No. ________

In The
Supreme Court of the United States

PATRICIA WILLITS; WILLIAM G. PARROTT, JR.; AND DONALD PETRIE, AS TRUSTEE FOR THE PPW ROYALTY TRUST,

Petitioners,

v.

PEABODY COAL COMPANY, LLC; PEABODY ENERGY CORPORATION; PEABODY DEVELOPMENT COMPANY, LLC; PEABODY HOLDING COMPANY, LLC; WESTERN DIAMOND, LLC; ARMSTRONG COAL COMPANY, INC.; CYPRUS CREEK LAND RESOURCES, LLC; CYPRUS CREEK LAND COMPANY; WESTERN LAND COMPANY, LLC; CERALVO HOLDINGS, LLC; CERALVO RESOURCES, LLC; ARMSTRONG COAL RESERVES, INC.; ARMSTRONG LAND COMPANY, LLC; AND STATE OF MISSOURI,

Respondents.

On Petition For A Writ Of Certiorari To The Missouri Court Of Appeals, Eastern District

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under two royalty agreements executed in 1954, Petitioners are to be paid royalties on coal mined by Peabody Coal Company ("Peabody"), its successors and assigns after December 1, 1954 from lands located in three designated boundaries in Kentucky. In 1999, the Sixth Circuit affirmed a Kentucky federal court judgment which rejected Peabody's claim that the two royalty agreements are invalid, and which confirmed the validity and enforceability of the two agreements. In subsequent litigation between Petitioners, Peabody, and its assignee, however, the Missouri Court of Appeals affirmed a judgment which ignored and contradicted the Kentucky federal court judgment, and which instead held that the two royalty agreements are partially invalid, and are not enforceable in accordance with their express terms. The Petitioners then filed suit against the State of Missouri, seeking a judgment declaring that the Missouri state court judgments were in violation of the Full Faith and Credit Clause, and should be vacated, and that the Missouri judgments constituted a "judicial taking" of Petitioners' established property rights, in violation of the Fifth Amendment. The Missouri Court of Appeals refused to address the merits of Petitioners' constitutional claims, based upon a nonexistent Missouri rule of procedure that Petitioners had waived their constitutional claims by not pursuing them in the earlier Missouri litigation. The questions presented are:

QUESTIONS PRESENTED – Continued

1. Does the Full Faith and Credit Clause of the United States Constitution require the Missouri courts to give *res judicata* effect to a valid Kentucky federal court judgment confirming the validity of two royalty agreements, and to vacate the later Missouri judgments which directly contradict the Kentucky judgment regarding the validity of those agreements?

2. Did the Missouri Court of Appeals violate the Fifth Amendment's "Takings Clause" by eliminating Petitioners' established property rights under two royalty agreements in direct contradiction to the unambiguous terms of those agreements?

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PETITION FOR WRIT OF CERTIORARI

Petitioners Patricia Willits, William G. Parrott, Jr., and Donald Petrie, as Trustee for the PPW Royalty Trust ("Petitioners") petition this Court for a writ of certiorari to review the judgment of the Missouri Court of Appeals in this case.

OPINION AND ORDER BELOW

The opinion of the Missouri Court of Appeals is reported at 400 S.W.3d 442 and reproduced in the appendix hereto ("App.") at 1. The final judgment of the Circuit Court for St. Louis County, Missouri granting the Respondents' joint motion to dismiss Petitioners' amended petition and denying Petitioners' motion for summary judgment is not reported and is reproduced at App. 24.

JURISDICTION

The judgment of the Missouri Court of Appeals was entered on April 9, 2013. (App. 1). On April 24, 2013, Petitioners timely filed their motion for rehearing and/or application for transfer to the Missouri Supreme Court with the Missouri Court of Appeals, which was denied on May 16, 2013. (App. 32). On May 31, 2013, Petitioners timely filed their application for transfer to the Missouri Supreme Court, which was denied on June 25, 2013. (App. 31). On August 26, 2013, Justice Alito extended the time for filing a

petition of certiorari to and including October 23, 2013. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Article IV, § 1 of the United States Constitution provides in relevant part that "Full Faith and Credit shall be given in each state to the public Acts, Records, and judicial proceedings of every other State."

The Fifth Amendment to the United States Constitution provides in relevant part that "[n]o person shall * * * be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

This case arises out of the State of Missouri's violation of Article IV, § 1 and the Fifth Amendment of the United States Constitution, based upon judgments entered in 2010 by the Circuit Court for the City of St. Louis, Missouri ("the Missouri Circuit Court") and the Missouri Court of Appeals, which ignored and directly contradicted a final judgment entered by the United States District Court for the Western District of Kentucky ("Kentucky federal court") on July 3, 1991, which was affirmed by the Sixth Circuit Court of Appeals, that confirmed the validity and

enforceability of two royalty agreements entered into on November 17, 1954 ("the 1954 Royalty Agreements"). The State of Missouri, through its courts, failed to give *res judicata* effect to the prior judgments entered by the Kentucky federal court and the Sixth Circuit which held that the 1954 Royalty Agreements are valid and enforceable in accordance with their express terms. In addition, the Missouri Circuit Court's and the Missouri Court of Appeals' refusal to enforce the 1954 Royalty Agreements in accordance with their express terms, and in direct contradiction to the binding judgments of the Kentucky federal court and the Sixth Circuit, eliminated the Petitioners' established property interests under the 1954 Royalty Agreements in violation of the "Takings Clause" of the Fifth Amendment of the United States Constitution.

A. The 1954 Royalty Agreements

On November 17, 1954, W.G. Parrott and his relatives ("the Parrotts") entered into the 1954 Royalty Agreements with the Alston Coal Company ("Alston"), under which Alston agreed to pay the Parrotts a royalty on coal mined and sold on and after December 1, 1954, by Alston, its successors and assigns from "any of the lands" in three boundaries in Ohio County, Kentucky ("the Boundaries"). There is no provision in the 1954 Royalty Agreements which limits Alston's royalty obligation to coal mined only under a particular lease, or to coal mined only from lands in the Boundaries which Alston, its successors and assigns

owned on November 17, 1954 as a tenant in common, or to coal mined only from lands in the Boundaries which Alston owned or leased on November 17, 1954.

When Alston entered into the 1954 Royalty Agreements, Alston did not have an ownership interest or leasehold interest in all of the lands or coal lying within the Boundaries. Alston instead had either an ownership interest as a tenant in common with Beaver Dam Coal Company or a leasehold interest under a lease agreement with Beaver Dam Coal Company ("the 1954 Properties"), which encompassed approximately twenty-seven percent of the 53,000 acres of lands lying within the Boundaries.

In 1956, Peabody Coal Company of Illinois acquired Alston, and assumed Alston's obligations to the Parrotts under the 1954 Royalty Agreements. In March 1968, Peabody Coal Company of Illinois conveyed and assigned to Peabody Coal Company of Delaware ("Peabody") its interest in the coal and surface tracts in the Boundaries. Between November 17, 1954 and June 1, 1990, Peabody acquired substantial lands and coal within the Boundaries which Alston did not own or lease on November 1, 1954 ("After-acquired Properties"). By June 1, 1990, the After-acquired Properties which Peabody owned or leased constituted approximately fifty-three percent of the 53,000 acres in the Boundaries.

Between September 1989 and February 29, 2012, Petitioners Patricia Willits, William G. Parrott, Jr., and Donald Petrie, as the Trustee of the PPW Royalty

Trust, held all of the Parrotts' royalty rights under the 1954 Royalty Agreements.

At various times between November 17, 1954 and June 1, 1990, Peabody mined and sold coal from the 1954 Properties and from the After-acquired Properties, and paid substantial royalties to the Petitioners on such coal. Such royalties were paid by Peabody regardless of whether the coal was mined from lands which Peabody owned in fee simple, or from lands which Peabody owned as a tenant in common with a third party, or from lands which Peabody had leased from a third party.

B. Peabody's Legal Challenge To The Validity Of The 1954 Royalty Agreements, And The Kentucky Federal Court's July 3, 1991 Judgment Confirming The Validity Of The 1954 Royalty Agreements

In 1990, the Petitioners filed a lawsuit against Peabody in the Kentucky federal court, asserting various claims against Peabody for royalty underpayments under the 1954 Royalty Agreements. ("*Willits I*"). Peabody filed a counterclaim in that litigation alleging that it had overpaid the Petitioners seven million dollars in royalties because the 1954 Royalty Agreements are partially invalid to the extent that they obligate Peabody to pay royalties from coal mined and sold from the After-acquired Properties which Alston did not own or lease as of November 17, 1954. The Petitioners filed a Fed. R. Civ. P. 12(b)(6)

motion to dismiss Peabody's counterclaim based on the alleged partial invalidity of the 1954 Royalty Agreements. After full briefing, the Kentucky federal court entered its July 3, 1991 judgment granting the Petitioners' motion to dismiss, and rejecting Peabody's contention that the agreements were invalid to the extent that they require Peabody to pay Petitioners royalties on coal mined and sold from the After-acquired Properties. (App. 58-62).

In its July 3, 1991 judgment, the Kentucky federal court held that: (1) Peabody, by virtue of its acquisition of Alston, has assumed the obligation of the 1954 Royalty Agreements, and has the right to mine coal from the Boundaries; (2) if Peabody elected to exercise its right to mine coal within the Boundaries, then Peabody has a contractual obligation to pay royalties to the Petitioners; (3) if Peabody assigns its rights to mine coal to others, Peabody remains contractually obligated to pay the Petitioners royalties under the terms of the 1954 Royalty Agreements; and (4) the 1954 Royalty Agreements are not invalid to the extent they obligate Peabody to pay royalties based on coal mined and sold from the After-acquired Properties. (App. 61-62). The Kentucky federal court therefore entered a separate judgment in favor of the Petitioners in which it dismissed with prejudice those parts of Peabody's counterclaim that depended upon "the invalidity" of the 1954 Royalty Agreements. (App. 62). Peabody appealed that judgment to the Sixth Circuit Court of Appeals after the judgment became final. The Sixth Circuit affirmed the Kentucky federal

court's July 3, 1991 judgment confirming the validity of the 1954 Royalty Agreements, and held that under those Agreements, the Petitioners own "a fee simple interest in Peabody's contingency," *i.e.*, the mining of coal from any of the lands in the Boundaries by Peabody, its successors and assigns. (App. 120).

C. Petitioners' Lawsuit Against The Peabody Defendants And The Armstrong Defendants Which Was Filed In May 2008, And The Subsequent Judgments Entered By The Circuit Court And The Missouri Court Of Appeals

In 2006, Peabody and its affiliates ("the Peabody Defendants") sold and assigned lands and mining rights in the boundaries to Western Diamond Company and Armstrong Coal Company, and their affiliates ("the Armstrong Defendants") for 151 million dollars. When the Armstrong Defendants began mining and selling coal from the Boundaries, and the Peabody Defendants and the Armstrong Defendants did not pay Petitioners royalties on such coal, Petitioners sued the Peabody/Armstrong Defendants in the Circuit Court for breach of the 1954 Royalty Agreements. ("*Willits II*"). The Peabody/Armstrong Defendants filed motions for summary judgment, which included the same contract invalidity argument which the Kentucky federal court and the Sixth Circuit had conclusively rejected in *Willits I*. Petitioners' cross-motion for summary judgment and opposition to the Peabody/Armstrong Defendants' motions for summary judgment informed the Missouri Circuit Court

of the judgments in *Willits I* which confirmed the validity of the 1954 Royalty Agreements.

On March 29, 2010, however, the Missouri Circuit Court granted summary judgment in favor of the Peabody/Armstrong Defendants, based on its determination that the 1954 Royalty Agreements are invalid to the extent they obligate Peabody, its successors and assigns to pay royalties on coal mined from the After-acquired Properties which Alston did not own or lease as of November 17, 1954. (App. 129-138). The Missouri Circuit Court held that the 1954 Royalty Agreements terminated when the original lease between Alston and Beaver Dam Coal Company was terminated, and when lands previously owned by Alston and Beaver Dam Coal Company as tenants in common were "merged" into a fee simple ownership by Peabody. (App. 129-138). The Missouri Circuit Court reached this result – which directly contradicted the binding final judgment in *Willits I* – without any reference to the Kentucky federal court's or Sixth Circuit's decisions in *Willits I*, which had conclusively determined that the 1954 Royalty Agreements were not partially invalid, and that the Petitioners' royalty rights are not limited to coal mined from the 1954 Properties, but also extend to coal mined from the After-acquired Properties. (App. 123-138).

In their appeal of the Missouri Circuit Court's judgment in *Willits II*, Petitioners stated that the Missouri Circuit Court's judgment was erroneous because it was based on a contract invalidity finding which directly contradicted the judgments of the

Kentucky federal court and the Sixth Circuit in *Willits I*. The Missouri Court of Appeals, however, without any reference to the Kentucky federal court's July 3, 1991 judgment or the Sixth Circuit's decision, affirmed the Missouri Circuit Court's judgment, including its determination that the 1954 Royalty Agreements are partially invalid to the extent they obligate Peabody to pay royalties on coal mined from the After-acquired Properties which Alston did not own or lease as of November 17, 1954. (App. 146-150). Thus, the Missouri Court of Appeals, like the Missouri Circuit Court, directly contradicted the Kentucky federal court's July 3, 1991 judgment that the 1954 Royalty Agreements are valid and enforceable agreements, and that Peabody owes a royalty on all coal mined from the After-acquired Properties by Peabody, its successors and assigns.

D. The Constitutional Claims Which The Petitioners Have Asserted Against The State Of Missouri

On August 8, 2011, the Petitioners filed suit in the Circuit Court of the County of St. Louis, Missouri ("the trial court") against the Respondents, asserting constitutional claims against the State of Missouri for violation of the Full Faith and Credit Clause, and for violation of the "judicial takings" and due process provisions of the Missouri and the United States Constitutions, which first arose when the Circuit Court entered its final judgment in *Willits II*. ("*Willits III*"). On January 20, 2012, Petitioners filed their first

amended petition in the trial court, which made some revisions to the original petition, but which maintained the same constitutional claims which had been alleged in their original petition.

