Thirteenth Legislature, State of Oklahoma, Transcript of Proceedings of the Senate Sitting as a Court of Impeachment 402 (May 13, 1965) (vote of 32 to 15); Justice for Sale, supra note 560, at 16.
594 See CASEY, supra note 565, at 194; Interview with Marvin Emerson, Oklahoma Bar Association Executive Director, in Oklahoma City, Okla. (June 14, 1989). James Fellers, 1964 Oklahoma Bar Association President, reports that members of the Oklahoma Supreme Court requested a bar investigation in order to clear the names of those not involved. The governor appointed a watchdog committee to oversee the investigation. Telephone Interview with James Fellers, Oklahoma City Attorney (Oct. 11, 1993). Because the bar inquiry was conducted in private, closely guarding its findings as to all except Justices Corn, Welch, and Johnson, it left some observers skeptically wondering whether the outcome was an expedient whitewash. Blankenship’s Bombshell, SUNDAY OKLAHOMAN, Jan. 24, 1965.
596 Welch resigned from the bar on April 2, 1965. He died of a heart attack on November 12, 1969. Welch served several months in federal prison. See Culver, supra note 576, at 14.
597 See Final Report, supra note 573, at 604. One subheading referred to difficulties in reconstructing ancient history where many of the principals were dead and records were lost or destroyed. “The misconduct trail is covered with ingenuity and cunning at the time it is made. Eroded by time, it is indeed difficult to discover and follow.” Id. at 605.
fed requests for access to investigation records. Because of the bribe scandal, some lawyers and a host of supreme court decisions remain under a cloud of suspicion.

1. O.A. Cargill.—O.A. Cargill was indicted for perjury arising out of the Pierre Laval fiction presented to the original grand jury. His trial offered glimpses into the complex web of corruption. For instance, Cargill was listed as counsel in some cases where he procured favorable votes and received payment for his phantom services. While no clear explanation was given, Corn did not consistently vote in favor of Cargill's interest. Convicted on June 17, 1965, Cargill certainly was not the only attorney involved in the scandal.

2. Wayne W. Bayless.—Wayne W. Bayless served on the Oklahoma Supreme Court from 1933 to 1949, when he was defeated by N.B. Johnson. On October 12, 1965, the Oklahoma Bar Association filed a three count complaint alleging that Bayless conspired to obtain favorable treatment from the Oklahoma Supreme Court in three cases: Marshall v. Amos, Woodson v. Huey, and Young v. West Edmond Hunton Lime Unit. Count III, regarding Young, alleged that Bayless conspired with Cargill and others to obtain a favorable judgment by improper means and to divide the fees obtained in the case. Upon receipt of $21,000 in fees, Bayless allegedly paid $10,000 to Cargill, who had previously paid to one Ned Looney $5,000 for his (Looney's) share of the fee in the case. Neither the said Ned Looney nor the said O.A. Cargill, Sr., had ever appeared in the case or were shown as attorney of record in the case nor was the interest of either one of them as attorneys in the case disclosed to opposing counsel or to the Supreme Court as a whole. Bayless's answer denied any such conspiracy and further stated that "[h]e was not aware of the payment by O.A. Cargill, Sr. to Ned Looney of $5,000.00, as alleged in said complaint, until after the insti-

600 See Katherine Hatch, Nance Says Cargill Made $10,000 Offer to Influence Justice: Jurors Likely to get by Afternoon, DAILY OKLAHOMAN, June 15, 1965, at 1.
601 See ASHMAN, supra note 551, at 62.
604 300 P.2d 990 (Okla. 1956).
605 261 P.2d 199 (Okla. 1953).
607 Id.
tution of these proceedings, and has no knowledge, information or belief with respect to the reason or reasons for such payment." 608

The complaint and answer were filed with the supreme court on February 17, 1966, when Bayless tendered his resignation from the bar. 609 From these sworn bar disciplinary pleadings one might infer that Ned Looney was the subject of inquiry when he died in the fall of 1965.610

3. Ned Looney's Influence?—Without question, M.A. "Ned" Looney was a powerful man in Oklahoma politics. Beyond that, divergent views exist. Some lawyers held him in the highest regard: a model of professionalism with solid commitment to clients and an unblemished reputation. 611 Other lawyers recalled rumors that Ned Looney was among those thought to have influence with the Oklahoma Supreme Court, that he was one of the lawyers who could get things done. 612

Born Marion Augustus (M.A.) Looney in Vienna, Illinois in 1886, Ned Looney received his undergraduate degree from the University of Illinois and his law degree from Washington University. After admission to practice in the Oklahoma Territory in 1907, he started a general practice in Tishomingo. In 1914, he became Johnson County attorney, based in Tishomingo. He served as mayor of Tishomingo

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608 Answer of Respondent, State, ex rel., Oklahoma Bar Ass'n v. Bayless, filed with Trial Examiner Jan. 25, 1966, and with the Oklahoma Supreme Court Feb. 17, 1966. Robert D. Looney, Sr. does not believe Cargill made any such payment to his father. Neither he, nor other lawyers in the firm were aware of any payment; had it occurred they would have known. Letter from Robert D. Looney, Sr. to author (Jan. 26, 1994) (on file with author).

609 See ASHMAN, supra note 531, at 64-65.

610 See, e.g., Interview with T.D. Nicklas, 1965 Oklahoma Bar Association president, in Lawton, Okla. (June 19, 1992). Nicklas remembers nothing concrete, just that Ned Looney was having problems "from the bar standpoint." Id. But see Telephone Interview with Philip Daugherty, Oklahoma City attorney (Aug. 5, 1992). Daugherty practiced law in the same building, was good friends with Ned Looney, and successfully represented his children in a will contest asserting his lack of testamentary capacity. Had Ned Looney been under investigation, their relationship was such that he believes Ned Looney would have told him. Ned Looney said nothing about a bar investigation. Similarly, Ned Looney's son believes there was no pending bar investigation, and is confident he would have known had it occurred. Interview with Robert D. Looney, Sr. in Oklahoma City, Okla. (Jan. 26, 1994).

611 Interview with Robert D. Looney, Sr., in Oklahoma City, Okla. (Jan. 26, 1994); Telephone Interview with D.C. Thomas, Oklahoma City attorney (Sept. 9, 1993); Telephone Interview with Philip Daugherty, Oklahoma City attorney (Aug. 5, 1992).