Because Petitioners' constitutional claims against the State of Missouri did not arise or accrue until the entry of the Missouri Circuit Court's 2010 final judgment, Petitioners, in accordance with the applicable case law, did not attempt to raise those claims for the first time in their appeal from the Missouri Circuit Court's judgment in *Willits II*. Instead, Petitioners filed their separate lawsuit against the State of Missouri in St. Louis County Circuit Court for a declaratory judgment that the *Willits II* judgments should be vacated because they violated the Petitioners' constitutional rights, including their rights under Article IV, § 1 of the United States Constitution and the Fifth Amendment of the United States Constitution. The Peabody/Armstrong Defendants were joined as additional defendants with the State of Missouri, pursuant to the requirements of Mo. Rev. Stat. § 527.110 (2013).

The Respondents in *Willits III* jointly moved to dismiss Petitioners' first amended petition based solely on the argument that the Petitioners' constitutional claims against the State of Missouri are barred under the doctrine of *res judicata*, relying upon the Missouri Circuit Court's judgment and the Missouri Court of Appeals' opinion entered in *Willits II*. After full briefing, the trial court granted the Respondents' motion to dismiss, but did so for reasons other than

the *res judicata* defense which was the sole basis for the Respondents' motion to dismiss. (App. 24-30). Instead, the trial court ruled, *sua sponte*, that Petitioners' claims against the State of Missouri were barred under the doctrine of judicial immunity, and that the Petitioners' judicial takings claim under the Fifth Amendment of the United States Constitution does not state a cognizable claim for relief. (App. 27-29).

On April 9, 2013, the Court of Appeals affirmed the trial court's judgment. (App. 1-23). Although the Court of Appeals did not make any express determination as to whether Petitioners' constitutional claims were barred under the doctrine of *res judicata*, it did hold that Petitioners' constitutional claims should not be considered on their merits because Petitioners had waived their constitutional claims by failing to pursue such claims in *Willits II*, based upon the principle that constitutional claims should be raised at the earliest opportunity which is consistent with good pleading and orderly procedure. (App. 9). On May 31, 2013, Petitioners timely filed their application for transfer to the Missouri Supreme Court, which was denied on June 25, 2013. (App. 31).

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari to consider whether the Full Faith and Credit Clause of the United States Constitution required the Missouri courts in *Willits II* to give *res judicata* effect to the Kentucky federal court's July 3, 1991 judgment

confirming the validity of the 1954 Royalty Agreements, and to vacate the later Missouri judgments in *Willits II* which directly contradict the Kentucky federal court's July 3, 1991 judgment regarding the validity of the 1954 Royalty Agreements. This Court should also grant certiorari to consider whether the Missouri Court of Appeals in *Willits II* violated the Fifth Amendment's "Takings Clause" by eliminating Petitioners' established property rights under the 1954 Royalty Agreements in direct contradiction to the unambiguous terms of the 1954 Royalty Agreements. The Missouri courts in *Willits III* refused to address these valid constitutional claims asserted by the Petitioners, and instead held that Petitioners' constitutional claims were barred based upon a nonexistent Missouri rule of procedure that the Petitioners had waived their constitutional claims by not pursuing them in *Willits II*.

I. The Missouri Courts Were Obligated To Give Full Faith And Credit To The Kentucky Federal Court's July 3, 1991 Judgment.

The Full Faith and Credit Clause of Article IV, § 1 of the United States Constitution required the Missouri courts in *Willits II* to give *res judicata* effect to the Kentucky federal court's July 3, 1991 judgment. With respect to final judgments, the Full Faith and Credit obligation is "exacting," and a "final judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition

throughout the land. For claim and issue preclusion (*res judicata*) purposes, in other words, the judgment of the rendering State gains nationwide force." *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 233 (1998). The fact that a final judgment is rendered by a federal court exercising diversity jurisdiction does not diminish the binding effect of that judgment in subsequent state court litigation between the same parties. *Semtek Int'l v. Lockheed Martin Corp.*, 531 U.S. 497, 508 (2001).

In addition, the Full Faith and Credit Clause requires every state to give a judgment at least the *res judicata* effect which the judgment would be accorded in the state which rendered it. *Underwriters Nat. Assur. Co. v. North Carolina Life & Acc. & Health Ins. Guar. Ass'n*, 455 U.S. 691, 704-06 (1982); *Durfee v. Duke*, 375 U.S. 106, 109 (1963). With respect to the Kentucky federal court's July 3, 1991 judgment which determined that the 1954 Royalty Agreements are not partially invalid, and do impose royalty payment obligations on coal mined and sold by Peabody, its successors and assigns from the After-acquired Properties, under Kentucky law that claim has been conclusively adjudicated in *Willits I*, and the principles of *res judicata* barred any re-litigation of that claim in *Willits II*. *Coomer v. CSX Transp.*, 319 S.W.3d 366, 371 (Ky. 2010). As the Supreme Court of Kentucky has recognized, "the doctrine of *res judicata* is that an existing final judgment rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction, is conclusive of causes of action

and of facts or issues thereby litigated, as to the parties and their privies" in any subsequent litigation. *Yeoman v. Commonwealth Health Policy Bd.*, 983 S.W.2d 459, 464 (Ky. 1998).

Accordingly, the Missouri courts in *Willits II* were constitutionally required to give the Kentucky federal court's July 3, 1991 judgment in *Willits I* preclusive effect. In the *Willits II* litigation, the Petitioners fully informed both the Missouri Circuit Court and the Missouri Court of Appeals of the Kentucky federal court's July 3, 1991 judgment which conclusively determined that the 1954 Royalty Agreements are not partially invalid, and that Peabody's royalty payment obligations therefore extend to coal mined and sold by Peabody, its successors and assigns from both the 1954 Properties and the After-acquired Properties. (App. 61-62). Nevertheless, both the Missouri Circuit Court and the Missouri Court of Appeals in *Willits II*, in direct contradiction to the Kentucky federal court's July 3, 1991 judgment, held that Peabody's royalty payment obligations only extended to the interests which Alston had held in the 1954 Properties when the 1954 Royalty Agreements were created, and once those interests ceased to exist, Peabody was no longer obligated to pay royalties to the Petitioners despite Peabody's continued ownership of land and coal interests in the After-acquired Properties. (App. 129-138, 146-150).

This holding, which was essential to the Missouri courts' rulings in *Willits II*, was in direct contradiction to the Kentucky federal court's July 3, 1991 binding

judgment that the Petitioners' royalty rights extended to coal mined and sold from the After-acquired Properties by Peabody, its successors and assigns, and neither the Missouri Circuit Court nor the Missouri Court of Appeals in *Willits II* had any authority or discretion to disregard, or to contradict, the final and conclusive July 3, 1991 judgment rendered by the Kentucky federal court which conclusively adjudicated the validity and the enforceability of the 1954 Royalty Agreements. *Baker*, 522 U.S. at 233 (an issue of fact or law, actually litigated and resolved by a valid final judgment, binds the parties in a subsequent action, whether on the same or different claim); *Underwriters Nat. Assur. Co.*, 455 U.S. at 704 (the judgment of a state court should have the same credit, validity, and effect in every other court of the United States that it had in the state where it was pronounced); *Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 277 (1935) (the Full Faith and Credit Clause alters the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin).

Moreover, as a result of the Missouri courts' refusal in *Willits II* to give the Kentucky federal court's July 3, 1991 judgment *res judicata* effect, and the Missouri Court of Appeals' refusal in *Willits III* to address the Petitioners' Full Faith and Credit claim,

the parties and the courts are now left with two directly conflicting judgments regarding the validity of the 1954 Royalty Agreements, with no conclusive guidance as to which of these two conflicting judgments – the July 3, 1991 judgment in *Willits I* or the March 29, 2010 judgment in *Willits II* – should control. It is this exact type of conflict created by two state courts reaching mutually inconsistent judgments on the same issue which resulted in this Court reversing a North Carolina Court of Appeals decision because that court violated the Full Faith and Credit Clause by refusing to treat a prior Indiana court's judgment as *res judicata*. *Underwriters Nat. Assur. Co.*, 455 U.S. at 710-16. This Court in *Underwriters Nat. Assur. Co.* held that all of the arguments which the respondents made before the North Carolina courts were raised, or could have been raised, in the prior litigation before the Indiana court, and therefore all of the issues before the North Carolina court had been fully and fairly considered by the Indiana court, and the Indiana court's judgment was entitled to full faith and credit in North Carolina. *Id*. For the same reasons, the Missouri courts in *Willits II* were constitutionally obligated to give *res judicata* effect to the Kentucky federal court's July 3, 1991 judgment, and the Missouri courts' judgments in *Willits II* should be vacated in order to cure the untenable conflict which exists between the Kentucky federal court's July 3, 1991 judgment and the Missouri judgments in *Willits II*.

II. The Missouri Courts In *Willits II* Violated The Takings Clause Of The Fifth Amendment Of The United States Constitution.

The Missouri courts' judgments in *Willits II* constitute an unconstitutional "judicial taking" of Petitioners' property interests in violation of the Fifth Amendment of the United States Constitution. In *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, 130 S. Ct. 2592, 2602 (2010), this Court in its plurality decision set forth the standard for determining whether a judicial decision constitutes an unconstitutional judicial taking in violation of the Fifth Amendment of the United States Constitution: "If a legislature or a court declares that what was once an established right of private property no longer exists, it has taken that property, no less than if the State had physically appropriated it or destroyed its value by regulation." Applying this standard, the Missouri Circuit Court's and the Missouri Court of Appeals' decisions in *Willits II* clearly constitute a "judicial taking" of the Petitioners' established property rights under the 1954 Royalty Agreements, in violation of the Fifth Amendment of the United States Constitution.

Pursuant to the express terms of the 1954 Royalty Agreements, Petitioners had a right to be paid royalties on coal mined and sold by Peabody, its successors and assigns from any of the lands in the Boundaries. The decisions by the Kentucky federal court and the Sixth Circuit confirmed this established property right based upon the unambiguous language of the

1954 Royalty Agreements in holding: (1) the 1954 Royalty Agreements are valid agreements, and Peabody's royalty payment obligations extend to coal mined from the 1954 Properties and the After-acquired Properties; (2) the Petitioners' property rights "vested" when the 1954 Royalty Agreements were executed; and (3) the Petitioners have a "fee simple interest" in Peabody's contingency, *i.e.*, the mining and sale of coal in the Boundaries by Peabody, its successors and assigns. (App. 61-62, 120). The Missouri Circuit Court and the Missouri Court of Appeals in *Willits II*, however, issued judgments which held that Peabody's royalty payment obligations only extend to the interests which Alston had held in the 1954 Properties when the 1954 Royalty Agreements were created, and once those interests ceased to exist, Peabody was no longer obligated to pay royalties to the Petitioners despite Peabody's continued ownership of lands and coal interests in the After-acquired Properties. (App. 129-138, 146-150). The Missouri courts' judgments in *Willits II* directly contradicted the unambiguous language of the 1954 Royalty Agreements, which do not contain any provisions limiting Peabody's royalty obligations only to the interests which Alston had held in the 1954 Properties when the 1954 Royalty Agreements were created, as confirmed by the binding and final Kentucky federal court judgment and Sixth Circuit opinion, which had conclusively determined that the 1954 Royalty Agreements are not partially invalid, and do obligate Peabody to pay Petitioners royalties on coal mined and sold by Peabody, its successors and assigns from the After-acquired

Properties. (App. 61-62, 120). Indeed, the Missouri courts in *Willits II* were not permitted to insert any conditions or limitations to the terms of the unambiguous 1954 Royalty Agreements. *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 183 (1959). Thus, the decisions of the Missouri Circuit Court and the Missouri Court of Appeals in *Willits II* constitute an unconstitutional "judicial taking" of Petitioners' established property interests under the "Takings Clause" of the Fifth Amendment of the United States Constitution.

It should also be noted that even though the Fifth Amendment expressly prohibits the taking of private property for "a public use," this Court has previously recognized that any taking of private property for a "private use" is also prohibited under the Fifth Amendment. *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 245 (1984); *Kelo v. City of New London, Conn.*, 545 U.S. 469, 477 (2005). Thus, the judicial decisions of the Missouri Circuit Court and the Missouri Court of Appeals in *Willits II*, which resulted in a taking of Petitioners' property interests under the 1954 Royalty Agreements to be paid royalties on the coal mined and sold by Peabody, its successors and assigns, are subject to the "Takings Clause" of the Fifth Amendment.

III. Petitioners' Constitutional Claims Cannot Be Waived.

In its April 9, 2013 opinion, the Missouri Court of Appeals failed to set forth any legal authority which supports its holding that the Petitioners waived their constitutional claims even though their constitutional claims could only have accrued, at the earliest, when the Circuit Court entered its March 29, 2010 judgment in *Willits II*. (App. 1-23). Contrary to this holding, there is no Missouri Rule of Civil Procedure, Rule of Appellate Procedure, or case law which suggests in any way that Petitioners were required to seek post-judgment relief in *Willits II* to have their constitutional claims adjudicated in an after-trial motion before the Missouri Circuit Court or in their appeal to the Missouri Court of Appeals in *Willits II*. In fact, the law is the exact opposite, and the Petitioners properly pursued their constitutional claims in *Willits III*.

First, there is no legal authority which supports the Missouri Court of Appeals' holding in *Willits III* that Petitioners waived their Full Faith and Credit claim. This Court has in fact made it clear that Petitioners' Full Faith and Credit claim cannot be waived. As this Court has held, a state court "may not, under the guise of merely affecting the remedy, deny the enforcement of claims otherwise within the protection of the full faith and credit clause, when its courts have general jurisdiction of the subject matter and the parties." *Broderick v. Rosner*, 294 U.S. 629, 643 (1935). The Missouri Court of Appeals' April 9, 2013 holding that the Petitioners had "waived" their Full

Faith and Credit claim under a nonexistent Missouri rule of procedure has improperly denied the Petitioners the protections of the Full Faith and Credit Clause. *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 438 (1943) (no local policies or laws should be relied upon to impair the force and effect which the Full Faith and Credit Clause requires state courts to give to a sister state's valid judgment); *Davis v. Wechsler*, 263 U.S. 22, 24 (1923) (the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice). Indeed, there is established Missouri case law which directly contradicts the Missouri Court of Appeals' April 9, 2013 holding that the Petitioners waived their Full Faith and Credit claim. In *Thompson v. Thompson*, 645 S.W.2d 79, 83 (Mo. App. 1982), the Missouri Court of Appeals expressly held that "the full faith and credit clause is a direct Constitutional limitation on the courts, *not a personal right or defense that can be waived by the parties*." (emphasis added). Thus, the Missouri Court of Appeals had no legal authority to judicially create a local waiver exemption to escape its constitutional obligation to address the Petitioners' Full Faith and Credit claim.

Second, Petitioners' constitutional claims did not arise until the Missouri Circuit Court in *Willits II* entered its March 29, 2010 judgment, which was long after Petitioners filed their petition in *Willits II*. The Missouri Court of Appeals, in holding that Petitioners' constitutional claims are barred because they were not pursued in *Willits II*, has directly

contradicted the established Missouri law that *res judicata* does not apply to bar claims that did not arise until after the earlier lawsuit was filed. *Kesterson v. State Farm Fire & Cas. Co.*, 242 S.W.3d 712, 716 (Mo. 2008) (*res judicata* does not apply to "new claims for relief" based upon "new ultimate facts" that were "unknown or yet to occur" when the first action was initiated); *Chesterfield Village, Inc. v. City of Chesterfield*, 64 S.W.3d 315, 320 (Mo. banc 2002) (recognizing that the critical question is "what did [the petitioner] know when [petitioner] brought the first action?"); *Twehous Excavating Co. v. L.L. Lewis Invs., L.L.C.*, 295 S.W.3d 542, 547 (Mo. App. 2009) (*res judicata* does not bar a claim for relief based upon facts which were unknown and yet-to-occur when the prior lawsuit was commenced).

Although the Missouri Court of Appeals in *Willits III* did not address this established line of Missouri decisions, it essentially concluded that constitutional claims should be an exception to this rule of law. Prior to the Missouri Court of Appeals' decision in *Willits III*, however, no Missouri appellate court has ever recognized any exception to this established limitation on the doctrine of *res judicata*, nor has any Missouri court, or this Court, ever suggested that a "constitutional claim" exception to this rule of law should be recognized. Indeed, this Court has confirmed that the doctrine of *res judicata* should not bar a person from pursuing, in a separate lawsuit, a constitutional claim based upon a "judicial taking" of his or her established property rights. *Stop the Beach*

Renourishment, Inc., 130 S. Ct. at 2617. Notably, in *Stop the Beach Renourishment, Inc.*, Justice Kennedy, in his concurring opinion, stated:

> It is doubtful that parties would raise a judicial takings claim on appeal, or in a petition for a writ of certiorari, in Case A, as the issue would not have been litigated below. Rather, the party may file a separate lawsuit – Case B – arguing that a taking occurred in light of the change in property law made by Case A. After all, until the state court in Case A changes the law, the party will not know if his or her property rights will have been eliminated. So *res judicata* probably would not bar the party from litigating the takings issue in Case B.

Id. at 2616-17.

Because the Petitioners could not have waived their constitutional claims, this Court should grant certiorari to consider the Petitioners' valid constitutional claims asserted in *Willits III*.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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October 23, 2013

[SEAL]

In the Missouri Court of Appeals
Eastern District

DIVISION THREE

PATRICIA WILLITS, et al.,	)	No. ED98674
Appellants,	)	
	)	Appeal from the Circuit Court of St. Louis County
vs.	)	
PEABODY COAL COMPANY, LLC, et al.,	)	Honorable Mary B. Schroeder
Respondents.	)	FILED: April 9, 2013

Patricia Parrott Willits, William G. Parrott, Jr., and Donald Petrie (collectively, "Appellants") appeal from the trial court's judgment sustaining the Peabody Defendants'[1] and Armstrong Defendants'[2] Joint Motion to Dismiss and denying Appellants' Motion for Summary Judgment. Finding Appellants failed to assert their constitutional arguments at the first opportunity available, we need not consider Appellants'

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[1] Peabody Defendants include: Peabody Development Company, LLC; Central States Coal Reserves of Kentucky, LLC; Cyprus Land Creek Land Resources, LLC; Grand Eagle Mining Company; Ohio County Coal Company, LLC; Cyprus Creek Land Company; Beaver Dam Coal Company, LLC; and Peabody Holding Co., LLC.

[2] Armstrong Defendants include: Armstrong Coal Company, Inc.; Western Diamond, LLC; Western Land Company, LLC; Ceralvo Holdings, LLC; Armstrong Coal Reserves, Inc.; and Ceralvo Resources, LLC.

allegations of error absent a showing of plain error. Making no such showing, we thus decline to consider the merits of Appellants' appeal, and affirm the trial court's judgment.

I. BACKGROUND

The facts, procedural background, and arguments of this case are so vast, academic, and novel, that this case is befitting for a law school exam. Thus, for ease of understanding, we begin, not with the underlying action, but, rather, we proceed in a chronological and systematic manner. However, we only convey the facts necessary for the disposition of the underlying claims as the other facts leading to this appeal have not changed and can be found in other judicial decisions referenced throughout this opinion.

Willits I

In 1990, Appellants filed suit against Peabody Coal Company ("Peabody")[3] in the United States District Court for the Western District of Kentucky seeking to recover damages for the alleged breach of contract and fraud perpetrated by Peabody, due to the manner in which Peabody calculated the payment of coal royalties under written agreements (dating back to the 1940s) with the Appellants. At issue in that case was the validity of the 1954 Royalty Agreements

[3] Peabody is also a named Defendant in the case at bar.

as applied to Peabody (i.e., Peabody's duty to pay royalties to Appellants). The district court upheld the validity of the 1954 Royalty Agreements, and, thus Peabody's duty to pay certain royalties to Appellants. After final judgment was entered by the district court in an unpublished opinion, Peabody appealed to the United States Court of Appeals for the Sixth Circuit.

In *Willits v. Peabody Coal Co.,* 1999 WL 701916 (6th Cir. Sept. 1, 1999) ("*Willits I*"), the Sixth Circuit affirmed, in relevant part, the district court's finding of the validity of the 1954 Royalty Agreements as applied to Peabody. *Willits v. Peabody Coal Co.,* 1999 WL 701916, *13-14 (6th Cir.1999) ("*Willits I*").

Willits II

At some time after *Willits I,* the Peabody Defendants entered into sales, assignments, and leases of certain lands covered by the 1954 Royalty Agreements with the Armstrong Defendants. There after, neither the Peabody nor Armstrong Defendants paid royalties to the Appellants for the coal mined by the Armstrong Defendants on the land either sold, assigned, or leased to the Armstrong Defendants.

In May 2008, Appellants filed suit against the Peabody Defendants and the Armstrong Defendants in the Circuit Court of the City of St. Louis for an alleged breach of contract based upon the written agreements (dating back to the 1940s) for failure to pay royalties and also seeking declaratory relief

regarding future royalty payments. At the trial court, Appellants argued that validity of the 1954 Royalty Agreements had already been conclusively established in *Willits I,* and, thus, the trial court was obligated to give full faith and credit to that judicial decision. Conversely, the Peabody Defendants and Armstrong Defendants contended that *Willits I* dealt with different issues (because the facts had changed since Peabody had entered into certain sales, assignments and leases in the interim) and *Willits I*'s had no bearing on the Armstrong Defendants. Specifically, the Peabody and Armstrong Defendants claimed *Willits I* did not involve the effect of the later sales, assignments and leases with the Armstrong Defendants to the 1954 Royalty Agreements.

At the trial court, cross-motions for summary judgment were filed. On March 29, 2010, the Circuit Court of the City of St. Louis entered its Order and Judgment ("March 2010 Trial Court Judgment") denying Appellants' motion for summary judgment and granting the Peabody Defendants' and Armstrong Defendants' motions for summary judgment. The trial court further held that the Peabody Defendants and Armstrong Defendants had "no further obligation to pay royalties to plaintiffs on coal mined on or after January 31, 2007 pursuant to [the 1954 Royalty Agreements.]"[4]

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[4] Significantly, the trial court held in its 2010 judgment that the Peabody Defendants' sales and assignments of the lands

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Appellants appealed the March 2010 Trial Court Judgment to this Court. *See Willits v. Peabody Coal Co., LLC,* 332 S.W.3d 260 (Mo. App. E.D. 2010) ("*Willits II*").[5] Agreeing with the trial court, this court affirmed the March 2010 Trial Court Judgment. *Id.* at 263-65.

Subsequently, Appellants filed their Motion for Rehearing and/or Transfer to the Missouri Supreme Court ("Rehearing/Transfer Motion"). This Court denied Appellants' Rehearing/Transfer Motion on March 1, 2011. Further, Appellant's Application for Transfer to the Missouri Supreme Court ("Application for Transfer") was denied March 29, 2011. The legal file is void of any evidence indicating that Appellants sought certiorari from the Supreme Court of the United States.

Willits III

Next, Appellants filed this underlying Petition for Declaratory Relief in the Circuit Court of Saint Louis

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covered by the 1954 Royalty Agreements with the Armstrong Defendants (that occurred in the interim between *Willits I* and *Willits II*) extinguished Appellants' royalty interests. Thus, while the 2010 judgment never mentioned *Willits I,* the trial court also never expressly invalidated the 1954 Royalty Agreements, but, rather, only applied the 1954 Royalty Agreements under the new and differing facts that had occurred since *Willits I.*

[5] *Willits II* was handed down on December 28, 2010.

County on August 8, 2011, against numerous defendants:

(1) Peabody Coal Company, LLC and Peabody Energy Corporation and its affiliates[6] (collectively, "Peabody Defendants");

(2) Armstrong Land Company, LLC and its affiliates[7] (collectively, "Armstrong Defendants"); and

(3) the State of Missouri ("State").

In their five-count Petition, Appellants allege five constitutional counts against the State[8] – acting through its judicial branch – in entering the March 2010 Trial Court Judgment and *Willits II*: (1) the State violated Article IV, Section 1 of the United States Constitution (commonly referred to as the "Full Faith and Credit Clause")[9] by failing to give full faith and credit to *Willits I's* holding regarding the validity of the 1954 Royalty Agreements; (2) the

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[6] Refer to n.1, *supra*.

[7] Refer to n.2, *supra*.

[8] No count in the Petition is directed at either the Peabody or Armstrong Defendants. Rather, the Peabody and Armstrong Defendants, as stated by the Appellants at oral argument, were joined as "affected parties" under Section 527.110, RSMo.

[9] "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." *See* U.S. Const. art. IV, Section 1.

State's actions constituted "judicial takings" in violation of the Takings Clause of the Fifth Amendment to the United States Constitution as made applicable to the State through the Fourteenth Amendment to the United States Constitution,[10] in that the State took private property (or more specifically, altered property rights that a private party had an established interest therein) without just compensation; (3) the State's actions violated the Due Process Clause of the Fifth Amendment to the United States Constitution as made applicable to the State through the Fourteenth Amendment to the United States Constitution,[11] in that Appellants were not afforded their substantive due process rights; (4) the State's actions constituted "judicial takings" in violation of Article 1, Section 28 of the Missouri Constitution (Missouri Constitution's "Taking Clause");[12] and (5) the State's

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[10] " . . . nor shall private property be taken for public use, without just compensation." *See* U.S. Const. Amend. V; *see also* *Chicago, B. & Q.R. Co. v. City of Chicago,* 166 U.S. 226, 241 (1897) (holding the Takings Clause of the Fifth Amendment applicable to the States).

[11] " . . . nor be deprived of life, liberty, or property, without due process of law . . . " *See* U.S. Const. Amend. V; *see also* U.S. Const. Amend XIV, Section 1 (" . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ").

[12] "That private property shall not be taken for private use with or without compensation, unless by consent of the owner, except for private ways of necessity, and except for drains and ditches across the lands of others for agricultural and sanitary purposes, in the manner prescribed by law; and that when an attempt is made to take private property for a use alleged to be

(Continued on following page)

actions violated Article 1, § 10 of the Missouri Constitution (Missouri Constitution's "Substantive Due Process Clause"),[13] in that Appellants were not afforded their substantive due process rights.

The Peabody and Armstrong Defendants filed their Joint Motion to Dismiss – which the State joined – and Appellants filed their Motion for Summary Judgment. After oral arguments before the trial court, on February 29, 2012, the trial court entered judgment sustaining the Peabody and Armstrong Defendants' Joint Motion to Dismiss. The trial court held, *sua sponte,* Appellants' claims against the State were barred under the doctrine of judicial immunity, and Appellants' claims under the United States Constitution did not state a cognizable claim for relief.

This appeal now follows.

II. DISCUSSION

Appellants raise four points on appeal. In all four points, Appellants argue that the trial court erred in sustaining the Peabody and Armstrong Defendants' Joint Motion to Dismiss. Specifically, Appellants claim that the trial court erred in: (1) sustaining the

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public, the question whether the contemplated use be public shall be judicially determined without regard to any legislative declaration that the use is public." *See* Mo. Const. art. I, Section 28.

[13] "That no person shall be deprived of life, liberty or property without due process of law." *See* Mo. Const. art. I, Section 10.

Joint Motion to Dismiss because *res judicata* does not bar Appellants' constitutional claims; (2) sustaining the Joint Motion to Dismiss because the March 2010 Trial Court Judgment and *Willits II* violated the Full Faith and Credit Clause of the United States Constitution; (3) *sua sponte* dismissing Appellants' Petition based upon the doctrine of judicial immunity because the Peabody and Armstrong Defendants did not raise said argument in their Joint Motion to Dismiss; and (4) *sua sponte* dismissing Appellants' Petition based upon a finding that Appellants' "judicial takings" claim failed to state an actionable claim for relief because the Peabody and Armstrong Defendants did not raise said argument in their Joint Motion to Dismiss.

Finding that Appellants failed to assert their constitutional arguments – thus, their entire Petition – at the first opportunity, we need not reach the merits of Appellants' arguments. We affirm the trial court's judgment because Appellants have waived their right to bring their constitutional claims.