612 Interview with William Berry, retired Oklahoma Supreme Court Justice, in Oklahoma City, Okla. (Dec. 18, 1991); Interview with G.T. Blankenship, in Nichols Hills, Okla. (June 13, 1989); Interview with Gomer Smith, Jr., Oklahoma City attorney, in Oklahoma City, Okla. (June 17, 1992); Interview with Ralph Newcombe, in Lawton, Okla. (June 19, 1992); Telephone Interview with Charles Nesbitt, Oklahoma City Attorney, former Oklahoma Attorney General (Aug. 5, 1992). Justice Berry thought that Ned had influence with several members of the court, including Earl Welch.
from 1916-18, when he resigned to serve in the Army. It appears that Ned Looney and Earl Welch first became acquainted in Tishomingo, where they both practiced. According to word on the street, they remained close during Welch’s tenure on the court. In almost sixty years of law practice, Looney represented four governors and two senators. He was politically very active, managing O.A. Cargill’s mayoral and gubernatorial campaigns and becoming involved with other statewide campaigns. The Looney, Watts firm regularly represented the Oklahoma Turnpike Authority in the Gary administration.

In 1919, O.A. Cargill, then county attorney of Oklahoma County, appointed Ned Looney as his assistant. For a short time in the mid-1920s, the two were law partners. They parted ways when Ned Looney chose to concentrate on insurance and criminal defense, while Cargill continued plaintiffs’ work. At first, they remained friends, but then drifted apart. In their later years, they resumed a casual friendship. They enjoyed competing in those cases where they represented opposing parties.

613 See Rex Harlow, Makers of Government 544 (1930).
614 Interview with Robert D. Looney, Sr., Oklahoma City attorney (May 13, 1989); Interview with Robert D. Looney, Sr., Oklahoma City attorney (Jan. 26, 1994). Robert Looney was uncertain where the two first met; Robert was born in 1919, the year Ned moved to Oklahoma City. He did not recall the men visiting each other’s homes, or joint political activity.
615 Interview with G.T. Blankenship, in Nichols Hills, Okla. (June 13, 1989); Telephone Interview with Charles Nesbitt, Oklahoma City attorney, former Oklahoma Attorney General (Aug. 5, 1992).
616 The governors were Holloway, Johnston Murray, Raymond Gary, and Howard Edmondson. See Ned Looney Dies, TULSA TRIB., Nov. 18, 1965, at 1.
617 See Harlow, supra note 613, at 544; Telephone Interview with Philip Daugherty, Oklahoma City attorney (Aug. 5, 1992). Robert Looney does not recall his father managing Cargill’s campaigns. Letter from Robert D. Looney, Sr. to author (Jan. 26, 1994). Ned Looney briefly appeared at the grand jury investigating Governor Gary’s campaign elections and was known to be “very close” to the governor. See generally Advertising Men Called in Gary Campaign Inquiry, TULSA TRIB., June 2, 1955, at 3. In 1928 Looney defended Judge Henry S. Johnson against impeachment charges which he deemed politically motivated. Interview with Robert D. Looney, Sr., in Oklahoma City, Okla. (May 31, 1989). In 1932, he helped obtain a reprieve from Governor Murray for a black man he believed wrongly convicted of a cross-racial rape. See 111 Chronicles of Okla. 166 (1988).
618 See Advertising Men Called in Gary Campaign Inquiry, TULSA TRIB., June 2, 1955, at 3.
620 Telephone Interview with Philip Daugherty (Aug. 5, 1992). His son recalls they split because of a difference in ethical views. Interview with Robert D. Looney, Sr., in Oklahoma City, Okla. (May 13, 1989).
621 Interview with Robert D. Looney, Sr., Oklahoma City Attorney (May 13, 1989); Interview with Robert D. Looney, Sr., Oklahoma City Attorney (Jan. 26, 1994).
622 Telephone Interview with Charles Nesbitt, Oklahoma City attorney, former Oklahoma Attorney General (Aug. 5, 1992); A Lexis search revealed at least eight reported supreme court cases when the two opposed each other.
By 1928, the Looney firm was well established. Clyde Watts, who litigated *Peevyhouse*, joined the firm in 1931. By 1928, the Looney firm was well established. Clyde Watts, who litigated *Peevyhouse*, joined the firm in 1931.623 Ned Looney was actively involved in a successful litigation practice until he began experiencing health problems in 1938. Thereafter, he did relatively little trial work, but regularly came into the office to supervise operations and to generate new business for the firm.624 Ned Looney had particularly close ties with Governor Gary's office. During this era, the firm increasingly represented governmental or political interests in cases before the supreme court.625 For about three years the firm employed as an associate, Don Welch, a second cousin of Justice Earl Welch, to work exclusively on matters involving the turnpike authority. Welch appeared in the firm name, although he was not considered a partner.626 Ned Looney died November 17, 1965, at the age of seventy-nine.627

624 Interview with Ralph Newcombe, in Lawton, Okla. (June 19, 1992); Interview with Robert D. Looney, Sr., in Oklahoma City, Okla. (Jan. 26, 1994).
625 Between 1954 and 1961, the Looney firm represented the Oklahoma Turnpike Authority in nine cases before the Oklahoma Supreme Court. In 1957 Governor Gary appointed Jim Hammill, his personal attorney from Madill, Oklahoma, and Ned Looney to represent the Grand River Dam Authority in a matter before the court. The appointment caused local controversy. See Hugh Hall, *GRDA Fee Of $50,000 Under Fire*, OKLA. CITY TIMES, Aug. 6, 1957, at 2.
626 See Oklahoma Turnpike Auth. v. Chandler, 316 P.2d 828 (Okla. 1957) (Looney, Watts, Looney, Welch, Hammill & Nichols represented appellee; five-to-four vote affirming $6000 judgment against Turnpike Authority, but setting aside prejudgment interest; Welch dissented); Adams v. National Casualty Co., 307 P.2d 542 (Okla. 1957) (same firm represented appellee, who lost on appeal by a five-to-four vote; Welch dissented); Cravatt v. City of Oklahoma City, 295 P.2d 807 (Okla. 1956) (same firm represented self-insured city; Welch opinion in which court unanimously denied recovery).