Standard of Review

This Court's review of a trial court's judgment sustaining a motion to dismiss is *de novo. Stein v. Novus Equities Co.,* 284 S.W.3d 597, 601 (Mo. App. E.D. 2009). When reviewing a motion to dismiss for failure to state a claim upon which relief may be granted, we apply the following standard of review:

> A motion to dismiss for failure to state a cause of action is solely a test of the adequacy

> of the plaintiff's petition. It assumes that all of plaintiff's averments are true, and liberally grants to plaintiff all reasonable inferences therefrom. No attempt is made to weigh any facts alleged as to whether they are credible or persuasive. Instead, the petition is reviewed in an almost academic manner, to determine if the facts alleged meet the elements of a recognized cause of action, or a cause that might be adopted in that case.

State ex rel. Henley v. Bickel, 285 S.W.3d 327, 329 (Mo. banc 2009) (quoting *Bosch v. St. Louis Healthcare Network,* 41 S.W.3d 462, 464 (Mo. banc 2001)).

Relevant to this Court's disposition, we may affirm the trial court's dismissal on any ground before the trial court in the motion to dismiss, even if the trial court relied on other grounds in dismissing the claim. *McCarthy v. Peterson,* 121 S.W.3d 240, 243 (Mo. App. E.D. 2003). In fact, "[i]f a trial court granting a motion to dismiss reaches a correct result for the wrong reason, we must still affirm." *State ex rel. Hazelwood Yellow Ribbon Comm. v. Klos,* 35 S.W.3d 457, 464-65 (Mo. App. E.D. 2000).

Analysis

Under Missouri law, "[i]t is firmly established that a constitutional question must be presented at the earliest possible moment that *good pleading and orderly procedure* will admit under the circumstances of the given case, otherwise it will be waived."

Meadowbrook Country Club v. Davis, 384 S.W.2d 611, 612 (Mo. 1964) (internal quotation omitted) (emphasis added). This rule has been posited by the Supreme Court of Missouri as necessary in order to prevent surprise to the opposing party and to permit the trial court the opportunity to adequately and fairly address the constitutional claim. *Land Clearance for Redevelopment Auth. of Kansas City, Mo. v. Kansas Univ. Endowment Ass'n,* 805 S.W.2d 173, 175 (Mo. banc 1991).

For a party to properly raise and preserve a constitutional argument, the litigant must: (1) raise the constitutional argument at the first opportunity; (2) specify the sections of the Constitution (federal or state) claimed to have been violated; (3) state the facts demonstrating the violation; and (4) preserve the argument throughout the appellate process. *City of Eureka v. Litz,* 658 S.W.2d 519, 521 (Mo. App. E.D. 1983).

Appellants argue the constitutional questions arose only after the March 2010 Trial Court Judgment was rendered. Accordingly, Appellants claim their only method of seeking recourse was the filing of a new lawsuit as effectuated in the case at bar. Even when giving the Appellants all reasonable inferences, we disagree. Appellants had multiple opportunities to raise their constitutional arguments: (1) Appellants' constitutional arguments may have been pled in the alternative; (2) throughout the appellate process in *Willits II,* Appellants failed to inform any court of their constitutional claims; and

(3) Appellants did not seek certiorari to the United States Supreme Court.

However, we note that this case does not impose upon this Court the opportunity to decide exactly *when* Appellants ought to have brought their constitutional arguments, only that Appellants failed to do so at the first opportunity[14] – which, under Missouri law and in Missouri courts, is not in a separate lawsuit as advanced by Appellants. As such, this Court only demonstrates the wide-ranging possibilities Appellants had in asserting their judicial takings, due process, and other constitutional claims during the pendency of *Willits II*. Exactly *when* such constitutional claims must be brought is left for another day when the facts of a case so require.

1. Appellants could have raised their constitutional claims at the time of filing their *Willits II* Petition.

Good and orderly pleading in Missouri permits a litigant to set forth two or more statements of a claim alternatively or hypothetically, regardless of the

[14] We note that in the Peabody and Armstrong Defendants' Joint Motion to Dismiss, Appellants' failure to timely raise their constitutional arguments was asserted: "Plaintiff's failure to raise the constitutional challenge at the earliest moment in the trial court or the Court of Appeals should doom their Petition's attempt to do so in this subsequent proceeding." Thus, this Court may affirm the trial court's grant of dismissal. *See McCarthy, supra.*

consistency of the alternative or hypothetical claims. *See* Rule 55.10. The effect of Rule 55.10 "is to enable parties, as far as practicable, to submit all their controversies in a single action and *avoid a multiplicity of suits.*" *Kaiser Aluminum & Chem. Sales, Inc. v. Lingle Refrigeration Co.,* 350 S.W.2d 128, 131 (Mo. App. 1961)[15] (emphasis added).

Thus, in that vein, Appellants could have argued their "judicial takings" and Due Process claims beginning with the filing of their petition in *Willits II. See e.g., Land Clearance for Redevelopment Auth. of Kansas City, Mo.,* 805 S.W.2d at 175-76, (finding that appellant's constitutional claims could not have been so surprising that those claims only became known to appellant after the trial court entered its verdict); *Adams By and Through Adams v. Children's Mercy Hosp.,* 832 S.W.2d 898, 907-08 (Mo. banc 1992) (overruled on other grounds). A reasonable litigant could have pled constitutional claims in the alternative, knowing that a judicial takings and a Due Process claim were inevitable if the Circuit Court of the City of St. Louis ruled adversely to the other claims set forth in the *Willits II* petition. *See* Ian Fein, *Why Judicial Takings Are Unripe,* 38 Ecology L.Q. 749, n.187 (2011) ("The plaintiff would claim in effect: 'We win our legislative taking claim, but if not, that state court itself will have committed a taking.'"). This requirement that litigants inform the trial court of a

[15] Interpreting the identical statutory provision, Section 509.110.

real and substantial constitutional argument at first opportunity "would prohibit them [the litigants] from sitting on their hands and waiting for a 'second bite of the apple,' a litigation strategy that imposes negative externalities on the courts and other parties." *Id.* at 777-78.

Here, the evidence manifests an appearance that Appellants sat on their hands. Not once did Appellants apprise any court during the litigation of *Willits II* of their constitutional arguments, but only four months after the Appellants' Application for Transfer was denied by the Missouri Supreme Court in *Willits II,* Appellants commenced the case at bar. Appellants seek a second bite of the apple.

Furthermore, it must be noted that Appellants cannot attempt to camouflage or shield their omissions of their constitutional claims by arguing that their constitutional claims did not become actionable or viable until after *Stop the Beach Renourishment Inc. v. Florida Department of Environmental Protection,* 130 S. Ct. 2592 (2010).[16] In *Stop the Beach,* the United States Supreme Court unanimously held that

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[16] *Stop the Beach* was handed down by the Supreme Court of United States on June 17, 2010. Appellants filed their *Willits II* Petition in May 2008. Giving Appellants all reasonable inferences, they, at the very least, knew or should have known of *Stop the Beach* before the filing of their *Willits II* appeals brief (July 8, 2010) and their Reply Brief (October 4, 2010). However, Appellants made no mention of *Stop the Beach* throughout *Willits II.*

the Florida Supreme Court had not taken any property from members of a non-profit corporation, comprised of beach front property owners, named Stop the Beach Renourishment ("STBR"). *Id.* at 2613. Specifically, the Court found that Florida's Department of Environmental Protection's project to renourish certain Florida beaches was not unconstitutional or in violation of STBR's property rights. *Id.* However, the Supreme Court's reasoning regarding why there had been no judicial taking was far from unanimous.

The plurality opinion, authored by Justice Scalia, held that a judicial takings occurs, "depending on its [the judicial decision's] nature and extent[,]" whenever a court ruling changes an "established right" of property law. *Id.* at 2602. Justice Scalia stated that an owner should be permitted to sue to overturn an alleged taking, thus rejecting the argument that the sole remedy should be financial compensation. *Id.* at 2607. However, in his view, the aggrieved party challenging a state court ruling should be limited to pursuing the claim through state court appellate process and seeking certiorari to the United States Supreme Court, within the same case. *Id.* at 2609. If the plaintiff was not a party to the original suit, he or she would be permitted to pursue the claim in federal court. *Id.* at 2609-10.

Conversely, in a concurring opinion – on which Appellants premise many of their constitutional arguments – Justice Kennedy argued the Court need not determine the viability of the judicial takings concept in this particular case, but rather, the Due

Process Clause was the better alternative or avenue on which to decide such a scenario. *Id.* at 2613-18. However, in contrast to Justice Scalia, Justice Kennedy suggested that the exclusive remedy for a judicial takings would be financial compensation.[17] *Id.* at 2617. Furthermore, Justice Kennedy found it "unclear" how a plaintiff would raise a proper judicial takings claim, and proposed that a party would possibly have to file a second, separate suit challenging the outcome of the first case. *Id.*

Judicial takings and due process jurisprudence existed prior to 2010 and *Stop the Beach*. *See Smith v. United States,* 2013 WL 646332, *2-3 (Fed. Cir. Feb. 22, 2013) ("it was recognized prior to *Stop the Beach* that judicial action could constitute a taking of property."); *see also The Debate on Judicial Takings: I Scream, You Scream, We all Scream for Property Rights,* 33 No. 7 Zoning and Planning Law Report 1 (July 2010) ("swimming in the depths of [Supreme] Court dicta as far back as the mid-19th century was the notion of a court taking property through its own actions."); *see also* James S. Burling, *Judicial Takings After Stop the Beach Renourishment v. Florida Department of Environmental Protection,* 12 Engage: J. Federalist Soc'y Prac. Groups 41, 42 (2011) ("The idea that a *court* can be responsible for a taking is not new. It has been around at least since 1897 in *Chicago, Burlington & Quincy Railroad Co. v. Chicago*[, 166

[17] Peculiarly, Appellants seeks invalidation of *Willits II* and the March 2010 Trial Court Judgment.

U.S. 226 (1897)] where the Court obliquely referred to a state court being involved in the taking of private property . . . "); *see e.g., Hughes v. State of Washington,* 389 U.S. 290, 296-97, 298 (1967) (J. Stewart concurring) ("the Due Process Clause of the Fourteenth Amendment forbids such confiscation by a State, no less through its court than through its legislature"); *Bonelli Cattle Co. v. Arizona,* 414 U.S. 313, 317 (1973) (overruled on other grounds); *Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. 155, 164 (1980) (indicating the Takings Clause prohibited a court decision from converting private property into public property without just compensation); *Stevens v. City of Cannon* ___, 114 S. Ct. 1332, 1334 (1994) (Scalia, J., dissenting from denial of certiorari) ("No more by judicial decree than by legislative fiat may a State transform private property into public property without compensation."). Therefore, Appellants' constitutional claims (or cause of action) did not emerge or become actionable only after the Supreme Court of the United States issued its *Stop the Beach* decision on June 17, 2010, but, rather, was actionable from the filing of their May 28, 2008 petition.

Thus, Appellants could have raised their constitutional claims at the time of filing their *Willits II* petition.

2. Appellants could have raised their constitutional claims in a motion for new trial after the March 2010 Trial Court Judgment.

Assuming, *arguendo,* Appellants' contention is correct – that Appellants' constitutional claims arose only after the March 2010 Trial Court Judgment – Appellants still failed in asserting their constitutional claims at the first opportunity.

Generally, a constitutional issue raised for the first time in a motion for a new trial is not preserved for appellate review. *Mo. Utils. Co. v. Scott-New Madrid-Mississippi Elec. Co-op.,* 450 S.W.2d 182, 185 (Mo. 1970); *see also State v. Blair,* 175 S.W.3d 197, 199 (Mo. App. E.D. 2005). However, although it rarely occurs, "a constitutional question may, in a proper case, be first raised in a motion for a new trial." *Mesenbrink v. Boudreau,* 171 S.W.2d 728, 730 (Mo. App. 1943); *see also e.g., City of Richmond Heights v. Gasway,* 2011 WL 4368522, *2 (Mo. App. E.D. Sept. 20, 2011) (appellant properly preserved its constitutional argument for appellate review because the constitutional challenge did not arise until after judgment was rendered and the appellant properly raised the argument in its motion for a new trial). After all, the rules of preserving a constitutional claim require the claim to be raised at the first opportunity that *orderly procedure would allow. Callier v. Dir. of Revenue, State of Mo.,* 780 S.W.2d 639, 641 (Mo. banc 1989).

Accordingly, good pleading and orderly procedure would have permitted Appellants to first raise their constitutional claims in a motion for a new trial after the March 2010 Trial Court Judgment was rendered.[18] Thus, after raising their constitutional arguments in a motion for new trial, Appellants could have then raised the same constitutional arguments on appeal during *Willits II*. However, there is no record that Appellants filed a motion for a new trial after the March 2010 Trial Court Judgment. In failing to do so, Appellants precluded the Peabody and Armstrong Defendants from responding and prevented the trial court from addressing the constitutional issues, thereby, failing to preserve their constitutional arguments for appellate review. *Ingle v. City of Fulton,* 260 S.W.2d 666, 667 (Mo. 1953) ("if defendant desired to urge and preserve the point that the trial court erred in ruling any constitutional issue which may have been the basis of the trial court's decree, defendant city could and should have called the trial court's attention to the point by assignment of error in the motion for a new trial"); *see also Lohmeyer v. St. Louis Cordage Co.,* 113 S.W. 1108, 1110 (1908) (overruled on other grounds) ("if the trial court had a chance to correct its error under an appropriate

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[18] The trial court entered its March 29, 2010 judgment after competing summary judgment motions were filed. A motion for new trial may be filed after trial or after entry of any judgment dismissing the claim on the merits. *See e.g., Edwards v. Hyundai Motor Am.,* 163 S.W.3d 494, 497 (Mo. App. E.D. 2005) (motion for new trial filed after court dismissed the petition).

ground in the motion for a new trial, the point would be saved on appeal . . . In such case, or cases of a kindred nature, the first door open for a constitutional question to enter would be in the motion for a new trial.").

Therefore, Appellants failed to raise their constitutional claims at first opportunity in a motion for new trial and, thus, waived the right to assert them now.