F. Is *Peevyhouse* a Tainted Case?

Was *Peevyhouse* tainted by the Oklahoma Supreme Court bribe scandal? Definitive proof is impossible. Suspicions persist based on

Charles Nesbitt, who was Attorney General between 1955-59 states that Don Welch was the outside contact for approaching Judge Welch. This was "common knowledge around town," defined as "gossip by the common lawyer." Telephone Interview with Charles Nesbitt, Oklahoma City attorney and former Oklahoma Attorney General (Aug. 5, 1992).


627 Interview with Robert D. Looney, Sr. in Oklahoma City, Okla. (Jan. 26, 1994). His daughters successfully challenged a holographic will written shortly before his death that left everything to his third wife, whom he recently married. The court found that when Ned Looney executed the purported will on October 5, 1965, he was suffering from delusional thinking resulting from senility, and thus lacked testamentary capacity (supporting documents on file with author). His son, Robert Looney, testified that in his final months "his father feared harm from someone, often failed to recognize old friends and clients, and couldn't remember incidents from day to day." *Looney Senile, Son Testifies*, DAILY OKLAHOMAN, Feb. 17, 1966, at 22. Under the circumstances, bar officials might well have turned their attention to other matters.
the voting records of Justices Welch and Johnson, both listed in the Pacific Reporter as consistently voting with the majority.\textsuperscript{628} Supreme court conference minutes show Welch did not participate in a dispositive vote on the case until March 1963, when the court denied the plaintiffs' second rehearing petition.\textsuperscript{629} In September 1963 a court order retroactively added Welch to the original decision, which became necessary to preserve the original majority opinion after Williams switched to the dissent.\textsuperscript{630}

People engaged in bribery or influence peddling seldom leave a paper trail. Any payment is made privately and in cash. After investigation conducted by various prosecutorial authorities, bribery was proved in only three cases.\textsuperscript{631} Practical exigencies precluded prosecution of all who were involved. Instead, authorities aimed to stop the corruption by focusing efforts on the strongest cases against the most culpable parties. Persuasive proof of just one bribe was sufficient to remove a judge from office or to disbar a lawyer. Several successful prosecutions were sufficient notice to all: continued corruption would not be tolerated.

This era could cast doubt over decades of Oklahoma decisions. Knowledgeable observers caution otherwise. For the most part, the Oklahoma legal system operated smoothly without bribery. Extraordinary cases presented opportunities for money to change hands—the most crass form of influence peddling. Proven bribery cases satisfy each of two conditions: high monetary stakes and a genu-

\textsuperscript{628} See Peevyhouse, 382 P.2d at 109. But see Slip Opinion, supra note 232 (on file with author) (Welch not listed as participating).

\textsuperscript{629} Conference Minutes of Oklahoma Supreme Court (Mar. 25, 1963) (on file with author).

\textsuperscript{630} Orders dated Mar. 25, 1963, Peevyhouse (No. 39,588) (Williams shown as dissenting), and Sept. 19, 1963, Peevyhouse (No. 39,588) (correcting majority opinion of December 11, 1962 and adding Welch as concurring with the majority “as said votes appear in this Court's conference minutes”) (both on file with author).

\textsuperscript{631} See Marshall v. Amos, 471 P.2d 896 (Okla. 1970) (affirming order for accounting); Marshall v. Amos, 300 P.2d 990 (Okla. 1956) (involving an oil and gas dispute), mandate vacated, 442 P.2d 500 (Okla. 1968) (parties stipulating to Corn's admission of bribery, based on his Dec. 9, 1964 sworn statement); Oklahoma Co. v. O'Neil, 440 P.2d 978 (Okla. 1968) (affirming finding of fraud); Oklahoma Co. v. O'Neil, 333 P.2d 534 (Okla. 1958) (involving an oil and gas investment dispute), vacated, 431 P.2d 445 (Okla. 1967). The bar examiners specifically found that Welch accepted bribes in O'Neill and in Selected Inv. Corp. v. Oklahoma Tax Comm'n, 309 P.2d 267 (Okla. 1957); no action was brought to vacate the original decision.

While serious questions remain about other decisions, the court has refused to conduct a wholesale re-examination of all cases in which a corrupt judge cast the deciding vote. See Johnson v. Johnson, 424 P.2d 414 (Okla. 1967), refusing to vacate 279 P.2d 928 (Okla. 1954). Reasons of expediency dictate this outcome; the contrary result would produce chaos in Oklahoma decisional law from that era. The later Johnson court stated:

We think it more just that those cases in which no corruption can be found should be allowed to stand, at the same time giving full right to any person who believes that any such decision has been corruptly obtained, to petition this Court for a hearing, in which, if corruption can be shown, the decision may be set aside.

424 P.2d at 418.
ine legal issue that divides the court. High stakes present the motive tempting one to seek influence. Division on the court creates the opportunity.\textsuperscript{632}

We must also place the scandal in historical context. Oklahoma became a state in 1907. The land run of 1889 opened up the Indian Territories to white settlement. The “Sooners” who jumped the gun and snuck out early to stake their claims acted lawlessly. These were the days of the wild west. Justice Berry, who was elected to the court in 1958, recalls that lawyers from outlying towns would come in to file an appeal and then visit the judge from their district to inform him about the case. Lawyers who may have gained competitive advantages from their influence with judges were still “fine people, . . . it was . . . a way of life in those days.”\textsuperscript{633} Justice Berry recalled a conversation during the election campaign for the court when Clyde Watts intimated that where there is equal influence and pressure on both sides, a just decision will result.\textsuperscript{634}

\textit{Peevyhouse} did not involve a great deal of money. Garland’s defense team considered the $5000 verdict a victory; it cross-appealed on the diminution issue only as a protective measure. The legal issue of damage liability makes it a high stakes case only if Garland anticipated repeat litigation over this type of special contract and feared the long-term costs of adverse precedent. Given landowners’ passive acceptance of proffered mining leases, the \textit{Peevyhouse} facts presented little risk of repetition.

There is no evidence that a bribe was paid in \textit{Peevyhouse} or that Ned Looney sought favorable treatment from the court. However, the evidence strongly suggests that Justice Welch voted in favor of interests represented by the Looney, Watts law firm, especially in close cases where his vote could make a difference. \textit{Peevyhouse} is such a case. Improper judicial bias may well have determined its outcome. Thus, if one defines taint as limited to bribery, \textit{Peevyhouse} is probably unblemished. If the definition includes all cases with out-

\textsuperscript{632} Telephone Interview with Charles Nesbitt, Oklahoma City attorney and former Oklahoma Attorney General (Aug. 5, 1992).

\textsuperscript{633} Interview with William Berry, retired Oklahoma Supreme Court Justice, in Oklahoma City, Okla. (Dec. 18, 1991) (on file with author).

\textsuperscript{634} Interview with William Berry, retired Oklahoma Supreme Court Justice, in Oklahoma City, Okla. (Dec. 18, 1991). Justice Berry inferred that Watts was making reference to Battle v. Mason (\textit{In re Meadors’ Estate}), 293 P.2d 324 (Okla. 1955), a large estate case that was the focus of inquiry by the Oklahoma County Grand Jury and the bar investigation. Newspapers reported at least two bribe attempts: a prominent newspaper editor claimed he was offered money to contact one judge; Justice Williams reported he was indirectly offered a substantial campaign contribution to change his vote. See Katherine Hatch, Nance Says Cargill Made $10,000 Offer To Influence Justice; Jurors Likely To Get Case By Afternoon, \textit{Daily Oklahoman}, June 15, 1965, at 1. The named lawyers representing the parties were subpoenaed to appear before the Oklahoma County Grand Jury; M.A. Ned Looney was hospitalized and did not appear. See J. Nelson Taylor, 3 Indictments Due From Grand Jury?, \textit{Daily Oklahoman}, Mar. 23, 1965, at 18.

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comes affected by improper judicial bias, then Peevyhouse appears tainted.

The court’s conference minutes catalogue Justice Welch’s participation in the case. When considered against the backdrop of his vote in other close cases, his votes in Peevyhouse indicate that he voted when needed to secure a favorable outcome for the firm’s client.

A computer search between 1945 and 1964 produced 196 reported decisions in which the Looney, Watts firm appeared before the Oklahoma Supreme Court. This number seems high, especially considering that it was primarily a defense trial firm. When interviewed for this project, Ralph Newcombe (a former Looney, Watts associate from the early 1960s) was surprised at the size of its appellate practice and speculated that appellate work came to the firm because of Ned Looney’s supposed influence with members of the court.

Nothing in the firm’s win-loss record suggests it consistently obtained favorable outcomes because of Ned Looney’s alleged influence. Overall, the firm won fifty-six percent and lost forty-four percent of its cases before the supreme court. Nor do the close cases show that the alleged influence improved the firm’s chances of success. Out of seventeen close cases, the firm won eight, or forty-seven percent. By all accounts, the court corruption was complex and not explainable with such superficial analysis.

Meaningful data analysis requires a closer look. Judges did not participate in voting for various reasons, including avoiding the appearance of impropriety because of their relationships with lawyers of parties appearing before the court. Rather than formally recuse from a specific case, which would require administrative appointment of a substitute judge, a judge could sit out and allow the remaining eight judges to decide the case without delay. Often, court opinions were per curiam and did not specify how individual judges voted. Such practices were certainly justified, given the backlog of the early Oklahoma Supreme Court. Justice Welch either did not participate,

635 Interview with Ralph Newcombe in Lawton, Okla. (June 19, 1992). Robert Looney, Sr. notes that many cases involved worker’s compensation, which often were appealed. The firm employed one woman attorney, Anna B. Otter, between 1957 and 1960. Newcombe indicates she wrote many of the firm’s appellate briefs. She was very bright and apparently an outstanding writer, but he doubted that she was the reason clients retained the firm for appellate work. Otter graduated Phi Beta Kappa from the University of Oklahoma where she also obtained her law degree in 1950. See MARTINDALE-HUBBELL 3641 (1957). Research and writing as her primary work assignment reflects the marginalization and sex-stereotyping of women lawyers common at the time. CYNTHIA F. EPSTEIN, WOMEN IN LAW 102-03 (1983).

636 See infra Appendix D (containing charts that set forth the basic statistical data and comparing the voting behavior of Justices Jackson and Welch in cases in which the Looney, Watts firm represented a party).

637 Interview with Pat Irwin, Federal Magistrate and former Oklahoma Supreme Court Justice, in Oklahoma City, Okla. (May 13, 1989).
or the vote was not reflected in forty-four percent of the Looney cases.

Cases that reflect Justice Welch's vote demonstrate his tendency to favor the interests represented by the Looney, Watts firm. Overall, Welch voted with the majority or authored the majority opinions in forty-nine percent of the cases; he dissented in seven percent of the cases. In examining Welch's overall voting pattern, there is a moderate, statistically significant correlation reflecting a pro-Looney, Watts bias. In those cases where the interest represented by the Looney, Watts firm prevailed, Welch voted with the majority or authored majority opinions sixty-seven percent of the time. He dissented, openly voicing opposition to the prevailing Looney, Watts interest only twice. By contrast, he dissented in about fourteen percent of the cases where the firm lost.

Welch's bias is most striking in the seventeen close cases where his vote could affect the outcome. A close case is defined as one where the court was split on the final vote, with five or six justices in the majority. He voted in every close case. In all but one case, Welch supported the interest represented by the Looney, Watts firm. In each case where the Looney, Watts interest lost, Welch dissented. In seven of the eight cases where the Looney, Watts interest prevailed, Welch voted with or authored the majority opinion. Only once did Welch dissent against the winning Looney, Watts interest, in the highly suspect case of Battle v. Mason (In re Meador's Estate). Because of the small sample, normal statistical tests are considered less reliable. Welch's likely favoritism is further evidenced by comparing how the other judges voted in the seventeen close cases. Welch voted for the interest represented by the Looney, Watts firm ninety-four percent of the time. No other judge came close. Johnson, who participated in fourteen of the cases, voted for the Looney, Watts interest nine times (sixty-four percent). Corn supported the firm's interest in six of the eleven cases in which he participated (fifty-five percent).

638 The Chi-square for voting pattern demonstrates statistical significance at the .001 level, reflecting a very high degree of confidence that such patterns could not occur by chance. The Phi coefficient is .289, which means there is a positive correlation between Welch's vote and the Looney, Watts firm's interest in the case. Professors Jorge Mendoza and Joe Rodgers of the University of Oklahoma Psychology Department conducted the statistical analysis on the data. (July 30, 1992, Aug. 8, 1994).

639 That is, Welch dissented in 1.8% of the cases when the firm prevailed.

640 Of 196 cases, 17 are defined as close. Of those, only eight judges voted in five cases.


642 293 P.2d 324 (Okla. 1955); see also supra note 634 and accompanying text.
The "loyalty rating" of other judges participating in most of the close cases ranged from a high of forty-seven percent to a low of fifteen percent.