3. Appellants could have raised their constitutional arguments during the appellate process of *Willits II*.

A motion for a new trial was not a prerequisite to perfecting an appeal in *Willits II. See* Rule 73.01(d). Thus, again, assuming, *arguendo,* that Appellants were not required to plead their constitutional claims or raise them in a motion for new trial, this Court still finds that Appellants failed to raise their constitutional claims at the first opportunity in accordance with orderly procedure.

Appellants correctly assert that, in Missouri, a constitutional issue cannot be raised for the first time on appeal. *Chambers v. State,* 24 S.W.3d 763, 765 (Mo. App. W.D. 2000). Nevertheless, unpreserved points on appeal – including, and especially, constitutional claims – may be reviewed under the plain error review standard. *MB Town Center, LP v. Clayton Forsyth Foods, Inc.,* 364 S.W.3d 595, 602 (Mo. App. E.D. 2012); *see also* Rule 84.13(c). Although plain

error review of such unpreserved points are solely within this Court's discretion, and, in fact, rarely granted in a civil case, Appellants still had the *opportunity* to raise their constitutional claims. *MB Town Center, LP,* 364 S.W.3d at 602-04. In failing to raise their constitutional claims on appeal, Appellants did not even afford this Court, in 2010, the possibility of reviewing their constitutional claims under plain error.

Continuously, Appellants bypassed the opportunity to allow the courts to consider their constitutional claims. First, Appellants' Rehearing/Transfer Motion and Appellants' Application for Transfer did not raise Appellants' constitutional claims. Second, after the Missouri Supreme Court denied transfer, Appellants did not seek certiorari to the United States Supreme Court.

Appellants' failure to do either is detrimental to their present argument that they did not waive their constitutional claims. While the United States Supreme Court is not willing to waive the requirement that a federal issue be presented to the state court before it may be raised in the Supreme Court, there is no federal requirement that a federal issue must be raised in the state *trial court* before it is raised in the state appellate courts. *Whitfield v. State of Ohio,* 297 U.S. 431, 435-36 (1936). There is no federal requirement that a constitutional issue be raised at first opportunity. In fact, "the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." *Osborne v.*

Ohio, 495 U.S. 103, 125 (1990) (quoting *Davis v. Wechsler,* 263 U.S. 22, 24 (1923)). Where the constitutional issue could not have been raised by the party in the state court because the issue was first presented in that court's opinion, raising the issue in a petition for rehearing (or transfer), even though it was denied, will suffice in order to sufficiently preserve for U.S. Supreme Court review. *See e.g., Saunders v. Shaw,* 244 U.S. 317, 319-20 (1917) (a federal question may be noted for the first time in a motion to rehear a matter in a state supreme court if the federal question unanticipatedly arose in that court's opinion); *Herndon v. State of Georgia,* 295 U.S. 441, 443-44 (1935) ("[T]he question respecting the validity of the statute as applied by the lower court first arose from its unanticipated act in giving to the statute a new construction which threatened rights under the Constitution. There is no doubt that the federal claim was timely if the ruling of the state court could not have been anticipated and a petition for rehearing presented the first opportunity for raising it."); *State of Missouri ex rel. Missouri Ins. Co. v. Gehner,* 281 U.S. 313, 320 (1930). Thus, while the Appellants' constitutional claims may not have been preserved for appellate review (except for plain error review) by this Court or the Missouri Supreme Court in 2010, review by the United State Supreme Court was possible[19] if Appellants asserted their

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[19] We note that the underlying case of *Stop the Beach* involved this procedural background – landowners sought certiorari
(Continued on following page)

constitutional claim in either their Rehearing/ Transfer Motion or in their Application for Transfer (and then sought certiorari).

In failing, at the minimum, to assert their constitutional arguments in their Rehearing/Transfer Motion or their Application for Transfer, and then failing to file an application for writ of certiorari, we find that Appellants have waived their constitutional arguments.

III. CONCLUSION

For the foregoing reasons, the trial court's judgment is affirmed.

/s/ Roy L. Richter
Roy L. Richter, Judge

Robert G. Dowd, Jr. P.J., concurs
Angela T. Quigless, J., concurs

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to the United State Supreme Court for their constitutional claims after the state supreme court decision was rendered. *Stop the Beach*, 130 S.Ct. at 2600-01. In fact, while Justice Scalia wrote that persons that were not parties in the original state court case could possibly challenge that original decision in a different federal court case (as a judicial takings), Justice Scalia held that the only remedial avenue for parties aggrieved in state supreme courts is a request for certiorari to the United States Supreme Court. *See* Timothy M. Mulvaney, *Uncertainties Remain for Judicial Takings Theory,* 24-Dec Prob. & Prob. 10, 13.

STATE OF MISSOURI)
) ss.
COUNTY OF ST. LOUIS)

IN THE CIRCUIT COURT OF
THE COUNTY OF ST. LOUIS
STATE OF MISSOURI

PATRICIA WILLITS, et al.,	)	
Plaintiffs,	)	
	)	Cause No. 11SL-CC3193
v.	)	
PEABODY COAL COMPANY, LLC, et al.,	)	Division 32
	)	
Defendants.	)	

FINAL JUDGMENT

Cause called on Defendants' Joint Motion to Dismiss and Plaintiffs' Motion for Summary Judgment. Parties appeared by Counsel. Cause was argued and taken under submission. The Court having reviewed the pleadings and memorandums of law enters its Judgment as follows:

Plaintiffs filed an Amended Petition seeking Declaratory Relief in five counts alleging certain violations of the United States Constitution and the Missouri Constitution. Plaintiffs, in each count, seek a judgment vacating prior decisions of a Missouri Circuit Court and the Court of Appeals Eastern District involving the Plaintiffs and the Peabody Companies and Armstrong Companies as Defendants. The State of Missouri was not a party in that case.

By way of background, Plaintiffs state in their amended petition the history of the previous lawsuit. That case was brought to enforce certain rights to royalties based on 1954 royalty agreements between plaintiffs and a predecessor of Defendant Peabody Coal Company. The amended petition details the involvement of the Defendant Coal companies in sales and purchases of the rights to mine coal on the lands which were the subject of the original royalty agreement.

Suit was brought in May of 2008 against the Defendants Peabody Coal Companies and Armstrong Companies in Missouri seeking damages for the breach of the 1954 Royalty Agreements and seeking declaratory relief on the failure to pay royalties since April 2008. Venue was the City of St. Louis. On March 29, 2010, Summary Judgment was entered on behalf of Defendants Peabody and Armstrong companies. The Plaintiffs appealed the decision of the Court. The Court of Appeals Eastern District upheld the decision of the lower court and affirmed the judgment. Motions for rehearing and transfer were denied. All State Court remedies have been exhausted. Plaintiffs did not seek a writ of certiorari to Federal court to address the constitutional issues.

Plaintiffs brought this suit in August, 2011 and included the State of Missouri as a party alleging the State, acting through its judicial branch, violated Plaintiffs' rights under various provisions of the United State [sic] and Missouri Constitutions.

Plaintiffs do not state, nor ask for any relief, remedy or action be declared or determined between themselves and Defendants Peabody Companies and Armstrong Companies. Their inclusion in the current lawsuit is based only on the fact they were involved in the previous decisions and are, under §527.110 RSMo, parties with an interest which would be affected by declaratory judgment.

Defendants filed a joint Motion to Dismiss and leave was granted to the State to join in the Motion. Defendants Peabody Companies and Armstrong Companies argue the suit is barred by the doctrine of Res Judicata. The State joins in the argument and further states the petition fails to state a claim upon which there can be relief granted.

The crux of the claims is seeking to vacate a prior decision of a Court after it has been fully adjudicated. Plaintiffs allege in Count I the prior decision violates the Full Faith and Credit Clause of the United States Constitution. In Counts II and III Plaintiffs allege the prior decision results in a judicial taking in violation of the Fifth Amendment of the United States Constitution and Article I §28 of the Missouri Constitution. Counts IV and V alleges a violation of the Substantive Due Process in Article I, §10 of the Missouri Constitution and the Fourteenth Amendment of the United States Constitution.

Plaintiffs argue res judicata does not bar the current lawsuit since it only raises constitutional issues based on a judicial taking without due process of law

and this claim did not arise until the prior Court made its decision. This argument would support the Defendants Peabody Companies and Armstrong Companies argument to dismiss since private entities cannot engage in a judicial taking or violation of a constitutional right of due process. Further, Plaintiffs tacitly acknowledge that all issues have been determined between Plaintiffs and Defendant Peabody Companies and Armstrong Companies in the prior decision. The Amended Petition alleges no action taken by these Defendants nor does it ask for any relief or remedy as to them.

As stated above, the only issue is whether the previous judicial action states a claim upon which relief can be granted. The State of Missouri was not a party to the prior lawsuit, however, Plaintiffs argue the prior decisions resulted in violations of both the United States and Missouri Constitution giving rise to the present case. The State appears to be included as a party on a theory of vicarious liability with the State as the principle and the Judiciary as its agent. This would appear to violate Article 2 §1 of the Missouri Constitution whose purpose is to keep the several departments of state government separate and independent. Further, the prior Courts were exercising a "judicial function" as provided in Article V §1 and therefore have judicial immunity. As stated in *State ex rel. Raak v. Kohn,* 720 S.W.2d 941, 944 (Mo. banc 1986) "[a] judge with subject matter jurisdiction has judicial immunity from all actions taken, even when acting in excess of his jurisdiction." Clearly, suit

could not be brought against any of the individual judges. Instead, Plaintiffs have engaged in a sophistical exercise alleging the State has liability because of the actions of the Judiciary.

Plaintiffs do not allege that any of the actions taken by the judges were outside their official capacity. The amended petition ignores the immunity doctrine and instead attempts to couch the allegations as violations of the constitution. But the allegations fail to state a claim. Specifically the amended petition states in ¶¶ 55 and 64, Plaintiffs raised the issue of Full Faith and Credit in the prior lawsuit and this argument was rejected by both the trial court and the appellate court. The petition also sets out the due process afforded the parties during the pendency of the prior suit. Plaintiffs did not prevail in the action but that is not proof of the denial of their constitutional rights. The allegations concede that the actions taken by the Courts were done pursuant to their judicial authority and therefore, the Courts would not be "liable for its decisions, regardless of whether or not they were correct." *Long v. Cross Reporting Service, Inc., et al.,* 103 S.W.3d 249, 254 (MO. App. W.D. 2003)

Plaintiffs finally allege the decisions of the Courts resulted in a judicial taking of property in violation of the Fifth Amendment of the United States Constitution. In support of this argument Plaintiffs cite a concurring opinion filed in the case of *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection, et al.* 130 S.Ct 259 (2010)

In this case the State of Florida was an original party and the suit involved a determination of Florida State property law. The United States Supreme Court upheld a Florida Supreme Court decision ruling it did not engage in an unconstitutional taking when it upheld the State's decision to restore eroded beach. In a concurring opinion, Justice Kennedy discussed certain scenarios where a judicial takings case could arise. One of the scenarios involved a previous decision by a Court changing current property law and the right of property owners affected by the change in the law to bring suit for compensation. The opinion went on to discuss what type of remedy would be available in such cases. Justice Kennedy noted equitable relief is not available to enjoin the alleged taking since the violation requires a taking without just compensation. The opinion went on to discuss the difficulties involved in bringing such actions but came to no conclusion as to the viability of such claims.

In the present case, the State of Missouri was named as a party only after the prior Courts decided private property rights between private parties. The State did not initiate the action, change existing law, or derive any benefit as the result of the decision. Further, the relief requested is equitable since a suit for compensation or damages could not lie.

For the reasons stated above, the Joint Motion to Dismiss is granted. Plaintiffs' Motion for Summary Judgment is denied as the issue is moot. Defendants' Motion for Sanctions is denied as there has been no showing of bad faith.

Costs are assessed against plaintiffs.

SO ORDERED

/s/ Mary B. Schroeder
2/29/12

cc: Attorneys of Record

Supreme Court of Missouri
en banc

SC93416
ED98674

May Session, 2013

Patricia Willits, et al.,
Appellants,

vs. (TRANSFER)

Peabody Coal Company, LLC, et al.,
Respondents.

Now at this day, on consideration of the appellants' application to transfer the above-entitled cause from the Missouri Court of Appeals, Eastern District, it is ordered that the said application be, and the same is hereby denied.

STATE OF MISSOURI-Sct.

I, Bill L. Thompson, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the May Session, 2013, and on the 25th day of June, 2013, in the above-entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson, this 25th day of June, 2013.

[SEAL]

/s/ Bill L. Thompson Clerk

/s/ Christina Vinson Deputy Clerk

[SEAL]

In the Missouri Court of Appeals
Eastern District

PATRICIA WILLITS, ET AL., APPELLANTS,	)	
vs.	)	No. ED98674
PEABODY COAL COMPANY, LLC, ET AL., RESPONDENTS.	)	

ORDER

Appellants' Motion for Rehearing and/or Application for Transfer to Missouri Supreme Court, is denied.

SO ORDERED.

DATED: MAY 16 2013

/s/ Gary M. Gaertner
Chief Judge
Missouri Court of Appeals
Eastern District

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT OWENSBORO

PATRICIA PARROTT WILLITS, et al PLAINTIFFS

v. CIVIL ACTION NO. 90-0034-0(CS)

PEABODY COAL COMPANY DEFENDANT

GEORGE DAVID KELCE, et al PLAINTIFFS

v. CIVIL ACTION NO. 90-0147-0(CS)

PEABODY COAL COMPANY, et al DEFENDANTS

GEORGE DAVID KELCE, et al PLAINTIFFS

v. CIVIL ACTION NO. 90-0148-0(CS)

PEABODY COAL COMPANY, et al DEFENDANTS

MEMORANDUM OPINION AND ORDER

Several motions are pending in these cases, consolidated for purposes of discovery and pretrial motions. For purposes of all of the motions, we summarize the facts and circumstances, which go back more that [sic] 40 years, giving rise to these lawsuits.

I

A. Factual Background

During the mid-1940s, the predecessors to the parties to these actions were engaged in developing and exploiting coal deposits in western Kentucky. W. G. Parrott incorporated Rough River Coal Company and became its principal shareholder, and an officer

and director. In December, 1946, after acquiring land from Parrott and his wife, Beaver Dam Coal Company ("Beaver Dam") leased coal mining rights on parts of a 6,000-acre tract in Ohio County, Kentucky back to Parrott, who then assigned the coal leases to Rough River Coal Company. In return for the coal leases, Rough River agreed to pay a royalty to Parrott and his wife, Pauline. The royalty was to be 5% of the average gross realization on all coal mined and sold from any and all lands lying within designated boundaries.