Welch appeared loyal to the Looney, Watts firm interest when it mattered. He never voted dispositively to defeat a Looney case, and he cast the deciding vote in three cases, including Peevyhouse. Welch's conference votes in Peevyhouse suggest that he stayed his hand and did not participate in any dispositive vote until necessary for Garland to prevail.

VI. CONCLUSION

Peevyhouse is not merely a curious legal relic—an insignificant aberration easily forgotten. Rather, it is an important exhibit worthy of detailed study by generations of law students. It has long been a favorite of law professors, for both pedagogical and theoretical purposes. This Article expands its utility. Beyond the diminution principle, the foregoing contextual and legal analyses enable concentrated focus on lawyering skills critical to competent representation such as fact-gathering and theory development. In seeing how litigation incapacities (and perhaps judicial bias) affected the outcome, this case study provides further ammunition for law reform efforts aimed at systemic defects in the adversary process.

While Peevyhouse has generated significant academic interest, its national reception by courts has been mixed. Two intermediate state appellate courts seemingly adopted the damages formulation for breached remedial provisions, but avoided its immediate application. The Ohio Court of Appeals upheld an award for stripmining reclamation costs, finding Peevyhouse was superseded by environmental statutes imposing a restitutionary obligation to pay for restoring the status quo. Three courts extended Peevyhouse to a landlord's damage claim brought after termination of the lease; where the tenant usually is liable for the cost of repairs, these courts have used the diminution principle as an absolute ceiling on recovery.


Its greatest current impact is in environmental law. In 1980, Congress enacted the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA),\textsuperscript{646} empowering the Environmental Protection Agency or state agencies to recover both damages and restoration costs for injury to public natural resources.\textsuperscript{647} Three cases used \textit{Peevyhouse} to conclude that CERCLA response costs (used to pay for remediation) are equitable remedies in the nature of restitution and not damages covered by the responsible parties' general insurance policies.\textsuperscript{648} Damages, they reasoned, are a "form of substitutional redress which [seek] to replace the loss in value with a sum of money"; \textit{Peevyhouse} exemplified how substitutional damages can cost far less than restoration.\textsuperscript{649} These disputes involve high stakes for all concerned—insurance carriers and their insureds, government agencies, and taxpayers who may end up footing the bill. The proper resolution under CERCLA clearly exceeds the scope of this paper. Nevertheless, it is disturbing to see the fiction perpetuated that diminution damages serve as an adequate substitute for performance. Oklahoma courts literally ignored \textit{Peevyhouse} for twenty years. Between 1980 and 1993, it had been cited four times: twice by the supreme court on issues unrelated to damages\textsuperscript{650} and twice by the court of appeals.\textsuperscript{651} A 1994 Oklahoma Supreme Court decision gave new life to \textit{Peevyhouse}.\textsuperscript{652}

Federal courts sitting in diversity, required to take heed of local law, have produced a checkered series of decisions casting doubt on its status as binding precedent. In 1973, the Tenth Circuit remanded a judgment based on diminution because the jury was not told to determine whether the remedial provisions were incidental or central to the contract purpose.\textsuperscript{653} This procedural disposition protects the parties'...
actual intent far better than the original decision. In a remarkable 1983 decision, the Tenth Circuit upheld a judgment for $375,000 in reclamation costs, concluding that Oklahoma courts would no longer apply *Peevyhouse* to limit recovery for breached reclamation provisions contained in a mining lease. That case also involved a coal operator's breach of restoration provisions contained in a mining lease where the cost far exceeded the diminution in value. The Tenth Circuit justified its decision by determining that subsequent state reclamation statutes reflect changed policy and by observing that Oklahoma courts did not cite the sharply divided *Peevyhouse* opinion. Although reclamation costs about five times the current land value, and fifty times the diminution in value, the recovery did not apparently result in a windfall to the plaintiff. A representative for the railroad testified about plaintiff's desire to reclaim the land; presumably, it used the recovery for that purpose.

Ironically, *Rock Island* rekindled interest in *Peevyhouse*. The next year, an Oklahoma court—for the first time—used *Peevyhouse* to limit recovery to diminution in value. *Thompson v. Andover Oil Co.* involved a quite different context: an owner's action for surface damages caused by an oil drilling operation. The owner may recover for the diminished value of the property resulting from permanent injury and the cost of curing temporary injury not to exceed the diminished value of the land. Judge Means explained that he published the opinion to clarify murky questions on recovery for permanent and temporary injuries; he bristled at the federal court's attempt to overrule a state court opinion. Since then, the Oklahoma

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655 *Id.* at 1078.
656 The land's fair market value was then $76,345; the parties stipulated that the diminution in value caused by the breach was $6797. Respondent's Brief in Opposition to Petition for Writ of Certiorari to Supreme Court of United States at 7, Rock Island Improvement Co. v. Helmeric & Payne, Inc., 698 F.2d 1075 (10th Cir.), cert. denied, 461 U.S. 944 (1983) [hereinafter Respondent's Brief Opposing Certiorari] (copy on file with author).
657 The witness listed the reasons: the hazards the land posed to the community that could result in liability; aesthetic considerations and blight on community; and pressure from state officials, including former Governor David Boren, community representatives, and civic clubs. Respondent's Brief Opposing Certiorari, *supra* note 656, at 6. Rock Island Railroad was then in bankruptcy, and the trustee was understandably concerned about the risk of liability that could consume the bankruptcy estate. *See* Reading Co. v. Brown, 391 U.S. 471 (1968); Brief of Appellee at 7, Rock Island Improvement Co. v. Helmeric & Payne, Inc., 698 F.2d 1075 (10th Cir. 1983) (on file with author); *see also supra* text accompanying note 327.
659 *Id.* at 80 (involving lease of oil and gas drilling rights from the holder of the mineral estate). The surface owner's damage claims arose under tort law and the Oklahoma Surface Damages Act, OKLA. STAT. ANN. tit. 52, §§ 318.2-318.9 (West 1991).
660 *Thompson*, 691 P.2d at 82-83.
661 Interview with Judge William Means, in Oklahoma City, Okla. (Apr. 26, 1988).
Supreme Court has limited recovery for surface damages to diminution in value under both the Oklahoma Surface Damage Act and the common law.\textsuperscript{662} Whether this outcome reflects sound policy is beyond the scope of this work. It is clear, however, that environmental harm from mineral exploitation persists because of the diminution principle.