At around the same time, Sentry Coal Mining Company ("Sentry") also acquired leases on other land owned by Beaver Dam.[1] In return for the right to mine the coal, Sentry entered into a Royalty Agreement in which it agreed to pay royalties to partners doing business as Jackson Development Company. Among the partners were Merl C. Kelce and Raymond C. O'Dell.[2] Under the Sentry Royalty Agreement,

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[1] It appears that Beaver Dam was also entitled to royalties on coal mined under its leases. When Peabody Coal ultimately acquired those mining rights, it assumed the obligation to pay royalties to Beaver Dam. (*See infra* at notes 4-5.)

[2] Sentry Coal Mining Co. and Rough River had a common principal in the person of one L. Russell Kelce, who was involved in Sentry and in Rough River. The relationship between L. Russell Kelce and Merl Kelce is not explained, nor is the relationship, if any between Sentry Coal Mining Co. and Sentry Royalty Co., a predecessor to Peabody Coal, to which the Parrott/Rough River leases were ultimately transferred. (Comparison of the complaints and Peabody's counterclaims suggests Sentry Coal Mining Co. and Sentry Royalty Co. may be one and

(Continued on following page)

Sentry was to pay royalties on all coal mined and sold by Sentry, or its successors and assigns, from any lands situated within the so-called "Ken Mine area" in Ohio County. This royalty was also to be 5% of the average gross realization on coal mined and sold. It is alleged that "gross realization" is defined in the Sentry Royalty Agreement as "the gross selling price of all merchantable coal invoiced F.O.B. mines to the customer or buyer, without any deductions for sales commissions or other expense."[3]

In 1954, W. G. Parrott purchased Alston Coal Company, which took over the Rough River coal leases. The Parrotts then entered into new Royalty Agreements with Alston. Under these 1954 agreements, Alston was to pay W. G. and Pauline Parrott royalties on coal mined and sold after December 1, 1954 in certain areas described in the Royalty Agreement. In a second agreement, involving a different area, Parrott's daughter, Patricia, now Patricia Parrott Willits, was granted royalty rights, as well as her parents.

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the same company.) In 1948, Sentry merged with Sinclair Coal Co., which Peabody Coal acquired in 1955. In any event, it is clear that all the corporations shared some common shareholders, officers and directors, whose descendants are plaintiffs in these cases.

[3] No copy of the Sentry/Jackson Development Royalty Agreement was tendered in support of the pending motions. However, if this is an accurate characterization of the "gross realization" definition in the 1946 Sentry Royalty Agreement, it is identical to the language contained in the 1946 Rough River/Parrott Royalty Agreement. *See* Ex. 4 to Peabody's Memorandum in Opposition to Motion for Summary Judgment in No. 90-0034.)

The 1954 Alston/Parrott agreements contained the following provisions:

> [F]irst party covenants and agrees to pay to second parties, in equal shares, a royalty in the aggregate amount of Two and One-Half (2-½%) percent of the average "Gross Realization" on coal mined by the strip-mining method only, and a royalty in the aggregate amount of One percent (1%) of the average "Gross Realization" on all coal mined by any underground mining methods, and sold on and after December 1, 1954 by first party, its successors and assigns, from any of the lands situated in Ohio County, Kentucky and lying within the [boundaries] described as follows: . . .
>
> The term "Gross Realization" as used herein means the gross selling price of all merchantable coal as invoiced F.O.B. mine to the customer or buyer; Provided, However, that the foregoing shall apply only to coal invoiced F.O.B. cars at the mine, and as to any coal produced from said lands and loaded on barges, in determining "Gross Realization" there shall be deducted from the F.O.B. barge price to the customer or buyer the reasonable cost of transporting (but not including the cost of loading into vehicles for transporting) such coal to the River and loading same into barges.

In the 1954 agreements, W. G. and Pauline Parrott also agreed to release Alston from the prior 5% royalty rate on coal mined within designated

areas, and agreed not to acquire title to or leases on additional property within certain areas after execution of the Royalty Agreements.

In 1956, Alston transferred the leases to Sentry Royalty Company, a predecessor to Peabody Coal Company. Sentry Coal Mining Company, which had become Sinclair Coal Co., was likewise taken over by Peabody Coal. Peabody Coal thus got the leases to land in the Ken Mine and Parrott royalty areas. Over the years, Peabody Coal mined and sold coal from within the Ken Mine area and the Parrott boundaries and paid royalties under the Sentry and Parrott Royalty Agreements.

Many years after the original parties entered into the Royalty Agreements, taxes of various sorts were imposed on the coal mining industry. In 1972, the State of Kentucky levied a 4% severance tax on all persons engaged in the severance or processing of coal. In 1976, at tax rate was increased to 4-½% of the gross value of the severed coal. KRS 143.020. In 1977, a federal reclamation tax imposed on coal mine operators went into effect. As a means of financing reclamation of mined areas, coal operators are assessed thirty-five cents per ton for surface mined coal, fifteen cents per ton for underground mined coal, and ten cents per ton for lignite. 30 U.S.C. § 1232. In 1978, to help finance health benefits for Miners, the federal government also imposed a so-called "black lung" fax "on coal sold by the producer." The tax was fifty cents per ton on underground mined coal and

twenty-five cents per ton on surface mined coal. 26 U.S.C. § 4121.

Over the years, as these taxes went into effect, Peabody Coal passed them on as costs to its customers. However, for purposes of calculating royalties to be paid on coal it mined and sold, Peabody Coal determined that it would not include the amounts billed to customers for state and federal taxes in calculating the "gross realization." Accordingly, no royalties were paid to "gross realization" royalty holders on that portion of the gross selling price, as invoiced to the customer, that was attributable to these taxes.[4]

In 1978 and early 1979, Peabody Coal allegedly allowed certain of its coal leases on land within the Ken Mine area and Parrott Boundaries to revert back to Beaver Dam.[5] Beaver Dam then leased the property

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[4] In September, 1979, Beaver Dam, which also had become entitled to payments of "gross realization" royalties from Peabody, complained about Peabody's exclusion of the various taxes from the selling price in calculating gross realization. On October 1, 1979, Peabody and Beaver Dam entered into a settlement, whereby Peabody paid Beaver Dam over $3,000,00 [sic], and Beaver Dam agreed to release Peabody from the old royalty provisions. The record does not contain a complete explanation of how Beaver Dam came to be entitled to "gross realization" royalties. However, as the original lessor, it appears that Beaver Dam was entitled to such royalties on coal mined from the Parrott boundaries and the Ken Mine area.

[5] Peabody asserts that under the original leases, whereby Peabody's predecessors leased the land from Beaver Dam, if the lessee (ultimately Peabody) decided not to mine the coal, then it was required to release the land back to Beaver Dam. We are

(Continued on following page)

to Pyramid Mining, Inc., which mined the coal. Thus, from 1979 until at least 1986, under its leases from Beaver Dam, Pyramid has mined and sold coal from land covered by the Sentry and Parrott Royalty Agreements, but no royalties for coal mined by Pyramid have been paid to plaintiffs. However, Pyramid has paid royalties to Peabody[6] and Beaver Dam. Peabody has allegedly also entered into similar arrangements with other companies that have mined coal from the Ken Mine area without paying royalties to plaintiffs.

In addition to the foregoing acts, since 1963, Peabody Coal has allegedly paid a nickel per ton royalty on coal which Peabody Coal mined from the Riverview Mine area, from the Kronos Pit, from the Rockford Pit and from the Chandler Pit, all of these mines being located within the Parrott royalty areas. This was instead of paying the percentage of gross realization provided for in the 1954 Royalty Agreements. In addition, on some of the coal which Peabody Coal mined from the Parrott royalty area, it is alleged that no royalty at all was paid. On January 1, 1986, Peabody stopped mining coal within the Parrott

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not cited to any language to that effect in the original agreements, nor is there any evidence offered concerning Peabody's decision not to mine the coal.

[6] In 1984, Peabody Coal assigned portions of its rights and delegated portions of its obligations to a sister company, Peabody Development, to which Pyramid then began to pay royalties.

royalty areas, although coal remains there to be mined.

B. The Parties

Plaintiffs in Civil Action No. 90-0147 (hereinafter the "Sentry plaintiffs") are assignees of the Kelce and O'Dell royalty rights under the Sentry Royalty Agreement. George David Kelce has a 5% interest in the original Sentry Royalty Agreement. He and his wife are also co-trustees of two separate trusts having an additional 15% interest in the original Sentry Royalty Agreement. Anna Grace O'Dell, widow of Raymond C. O'Dell, has a 20% interest in the original Sentry Royalty Agreement. The Sentry plaintiffs are also named members of the class in Civil Action No. 90-0148.

Plaintiffs in Civil Action No. 90-0034 (hereinafter the "Parrott plaintiffs") are Patricia Parrott Willits, her bother William G. Parrott, Jr., her son-in-law Donald G. Petrie, and her son Robert W. Willits, Jr.[7] Petrie and Robert Willits are co-trustees of the P.P.W. Royalty trust, to which, in September, 1989, Patricia Willits assigned a 20% interest of her rights under the Parrott Royalty Agreements.

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[7] In 1959, W. G. and Pauline Parrott assigned their rights under the Royalty Agreements to their children, Patricia Parrott Willits and William G. Parrott, Jr., plaintiffs herein.

C. The Complaints

In the amended complaint in No. 90-0147, the Sentry plaintiffs allege various causes of action. Count I asserts a claim for breach by Peabody of the Sentry Royalty Agreements arising out of Pyramid's mining within the Ken Mine area and Peabody's failure to pay any royalties thereon to plaintiffs. Count II alleges fraud by Peabody, arising from Peabody's failure to disclose the mining by Pyramid and others of coal from the Ken Mine area, and the failure to accurately report the amounts of coal and royalties generated by mining in the Ken Mine area. Counts III, V, and VII assert claims for punitive damages. Count IV asserts a claim for tortious conversion of royalties, arising out of the arrangement with Pyramid and out of Peabody Coal's failure to pay royalties allegedly due under the Royalty Agreement. In Count VI, the Sentry plaintiffs assert they were fraudulently induced to agree to a lower royalty rate in 1986, allegedly in reliance on Peabody Coal's representation that the mining operation in the Ken Mine area was a "marginal operation." Count VIII seeks a full accounting from Peabody; Count IX purports to assert a claim under Florida's Civil Theft statutes. Fla. Stat. § 772.11 and § 812.012.[8]

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[8] The Sentry plaintiffs, George David Kelce, his wife, and Anna Grace O'Dell, are all residents of the State of Florida. William G. Parrott, Jr. is also Florida resident.

The amended class action complaint (Civil Action No. 90-0148) asserts breach of contract, fraud and conversion claims on behalf of the Sentry plaintiffs, as well as other class members similarly situated, against Peabody for improper exclusion of taxes in calculating "gross realizations" under the Royalty Agreements. The amended class action complaint also seeks punitive damages, and adds a count seeking declaratory relief.

In their second amended complaint in Civil Action No. 90-0034, the Parrott plaintiffs set forth similar causes of action. In Count I, they seek an accounting. In Count II, they allege breach of the Parrott Royalty Agreements arising from Peabody's failure to include taxes charged to customers from the "gross realization" on which royalties were calculated, and from Peabody's deduction of certain transportation expenses from the "gross realization" figure. Count VI alleges that Peabody's payment of five cents per ton royalties on coal mined from the Riverview Mine, and from the Kronos, Chandler and Rockford Pits, all within the Parrott boundaries, is a breach of its obligation to pay "gross realization" royalties. In Counts III and VII the Parrott plaintiffs claim that Peabody's conduct in failing to disclose the basis for its royalty calculations constituted fraudulent omissions. Counts IV, VIII, XII, XV and XVIII set forth punitive damage claims. Counts V, IX and XIII set forth claims for civil RICO. Counts X and XI assert claims for breach of contract and fraud arising from failure of Peabody to pay royalties on coal Pyramid

mined from within the Parrott boundaries, and from Peabody's failure to disclose Pyramid's mining. Count XIV sets forth claims for tortious conversion of royalties belonging to plaintiffs. Counts XVI and XVII allege that Peabody breached an implied duty of development and a fiduciary duty by stopping mining on areas within the Parrott areas, allegedly to induce plaintiffs to agree to lower royalty rates. In Count XIX, William G. Parrott, a Florida resident, adds a claim for treble damages under Florida's Civil Theft statutes.

II

Several motions stand submitted for decision. Pursuant to Fed. R. Civ. P. 12(b)(6), Peabody moves to dismiss Counts III, IV, VII, VIII, X-XII, and XIV-XIX of the Parrott plaintiffs' second amended complaint in Civil Action No. 90-0034. On similar grounds, Peabody also moves to dismiss Counts I-V, VII and IX of the Sentry plaintiffs' first amended complaint in Civil Action No. 90-0147 and Counts II-V of the first amended complaint in Civil Action No. 90-0148.

By separate motion, Peabody moves to dismiss the RICO claims asserted in Counts V, IX and XIII of the Parrott plaintiffs' second amended complaint, also for failure to state a claim under Rule 12(b)(6).

Both the Parrott and the Sentry plaintiffs move to dismiss four of the five counts set forth in Peabody's Counterclaims, summarized at pages 17-19 below, for failure to state a claim for which relief can

be granted. The Parrott plaintiffs move for partial summary judgment on Count II of their second amended complaint[9] in Civil Action No. 90-0034.

Plaintiffs moved for extension of time until March 1, 1991 to file memorandum in opposition to Peabody's two separate motion [sic] to dismiss in No. 90-0034, and for extension of time until March 1, 1991 to file memorandum in opposition to motions to dismiss in No. 90-0147 and No. 90-0148. There being no objection, the motions for extension of time are hereby **GRANTED**.

Peabody moves for oral argument on issues presented by motions pending in Civil Action No. 90-0034. The court does not believe that oral argument is necessary, and the motion is therefore **DENIED**.