Federal courts were uncertain about whether \textit{Peevyhouse} remained the law in Oklahoma.\textsuperscript{663} In 1992, a federal court certified to the Oklahoma Supreme Court the question concerning what damages measure applied for breach of a settlement agreement to reduce water pollutants following an oil and gas drilling operation.\textsuperscript{664} Two and one-half years later, the court reaffirmed \textit{Peevyhouse} with little consideration given to policy issues or federal environmental law mandating remediation regardless of market value.\textsuperscript{665} Despite the \textit{Schneberger} decision, the issue remains in doubt. The court split five to four on the vote to grant a rehearing.\textsuperscript{666} Meanwhile, the opposing forces press for legislative changes to damages from exploitation of mineral resources.\textsuperscript{667} Unfortunately, the reaffirmed \textit{Peevyhouse} principle appears now to have broader application. It is of dubious origin, made possible by the vagaries of the adversary process, yet has remarkable longevity against the weight of criticism. \textit{Peevyhouse} opponents must patiently await another opportunity to seek its reversal.

\textsuperscript{662} See Houck v. Hold Oil Corp., 867 P.2d 451 (Okla. 1993) (noting that the statute balanced interests of landowners and holders of mineral interests; stating that the recovery for surface damages was limited to diminution in value); Davis Oil Co. v. Cloud, 766 P.2d 1347 (Okla. 1989) (noting specific factors for determining diminished value). Because the landowners' claims sound in tort, the actual recovery for surface damage harm represents a comparatively small amount of the total award. Plaintiffs recover compensatory damages for nuisance and inconvenience claims, for punitive damages, and for attorneys' fees. Because multiple tort theories support recovery, the diminution measure may not result in drastic undercompensation as it does for contract claims, where it determines the exclusive remedy.

\textsuperscript{663} See Davis v. Shell Oil Co., 795 F. Supp. 381 (W.D. Okla. 1992) (Judge Cauthron refused to follow, noting also that landowners asserted several damage theories with no land value limitation); Blackburn v. Delaware PrimeEnergy Corp., No. Civ. 91-664 (W.D. Okla. July 8, 1992) (Judge West declined to apply) (unpublished order, copy on file with author); Schneberger v. Apache Corp., No. Civ. 89-1895T (W.D. Okla. filed May 6, 1992) (Judge Thompson found \textit{Peevyhouse} and \textit{Rock Island} did not control damages for breach of settlement to reduce water pollutants caused by oil and gas drilling operations; certified questions to Oklahoma Supreme Court) (unpublished order, copy on file with author).


The Ballad of Willie and Lucille

My name is Willie, my song may be silly,
But friends, if you’ll lend me an ear,
I’ve a story to tell ya, it might compel ya,
To buy me a shot and a beer.
Me and Lucille, we struck us a deal,
With Garland Coal & Mining.
But this thing I’ve learned—sometimes ya get burned,
And each cloud don’t have a silver lining.

We picked a fine time to strip mine, Lucille.
It sure looks to me like we got a raw deal.
That smooth city-slicker said we’d all get rich quicker.
I should have known it warn’t real.

We picked a fine time to strip mine, Lucille.
That smooth talkin’ stranger, I knew he was danger,
The minute he walked in our yard.
But his smooth city ways put us in a daze,
And that’s when we let down our guard.
He said that his goal was to mine all the coal,
Lying beneath our farm.
But, he said not to worry, because in a hurry,
They’d put back our dirt with no harm.

We picked a fine time to strip mine, Lucille.
That contract we signed was just a license to steal.
Where we used to grow taters,
Now looks like bomb craters,
Yes, that man was slippery as an eel.

We picked a fine time to strip mine, Lucille.
Well, they dug up the coal from a big strip mine hole
In what used to be our front lawn.
Every day they would dig, and the hole got so big,
Till one day the coal was all gone.
I said, “Mr. Garland, man what is your plan
To put all our dirt back in place?”
He said, “You know it’s funny — we just ran out of money
And on your farm it would just be a waste.”
We picked a fine time to strip mine, Lucille.
Make no mistake, hon, we got a raw deal,
I never went to law school,
I don’t know the value rule,
I thought sure we’d win our appeal,
The Supreme Court done gyped us, Lucille.
**Blasting:** The operation of breaking coal, ore or rock by boring a hole in it, inserting an explosive charge, and detonating or firing it.

**Cut:** a. To intersect a vein or working. . . . b. To excavate coal . . . . k. An excavation, generally applied to surface mining; to make an incision in a block of coal.

**Diversion:** A channel so excavated as to divert a stream or river away from a working site in order that construction might safely proceed to completion.

**Dragline:** A type of excavating equipment which casts a rope-hung bucket a considerable distance, collects the dug material by pulling the bucket toward itself on the ground with a second rope, elevates the bucket, and dumps the material on a spoil bank, in a hopper, or on a pile.

**Fill:** Any sediment deposited by an agent to fill or to fill partly a valley, a sink, or other depression. b. Manmade deposits of natural soils and waste materials. d. Material used to fill a cavity or passage. An embankment to fill a hollow or a ravine, or the place filled by such an embankment. Also, the depth of the filling material when it is in place. As a verb, to make an embankment in or to raise the level of a low place with earth, gravel, or rock.

**Grade:** d. To prepare a roadway of more uniform slope. . . . The finished surface of a . . . top of embankment, or bottom of excavation.

**Highwall:** The face or bank on the uphill side of a contour strip mine excavation.

**Overburden:** a. used by geologists and engineers in several different senses. By some, it is used to designate material of any nature, consolidated or unconsolidated, that overlies a deposit of useful materials, ores, or coal, especially those deposits that are mined from the surface by open cuts. By others, overburden designates only loose soil, sand, gravel, etc. that lies above the bedrock. The term should not be used with specific definition.

**Pit:** a. Loosely speaking, a coal mine. Not commonly used by coal men, except in reference to surface mining where the workings may be known as a strip pit. . . . i. A large hole from which some mineral deposit is dug or quarried, or the mine itself, as a gravel pit; stone pit . . . . o. An excavation on the surface of the earth, that is, open-pit mine, sample pit, etc.