II

THE MOTIONS TO DISMISS

In evaluating the complaints and counterclaims in light of Rule 12(b)(6) motions, this court "must accept all of the . . . allegations as true and resolve every doubt" in favor of the plaintiff or counterclaimant. *Hishon v. King & Spalding,* 467 U.S. 69, 73, 104 S. Ct. 2229, 2232, 81 L. Ed. 2d 59, 1984), cited in

[9] By agreed order entered January 31, 1991, the motion was deemed made in support of the second amended complaint, although originally made in support of the first amended complaint.

Craighead v. E.F. Hutton & Co., Inc., 899 F.2d 485 (6th Cir. 1990). Dismissal is proper only if "it appears beyond doubt that the plaintiff [or counter-claimant] can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 145-46, 78 S. Ct. 99, 102, 2 L. Ed. 2d 80 (1957).

PEABODY'S MOTIONS

A. The "Pyramid" Claims

Pursuant to Rule 12(b)(6), Peabody moves to dismiss all counts in Civil Actions No. 90-0147 and 90-0034 which arise from Pyramid's mining of coal from within the Sentry and Parrott plaintiffs' royalty areas (Counts I, II and III in No. 90-0147; Counts X, XI, and XII in No. 90-0034). Peabody argues that the Royalty Agreements obligate Peabody to pay royalties only if the coal is mined by Peabody, or by a "successor" or an "assign" of Peabody. Peabody argues that Pyramid "is an independent company, and was never Peabody's assignee or successor." Peabody contends that the complaints do not state facts sufficient to establish otherwise.

As best we can tell, Pyramid got the right to mine the coal as a result of Peabody intentionally allowing the leases to revert to Beaver Dam. It is undisputed that Pyramid now pays royalties to Peabody even though Beaver Dam was the purported lessor. Common sense tells us those royalties Pyramid pays are not a gift to Peabody. To the contrary, they evidence

the existence of some sort of contractual "privity" between Peabody and Pyramid. The injection of Beaver Dam between Peabody and Pyramid therefore smacks of nothing more than a "straw man." Under the facts, as pleaded in the complaint, it is not "beyond doubt" that Pyramid is not a "successor or assign" to Peabody's rights to mine coal in the Ken Mine and the Parrott royalty areas. The motion to dismiss the above-described "Pyramid claims" in Civil Actions No. 90-0034 and 90-0147 is therefore **DENIED**.

B. The Implied Covenant Claims

Peabody moves to dismiss those counts in the Parrott plaintiffs' complaint (XVI and XVII) that allege Peabody has breached an implied covenant and fiduciary duty to develop and mine the coal still remaining within the Parrott Royalty Areas.

The 1954 Royalty Agreements do not create any such implied covenant. The agreements represent a simple promise by Peabody that if it mines and sells coal, or if someone who is a "successor or assign" of Peabody mines and sells the coal, Peabody will pay a royalty to plaintiffs.

The only "duty to mine" runs to Beaver Dam, not to holders of these royalty interests. The original lease agreement, in which Beaver Dam granted Parrott the exclusive right to mine coal on land Beaver Dam owned or had coal rights to, acknowledged that the lessee (*i.e.,* Parrott, then Rough River, then Alston) had a "duty to lessor [Beaver Dam] . . . to

prosecute the mining of lessor's coal . . . with reasonable diligence." The original lease further provides that if the lessee does *not* mine the coal, that would be a default giving Beaver Dam a right to reenter and take possession of the leased premises. (Exhibit 18 to Motion for Summary Judgment in Civil Action No. 90-0034, at ¶ 20.) When W. G. Parrott entered into the Royalty Agreement with Rough River, he was aware of that reversion provision because he himself had negotiated it with Beaver Dam. He most certainly appreciated that there existed the risk that whoever holds the leases may decide not to mine them.

When Parrott assigned the right to mine to Rough River, in return for Rough River's promise to pay a royalty to Parrott, the inducement for mining the coal was the reversion provision in the Beaver Dam lease. No such "reasonable diligence" provision was included in the Royalty Agreement. We think it clear that Parrott assumed the risk that the Rough River leases might someday revert to Beaver Dam. It is reasonable that he would accept such a risk, in return for the promise that so long as Rough River, or its successors or assigns, made money on coal lands he conveyed to them, he would receive royalties. This was purely a contractual arrangement between Parrott and Rough River, and later Parrott and Alston, as consideration for transfer of the leases. There is no basis in the Royalty Agreement for implying a "duty to mine" in favor of plaintiffs.

The question of whether there exists a fiduciary relationship between Peabody and plaintiffs creating a duty to continue mining presents a separate question.

> [B]ecause the circumstances which may create a fiduciary relationship are so varied, it is extremely difficult, if not impossible, to formulate a comprehensive definition of it that would fully and adequately embrace all cases. . . . such a relationship is one founded on trust or confidence reposed by one person in the integrity and fidelity of another and which also necessarily involves an undertaking in which a duty is created in one person to act primarily for another's benefit in matters connected with such undertaking.

Steelvest, Inc. v. Scansteel Service Center, Inc., ___ S.W.2d ___, 1991 Ky. Lexis 35 (Ky. 1991) (citations omitted). A joint enterprise, *i.e.* a common enterprise undertaken by persons jointly, for their mutual benefit, creates a fiduciary relationship between the parties. *Lappas v. Barker,* 375 S.W.2d 248 (Ky. 1964).

Based on the foregoing, we conclude that between Peabody and plaintiffs there may exist a fiduciary relationship. While that relationship may create duties of disclosure and good faith that otherwise might not exist between the parties, it does not create a duty in Peabody to continue mining. Any fiduciary duty owed to plaintiffs in the present case exists only with respect to the trust arising out of plaintiffs' leaving it to Peabody to calculate and pay royalties, not out of

leaving it to Peabody to mine coal. To conclude otherwise would impose on Peabody duties beyond that which it assumed as grantee of the mineral rights and would disregard the "reversion" provisions in the original Beaver Dam lease. This is not a case in which a landowner has sacrificed a right to extract minerals from his own property in exchange for the benefits that would accrue from allowing another to extract those minerals. Cases which have imposed a duty to mine in favor of a landowner, whether as a result of a fiduciary relationship or otherwise, are thus not applicable.

There are no facts which create a duty in Peabody to mine the coal either under the Royalty Agreement or as a consequence of the parties' relationship. The motion to dismiss the "implied covenant to develop" claims will therefore be **GRANTED**, and those claims will be dismissed by separate judgment.

C. The Fraud Claims

Peabody moves to dismiss all the plaintiffs' fraud claims on the grounds that failure to perform under a contract is not a cognizable fraud claim and because plaintiffs have allegedly suffered no damage on account of any fraud.

Under Kentucky law, the essential elements of actionable fraud are (1) a material misrepresentation; (2) which is false; (3) which was known to be false, or made recklessly; (4) made with inducement to be acted upon; (5) which is acted in reliance thereon; and

(6) causes injury. *Compressed Gas Corp., Inc. v. U.S. Steel Corp.,* 857 F.2d 346 (6th Cir. 1988); *Wahba v. Don Corlett Motors, Inc.,* 573 S.W.2d 357, 359 (Ky. App. 1978). Kentucky courts recognize that actionable fraud may consist of the concealment or failure to disclose the truth. *Johnson v. Cormney,* 596 S.W.2d 23 (Ky. App. 1979); *Bryant v. Troutman,* 287 S.W.2d 918 (Ky. 1956). Moreover, when the defendant is in a position of superior knowledge of the material facts, or in a relationship of trust and confidence, a concealment of a material fact from the party without knowledge can constitute fraud. *Johnson v. Cormney,* 596 S.W.2d at 26; *Kaye v. Compton,* 283 S.W.2d 204, 207 (Ky. 1955); *Dennis v. Thomson,* 436 S.W.2d 18, 23 (Ky. 1931).

As we read the complaints, they are capable of making out a cause of action in fraud as well as breach of contract. The breach of contract is based on the failure of Peabody to perform the promise embodied in the Royalty Agreements. The breach of the Royalty Agreements is, however, separate and apart from the alleged concealment or omission by Peabody of facts relevant to its royalty calculations, and of Pyramid's mining activity, assuming that is something Peabody ought to have disclosed.

Peabody argues that plaintiffs' only conceivable damage for any fraudulent concealment would be that they were prevented from pursuing their breach of contract action. Because they have now filed a breach of contract claim, they are in no worse shape than if the breaches had not remained undisclosed.

However, merely because the measure of their damage is the same under both the fraud and contract claims does not mean plaintiffs are precluded from pursuing both claims. The mere fact of a contractual agreement between the parties does not preclude a fraud claim. The motion to dismiss these claims is therefore **DENIED**.

D. The Florida Civil Theft Claims

Peabody moves for dismissal of all claims asserted under Florida's Civil Theft statute. In order to be liable for civil theft under Florida's laws, the defendant's conduct must be capable of constituting, at the least, an act of "conversion" under Florida law. *See, e.g., Masdival v. Ochoa,* 505 So.2d 555 (Fla. App. 3 Dist. 1987). Under Florida law, there is no conversion of money unless the money can be specifically identified as being the identical money at issue. Moreover, where the damages purportedly flowing from the alleged conversion are the very same sums due and owing for a breach of contract claim, Florida does not recognize conversion as an independent tort. *See, e.g., Futch v. Head,* 511 So.2d 314 (Fla. App. 1 Dist. 1987).

Because the failure to pay royalties would not amount to a conversion under Florida law, the facts are incapable of making out a claim for treble damages under Florida's Civil Theft statutes. The motion to dismiss all claims asserted under Florida's Civil Theft statutes is therefore **GRANTED**.

E. The Conversion Claims

Peabody moves to dismiss plaintiffs' tortious conversion claims. Peabody argues that these claims must fail because a cause of action in conversion will not lie to enforce an obligation to pay money, created by contract.

Under Kentucky law, there are certain "well known rules" as to what constitutes a "conversion."

> [C]onversion is the wrongful exercise of dominion and control over property of another; . . . conversion is essentially a tort action, but the tort may be waived in favor of a contract action; . . . the measure of damages in conversion is the value of the property at the time of conversion; and . . . neither motive, intent, nor good faith is material to the action.

State Automobile Mut. Ins. Co. v. Chrysler Credit Corp., 792 S.W.2d 626, 627 (Ky. App. 1990) (citations omitted).

None of the parties cites this court to any Kentucky case addressing the question of whether failure to pay money to a plaintiff allegedly entitled it under a contract creates a claim cognizable as the tort of conversion, or what is meant by "property of another." However, the traditional view is that non-specific fund, in the hand of a debtor, against which a creditor asserts a claim, is not property that can be the subject of a conversion. *See, e.g.,* 18 Am. Jur. 2d *Conversion* § 9; *Futch v. Head,* 511 So.2d 314 (Fla. App. 1

Dist. 1987). Where, as here, the plaintiffs' entitlement to the property is under the terms of the Royalty Agreements, then the claim is more in the nature of a creditor against a debtor and there is no conversion in failing to pay pursuant to the contract. The motion to dismiss the conversion counts for failure to state a claim under Kentucky law will therefore be **GRANTED**, and a separate judgment will be entered accordingly.

F. The Punitive Damages Claim

Peabody moves to dismiss all the punitive damages claims. Peabody invokes KRS 411.184(5)[10] as a bar to recovery of punitive damages. Because the fraud claims asserted in the complaint remain viable, and because the allegations in the complaint are capable of establishing that Peabody acted with "oppression, fraud or malice," as required by KRS 411.184(2), the punitive damage claim is not barred by KRS 411.184(4).

Peabody also alleges that subjecting it to punitive damages would violate its rights to due process. However, in light of the recent holding in the case of *Pacific Mut. Life Ins. Co. v. Haslip*, ___ U.S. ___, 111 S. Ct. 1032, ___ L. Ed. 2d ___ (1991), we cannot conclude that punitives are *per se* due process violations.

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[10] That provision of the statute states: "In no case shall punitive damages be awarded for breach of contract."

G. The RICO Claims

Counts V, IX and XIII of the Parrott plaintiffs' second amended complaint purport to set forth civil RICO claims against Peabody. For all the RICO counts, plaintiffs allege that Peabody Coal is a person under §§ 1961(3) and 1962. Plaintiffs further allege that Beaver Dam, Peabody Coal, Peabody Development, and the association between Peabody and Beaver Dam are "enterprises" for purposes of § 1962. All three counts assert violations of both 18 U.S.C. § 1962(a) and § 1962(c). Count XIII also asserts a violation of § 1962(d).

In all three RICO counts, plaintiffs allege that Peabody Coal engaged in a pattern of racketeering activity (mail fraud) by using the mails to conceal the underpayment of "gross realization" royalties to plaintiffs (Count V); to conceal underpayment of royalties on coal from the Riverview Mine, and from the Chandler, Kronos and Rockport Pits (Count IX); and to perpetrate a scheme involving Pyramid to misappropriate plaintiffs' money (Count XIII). Count XIII also alleges "wire fraud" as a predicate act.

For their claims under § 1962(a), the Parrott plaintiffs allege that Peabody used or invested income it received as a result of the alleged racketeering activity in the operation of an enterprise engaged in interstate activity, and that plaintiffs were injured thereby. Specifically, in the second amended complaint, plaintiffs allege they were injured by Peabody's use of income to perpetuate and expand the

enterprise of extracting coal from mines located within the Parrott royalty areas (¶ 47); "to perpetuate and expand . . . the association of Peabody Coal and Beaver Dam for the purpose of extracting coal from mines located within the Parrott royalty areas" (¶ 79); and "to perpetuate and expand . . . the association . . . of Peabody Coal, Beaver Dam and Pyramid . . . for the purpose of extracting coal from mines located within the Parrott royalty areas" (¶ 114).