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* PAUL W. THRUSH, BUREAU OF MINES, DICTIONARY OF MINING TERMS (1968)
shale: a. A laminated sediment, in which the constituent particles are predominantly of the clay grade... c. One of the impurities associated with coal seams.

spoil bank: a. A term common in surface mining to designate the accumulation of overburden... c. The place on the surface where spoil is deposited. Also called a spoil heap.
CoAL LEASE

23rd November 1954

THIS LEASE executed this thirteenth day of November, 1954 by and between

Willie Peeryhouse and Lucille Peeryhouse, husband and wife, hereinafter called 'Lessors.'

Garland Coal and Mining Company, hereinafter called 'Lessee,'

WITNESSETH

WHEREAS, the Lessors are the owners of, or have the right to mine and remove the coal underlying the present and to take all or any part of the surface of the following described lands in the County of Haskell, State of Oklahoma:

The Southwest Quarter of the Southwest Quarter of Section 7, Township 8 North and Range 21 East, and the South Half of the Northeast Quarter of the South-east Quarter of Section 12, Township 8 North and Range 20 East,

NOW THEREFORE, in consideration of the sum of One Dollar ($1.00) cash in hand paid by Lessee to Lessors, receipt whereof is hereby acknowledged, and in consideration of the performance by each party of the conditions hereinafter set forth, Lessee grant and Lessee to the Lessee the exclusive rights to mine, shall, deep mine or strip and remove coal underlying the above described property, together with the right to use and/or remove any and/or all the surface of said lands necessarily incidental thereto, subject to the following terms and conditions:

Lessee desires to mine and remove the coal underlying said premises and Lessee desires to lease the same to Lessee for the purpose:

THEREFORE, Lessee agrees to pay to the Lessee upon all coal mined, removed and sold from these premises a royalty of 50 cents per ton of 2000 pounds, railroad weight to govern if shipped by rail, truck scale weight if loaded on trucks, such royalty to be paid not later than the thirty day of each month following the month in which the same be mined, removed and sold, provided that minimum royalties which may be advanced at the rates per acre herein set forth shall be credited on any royalty due for coal mined and sold. And Lessee will furnish to the Lessee on or before said date a statement showing the amount of coal mined and removed and sold during the preceding month: the Lessee shall have the right at reasonable times to inspect Lessee's books for the purpose of verifying the amount of coal so mined and Lessee shall have the right at reasonable times to inspect Lessee's operations.

Lessee grants to the Lessee upon all coal mined, removed and sold from these premises a royalty of 50 cents per ton of 2000 pounds, railroad weight to govern if shipped by rail, truck scale weight if loaded on trucks, such royalty to be paid not later than the thirty day of each month following the month in which the same be mined, removed and sold, provided that minimum royalties which may be advanced at the rates per acre herein set forth shall be credited on any royalty due for coal mined and sold. And Lessee will furnish to the Lessee on or before said date a statement showing the amount of coal mined and removed and sold during the preceding month: the Lessee shall have the right at reasonable times to inspect Lessee's books for the purpose of verifying the amount of coal so mined and Lessee shall have the right at reasonable times to inspect Lessee's operations.

Lessee shall have the exclusive right to enter upon and prospect for coal, drill holes and make any necessary excavations and if it determines coal be present in paying quantities. Then to dig, mine or strip, remove, sell and dispose of all the mineable and marketable coal that is in the opinion of the Lessee can be profitably mined and removed therefrom, together with all incidental mining rights necessary for the conduct of such operation, and the right of ingress and egress to and across said property, or any property owned by Lessee for the purpose of entering upon said premises in connection with the production and transportation of coal from said premises on adjacent lands.

After commencement, such operations shall be carried on in a miner-like and workmanlike manner, as usually conducted in similar operations. Lessee may strip the overburden from such coal as shall be profitably mineable and marketable and will pay all taxes arising from the mining operation, and Lessee agrees that they will pay and keep paid all taxes upon the premises herein leased. Lessee shall pay for damages, caused by Lessee's prospecting operations, to growing crops on said lands.

It is understood that in the mining operations hereunder the surface of said land may be excavated and the Lessee agree to furnish Lessee, in consideration of said royalty, all surface so as may be necessary to be used by Lessee in the operation of strip pits, and may be used by Lessee for drainage ditches, hauled roads, spoil banks, tipple tracks, and any other structures that Lessee finds necessary in the operation of said strip pit or pits or coal mine and the Lessee agrees that all such structures shall be located consistent with good operating practice so as to cause the least damage or inconvenience to the owner or user of such surface: Lessee agrees that he will save Lessee harmless from claims arising out of the actual mining and removing of said coal and agrees that they will save harmless and indemnify the Lessee from any claim or liability arising from any damage to the surface of these lands caused by such operations; it is further recognized the Lessee shall have the right without liability to the Lessee, wherever it may be necessary in conducting such operations, to change the course of any streams or water courses, or to erect and maintain such drainage ditches as it shall deem advisable having due regard for the successful operation of said strip pit and damage to the remainder of the property.

It is understood and agreed that in the type of operation contemplated by Lessee it is necessary to procure leases of other property from which coal can be mined or stripped so as to justify the investment to be made by Lessee and in consideration of the royalty herein paid. Lessee grants to the Lessee the right to haul over and across said premises and through said pits coal from adjacent lands free from any charge.

NORTWESTERN UNIVERSITY LAW REVIEW

APPENDIX C

1478

89:1341 (1995)

Peevyhouse Revisited

- 7a -
Lessors hereby acknowledges receipt of the sum of $2,000.00 as advanced royalty which is to be credited on any royalty due for coal thereafter mined from said lands by said Lessee from the first coal produced.

- 7b -
Lessee agrees to make fills in the pits dug on said premises on the property lines in such manner that fences can be placed thereon and access had to opposite sides of the pits.

- 7c -
Lessee agrees to smooth off the top of the spoils banks on the above premises.

- 7d -
Lessee agrees to leave the creek crossing the above premises in such a condition that it will not interfere with the crossings to be made in pits as set out in 7b.

- 7e -
Lessee agrees to build and maintain a cattle guard in the south fence of SW 1/4 SW 1/4 of Section 7 if an access road is made through said fence.

- 7f -
Lessee further agrees to leave no shale or dirt on the high wall of said pits.

- 7g -
It is further agreed between the parties hereto that this lease is not to be assigned, transferred or sub-let without the written permission of the lessors. Provided however, that an assignment of this lease to the Canadian Mining Company shall not require such written permission.

- 7h -
Lessee agrees to have the above described premises surveyed and the boundary lines on said premises established prior to commencement of digging coal.
The right is hereby conferred upon Lessee to cancel this Lease upon thirty (30) days written notice when the operation of removal of coal therefrom shall in his judgment become unprofitable and Lessee shall be the sole judge as to when same is unprofitable.

In case Lessee fails to pay the royalty when due or fails to comply with any one of the other terms of this Lease, the Lessors shall give the Lessee fifteen (15) days written notice, calling attention to the default by Lessee, specifying wherein the Lessee has failed to comply with the terms of this agreement, and, if at the end of said period, Lessee is still in default, the Lessors shall have the right to remove any of its property, machinery, tools or supplies from the described premises until all amounts due the Lessors have been paid in full.

In the event this Lease expires by operation of its own terms, or the Lessee elects to cancel the same under the provisions hereinafore set out, the Lessors shall have, provided it is not in default, six (6) months from said termination or cancellation within which to remove all of its property, machinery, tools, supplies or equipment that it might have upon said described premises. All structures built or erected upon said premises shall be and remain the sole and separate property of the Lessors.

It is mutually understood and agreed that the right, privileges and obligations herein conferred on the parties shall be binding on the executors, administratores, heirs, successors or assigns of the parties herein whether so specifically stated herein or not; in the event that the Lessors shall own less than the fee of the premises and coal herein demised, Lessee shall pay royalty to them as their respective Lessors shall appear. If the property is encumbered by a mortgage or other liens, Lessees shall have the right to pay said liens and deduct from royalty due Lessors.

IN WITNESS WHEREOF, the parties have set their hands this 23rd day of November, 1954.

[Signatures]

STATE OF: Oklahoma
COUNTY OF: Haskell

Before me, the undersigned, a Notary Public in and for the said County and State, on this 23rd day of November, 1954, personally appeared Willie Peavoyhouse and Lucille Peavoyhouse, his wife, to me known to be the identical persons who executed the within and foregoing instrument and acknowledged to me that they executed the same as their free and voluntary act and deed for the uses and purposes therein set forth.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal the day and year last above written.

My Commission Expires: 9-24-1957

[Notary Public]

1480
State of Oklahoma,  
County of Haskell,

Before me, the undersigned, a Notary Public in and for said State, on this 28th day of November, 1954, personally appeared Burrow Cuspton, to me known to be the identical person who executed the within and foregoing instrument as attorney in fact of Garland Coal & Mining Company, and acknowledged to me that he executed the same as his free and voluntary act and deed and as the free and voluntary act and deed of Garland Coal and Mining Company, for the uses and purposes therein set forth.

Witness my hand and official seal the day and year last above written.

My commission expires:

G. 24-1557

[Signature]  
Notary Public
### Appendix D

Summary of cases where Looney, Watts firm appeared before Oklahoma Supreme Court 1945-1964 (196 cases)

<table>
<thead>
<tr>
<th>Year</th>
<th>Won</th>
<th>Lost</th>
<th>Close cases (*Looney interest prevailed)</th>
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<tbody>
<tr>
<td>1964</td>
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</tr>
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**Notes:**
- Won cases include majorities and non-majorities.
- Lost cases include majorities and non-majorities.
- Close cases are cases where Looney, Watts firm appeared before the Oklahoma Supreme Court.
- Looney interest: Whether Looney, Watts firm appeared before the court.
- NP = Not participated or vote not shown.
## Welch Vote on All Cases

### Involving Looney, Watts Firm
(1945-1964)

<table>
<thead>
<tr>
<th>Vote</th>
<th>Prevalied</th>
<th>Lost</th>
<th>Total</th>
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<tr>
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<td></td>
</tr>
<tr>
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<td>87</td>
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<td></td>
<td>(49.7%)</td>
<td>(50.6%)</td>
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<tr>
<td>Joined majority</td>
<td>64</td>
<td>31</td>
<td>95</td>
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<tr>
<td></td>
<td>(67.4%)</td>
<td>(32.6%)</td>
<td>(48.5%)</td>
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<tr>
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<td>12</td>
<td>14</td>
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<tr>
<td></td>
<td>(14.3%)</td>
<td>(85.7%)</td>
<td>(7.1%)</td>
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<tr>
<td>Total</td>
<td>109</td>
<td>87</td>
<td>196</td>
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<tr>
<td></td>
<td>(55.6%)</td>
<td>(44.4%)</td>
<td>(100%)</td>
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Welch Vote on Close Cases*

Involving Looney, Watts Firm
(1945-1964)

<table>
<thead>
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<th>Vote</th>
<th>Prevalied</th>
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</tr>
</thead>
<tbody>
<tr>
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<td>0</td>
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<tr>
<td>Joined majority</td>
<td>7 (100.0%)</td>
<td>0</td>
<td>7 (41.2%)</td>
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<tr>
<td>Dissented</td>
<td>1 (10%)</td>
<td>9 (90%)</td>
<td>10 (58.8%)</td>
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<tr>
<td>Battle v. Mason</td>
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<tr>
<td>Total</td>
<td>8 (47.1%)</td>
<td>9 (52.9%)</td>
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* Close cases defined as 5-4 or 6-3 vote.
Jackson Vote on All Cases

Involving Looney, Watts Firm
(1955-1964)

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<td>12 (40%)</td>
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</tr>
<tr>
<td>Joined majority</td>
<td>57 (54.3%)</td>
<td>48 (45.7%)</td>
<td>105 (77.2%)</td>
</tr>
<tr>
<td>(or concurred in result)</td>
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<tr>
<td>Dissented</td>
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<td>1</td>
<td>1 (0.7%)</td>
</tr>
</tbody>
</table>

Total 75 (55.1%) 61 (44.9%) 136 (100%)

* Jackson went on the court in 1955. The Looney, Watts firm participated in 60 cases between 1945-1954, prevailing in 35 (58.3%) and losing in 25 (41.7%)

Peevyhouse Revisited
### Jackson Vote on Close Cases

**Involving Looney, Watts Firm**  
*(1955-1964)*

<table>
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<th>Vote</th>
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<td>5 (45.5%)</td>
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<td>Dissented</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td><strong>6 (50%)</strong></td>
<td><strong>6 (50%)</strong></td>
</tr>
</tbody>
</table>

*Close cases defined as 5-4 or 6-3 vote. Five such cases involving the Looney, Watts firm were decided before Jackson went on the court in 1955. The Looney, Watts interest prevailed in 3 (60%), and lost in 2 (40%).*