In order for the civil RICO claim asserted under §1962(a) to survive a motion to dismiss, the facts alleged in the complaint must be capable of establishing that a person who has received income from a pattern of racketeering activity used or invested the income to acquire, establish or operate an enterprise engaged in interstate commerce, and that the plaintiff has been injured as a result. A critical element to the § 1962(a) claim is that the "injury" giving rise to the civil action under §1964 must stem directly from the defendant's use or investment of the illegally obtained income. *Craighead v. E. F. Hutton & Co., Inc.,* 899 F.2d 485, 494 (6th Cir. 1990). The only "illegally obtained income" conceivably used by Peabody would be the moneys which Peabody would have otherwise have [sic] paid to plaintiffs as royalties. However, nothing in any of these RICO counts explains how the "ill-gotten gains" enabled Peabody to conduct any activity it wouldn't otherwise have conducted. Despite the plaintiffs' allegations that their injuries stem directly from Peabody Coal's use of its excess income "to perpetuate and expand the enterprise of extract-

ing coal from mines located within the Parrott royalty areas . . . ," the plaintiffs' loss of royalties was in no way the result of the use to which Peabody put any extra income it took in thereby. The § 1962(a) claims must therefore fail.

Plaintiffs also assert claims under § 1962(c). For each count, plaintiffs allege merely that, through a pattern of mail fraud and wire fraud "Peabody Coal has conducted or participated, directly or indirectly, in the affairs of enterprises . . . engaged in interstate commerce" (¶¶ 48, 80 and 115). In order for a civil RICO claim asserted under §1962(c) to survive a motion to dismiss, the facts must be capable of establishing that a person, through a pattern of racketeering activity, acquired or maintained an interest in or control of an enterprise engaged in interstate commerce, and that plaintiffs were injured thereby. Unlike subsection (a), subsection 1962(c) does not require a separate injury traceable to the RICO violation. *Craighead,* 899 F.2d at 494. To the contrary, for purposes of § 1962(c), "the compensable injury necessarily is the harm caused by predicate acts sufficiently related to constitute a pattern [of racketeering activity]" committed "in connection with the conduct of an enterprise." *Sedima S.P.R.L. v. Imrex Co. Inc.,* 473 U.S. 479, 105 S. Ct. 3725, 87 L. Ed. 2d 346 (1985). Thus, if Peabody Coal, directly or indirectly, conducted any of the alleged enterprises through a pattern of predicate acts of mail fraud, whereby it used the mails to perpetrate a scheme to defraud plaintiffs, and plaintiffs were injured by the

predicate acts, then that would be enough to make out the § 1962(c) civil RICO claim.

However, plaintiffs plead no factual basis for the conclusory allegations that Peabody acquired or controlled any of these enterprises, or conducted any enterprise other than Peabody itself, through a pattern of mail or wire fraud. If, as plaintiffs allege, Peabody Coal, Peabody Development, Beaver Dam, and any association among them, are "enterprises" for RICO purposes, those enterprises came into existence and operated independent of any "pattern of racketeering activity" by the mailing by Peabody of the allegedly fraudulent royalty statements or by telephone transactions. Peabody conducting its owns affairs through a pattern of mail or wire fraud does not satisfy the "separate enterprise" requirement. *Puckett v. Tennessee Eastman Co.,* 889 F.2d 1481 (6th Cir. 1989).

Because the § 1962(a) claims fail for lack of "injury" and the § 1962(c) claims fail for lack of a "separate enterprise" conducted through "a pattern of racketeering activity," the conspiracy claim under § 1962(d) must also fail. *Craighead,* 899 F.2d at 495 ("Plaintiffs' [RICO] conspiracy claim cannot stand in light of the dismissal of their other RICO counts.").

For the foregoing reasons, none of the RICO counts set forth in Civil Action No. 90-0034 state a claim upon which relief can be granted, and the motion to dismiss them is hereby **GRANTED**.

PLAINTIFFS' MOTIONS

A. The Plaintiffs' Motions to Dismiss Peabody's Counterclaims

With some minor differences, Peabody's counterclaims to the Parrott and Sentry plaintiffs' complaints are essentially identical. As the factual basis for its counterclaims, Peabody notes that at the time Sentry and Rough River entered into the original Royalty Agreements, there were parcels of land within the Sentry and Parrott royalty areas on which no coal leases or mineral rights had yet been acquired. Peabody alleges that the Royalty Agreements are conveyances of real property and that Sentry and Rough River (later Alston) could convey no royalty interest on land in which they had, at the time, no property interest. Peabody alleges that the Royalty Agreements under which it paid the Parrott and Sentry plaintiffs royalties for coal mined from these "after-acquired" properties are therefore invalid, as violating the Rule Against Perpetuities and the Statute of Frauds.[11] In the counterclaim to the Parrott complaint, Peabody also alleges that after 1978, it failed to deduct transportation costs for barge-loaded coal, as allowed under the agreement, in calculating "gross

[11] We reject outright Peabody's suggestion that the Statute of Frauds was violated by any of the agreements here. The Statute of Frauds merely requires a written agreement. The Statute of Frauds was undisputably satisfied in this case. Peabody's contention that payment has been made pursuant to "a non-existent agreement" does not implicate the Statute of Frauds where there is a written agreement, even if it is arguably invalid.

realization" for royalty purposes. It claims to have overpaid the Parrott plaintiffs some $250,000, as a result.

Based on the premise that there existed no valid contract, Peabody seeks to recover from plaintiffs all royalties it has paid. Asserting various legal theories, Peabody makes claims for (a) "Money Had and Received" (Count I) (asserting that the agreements under which royalties were paid were invalid, and that payments should therefore be repaid to Peabody); (b) "Mistake of Fact" (Count II) (alleging that royalties paid on coal mined from "after-acquired property," *i.e.,* property within the designated area on which mineral rights had not been acquired at the time the Royalty Agreement was made, were paid as a result of Peabody's "mistaken suppositions regarding [the recipients'] . . . contractual rights to such payments."); (c) Quasi-Contract (Count III) (seeking reimbursement from plaintiffs, as unjust enrichment, royalties Peabody paid on coal mined from after-acquired property, and on coal without deduction of transportation expenses, alleging it would be "inequitable for [plaintiffs] to retain these sums"); (d) Usurpation of Corporate Opportunities (Count IV) (alleging that various individuals wrongfully deprived Peabody of business opportunities, by entering into the Royalty Agreements); and (e) Civil Conspiracy (Count V) (claiming that L. Russell Kelce, W. G. Parrott, Sr., Merl C. Kelce, Raymond C. O'Dell and others conspired to injure Peabody).

The Sentry and Parrott plaintiffs move to dismiss, for failure to state a claim, Counts I, II, III and V of Peabody's counterclaims Plaintiffs contend that the agreements which form the basis for Counts I, II and III of Peabody's counterclaim do not violate the Rule Against Perpetuities, and that Peabody's counterclaims asserted in these counts are barred by the applicable statute of limitations and by laches.

In support of the motion to dismiss those parts of Peabody's counterclaim that require a finding that the royalty agreements violate the Rule Against Perpetuities (Counts I, II and III), plaintiffs argue that the royalty agreements do not create an interest in the land to which the Rule Against Perpetuities applies. The parties devote much of their supporting and opposing memoranda to debate of this question. However, under Kentucky law, the Rule Against Perpetuities applies to interests in personal property as well as those constituting interests in land. *See, e.g.,* KRS 381.215; *First Nat. Bank and Trust Co. of Lexington v. Parcell,* 244 S.W.2d 458 (Ky. 1951). We thus need not decide whether the Royalty Agreements, characterized by the parties as "nonparticipating" royalties, are interests *in land* or not.

The questions [sic] remains, however, whether the Royalty Agreements, which obligated Peabody's predecessor corporations to pay royalties, are subject to the Rule Against Perpetuities. The Rule Against Perpetuities applies only to transactions which create an interest in property (real or personal) and is intended to prevent the creation of property interests which

would have the effect of restricting the alienability of the property. An interest that is capable of vesting more than twenty-one years after a life in being at the creation of the interest would violate the Rule Against Perpetuities. However, a contract which creates no interest in the property is not subject to the Rule Against Perpetuities, and the rule has no effect on the duration of such a contract. *First Nat. Bank & Trust Co. of Lexington v. Purcell,* 244 S.W.2d 458, (Ky. 1951); 61 Am. Jur. 2d *Perpetuities* § 53.

In the present case, the agreements in question create no interest whatsoever in land, or in the coal leases themselves, that would restrict the alienability thereof. All the Royalty Agreements do is create obligations personal to the parties to those agreements. Peabody, which by virtue of its acquisition of Alston and Sentry became bound by the Royalty Agreements, has the rights to mine the coal. If Peabody elects to exercise that right, then Peabody owes a contractual obligation to pay royalties to the plaintiffs. Peabody is free to assign to some other entity its rights to mine the coal, but nothing in the Royalty Agreement makes that assignee liable for payment of royalties. The alienability of the mining rights is thus not restrained by any interest that could vest at some remote time. To the contrary, under the plain language of the Royalty Agreements, a purchaser of those rights would take free of any obligations to pay royalties. Even if Peabody assigns its rights to mine to others, Peabody remains obligated to pay royalties.

If the Royalty Agreements purported to create a duty to pay royalties in whoever mined the coal, so that the property interest creating the right to mine (*i.e.,* a coal lease) carried with it a royalty obligation payable by the miner, that royalty interest might be considered an interest in property subject to the Rule Against Perpetuities. The alienability of the coal leases could be restricted by such an interest, because whoever got the leases would also acquire a royalty obligation. If that property right vested at some remote period beyond twenty-one years after a life in being, then the Rule Against Perpetuities might be in issue. But that issue is not presented by the Royalty Agreements here. They simply represent contractual obligations created by Peabody's predecessor corporations, and for which Peabody has become liable, by virtue of the acquisition by Peabody of Alston and Sentry. The Royalty Agreements therefore are not subject to and do not violate the Rule Against Perpetuities, whether they cover "after-acquired" property or not.

To the extent Counts I, II and III of Peabody's counterclaims depend on the invalidity of the Royalty Agreements under the Rule Against Perpetuities, those counts fail to state a claim upon which relief can be granted. The plaintiffs' motion to dismiss that portion of those counts is hereby **GRANTED**, and a separate judgment will be entered in accordance herewith.

Peabody also claims that it paid royalties to the Parrott plaintiffs without properly deducting transportation expenses, which claims are necessarily independent of its Rule Against Perpetuities argument. The essence of those claims is the equitable argument that plaintiffs have been unjustly enriched by Peabody's overpayments, and the [sic] Peabody is entitled to restitution of the sums by which it overpaid plaintiffs.

Plaintiffs contend that the claim is barred by the equitable doctrine of laches of [sic] by applicable statutes of limitations. However, we cannot determine that Peabody will not be entitled to recover on that claim, the facts concerning the dates and nature of the overpayments not being before the court. The Parrott plaintiffs' motion to dismiss that part of the counterclaim seeking recovery of undeducted transportation expenses is thereby **DENIED**.

The motions to dismiss Count V, purporting to assert a claim of "civil conspiracy," will be **GRANTED**. The acts complained of in that count are: (a) that L. Russell Kelce, W. G. Parrott, Merl C. Kelce, and Raymond C. O'Dell, "and others known and unknown" "planned, schemed, conspired [etc.] to work, dissipate and fraudulently misappropriate funds of Peabody in the form of excess royalty payments not lawfully due them," and concealed such activity; (b) that certain persons "usurped corporate opportunities in the form of 'overriding' royalty payments"; and (c) that the conspiracy was for the purpose of allowing Parrott, Kelce and O'Dell "to profit and obtain advantages and benefits in their dealings with

Peabody . . . to the detriment and at the expense of Peabody."[12] Peabody does not claim that any of the plaintiffs herein are responsible for or were the participants in any such conspiracy. Peabody contends, however, that a constructive trust should be imposed on the allegedly "ill-gotten gains" resulting from the conspiracy. Plaintiffs contend that the count fails to state a claim, because they were not participants. We need not decide that question, for even if we assume that making advantageous business deals is a tort, we find not a single Kentucky case recognizing a cause of action for civil conspiracy to commit a wrong such as that alleged in this count, nor are we inclined to invent one. If a "conspiracy" to commit a tortious act culminates in the commission of a tort, then that is basis enough for liability. Attempts to commit torts are not actionable in this state.

B. The Parrott Plaintiffs' Summary Judgment Motion

A party moving for summary judgment has the burden of showing that there are no genuine issues of fact and that the movant is entitled to summary judgment as a matter of law. *Adickes v. S. H. Kress & Co.,*

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[12] Peabody acquired Sinclair Coal Co., a successor to Marigold Coal Co., in which L. Russell Kelce, W. G. Parrott and Raymond O'Dell were shareholders. In 1955, upon acquisition by Peabody of Sinclair, L. Russell Kelce, Merl C. Kelce and Ted L. Kelce, respectively, became President and Executive Vice President of Peabody Coal.

398 U.S. 144, 151-60, 90 S. Ct. 1598, 16 L. Ed. 2d 142 (1970); *Felix v. Young,* 536 F.2d 1126, 1134 (6th Cir. 1976). Not every factual dispute between the parties will prevent summary judgment. The disputed facts must be material. They must be facts which, under the substantive law governing the issue, might affect the outcome of the suit. *Anderson v. Liberty Lobby, Inc.,* 106 S. Ct. 2505, 2510 (1986). To defeat summary judgment, the non-moving party is required to present some significant probative evidence which makes it necessary to resolve the parties' differing versions of the dispute at trial. For the reasons set forth below, we conclude that the Parrott plaintiffs have met their burden of showing summary judgment on Count II of their complaint is proper. Peabody set forth no genuine issue of fact material to Count II, so the motion for summary judgment on Count II is hereby **GRANTED IN PART**.

The Parrott plaintiffs move for summary judgment on that portion of Count II in Civil Action No. 90-0034 alleging breach of contract arising from the deduction of taxes from "gross realization" used to calculate plaintiff's royalties. Plaintiffs contend that under the plain and reasonable meaning of the language used in the 1954 Parrott/Alston Royalty Agreements, taxes were not properly deducted from amounts billed to customers, for purposes of calculating the "gross realization" on which plaintiffs' royalties were based. The Parrott plaintiffs contend that by deducting such taxes since 1972, when the first of the taxes was imposed, Peabody has breached

the Royalty Agreements. Additionally, although this action was not commenced until 1990, plaintiffs contend that their claims, which otherwise might have accrued as early as 1972, are not time-barred by the fifteen-year statute of limitations, because plaintiffs did not learn of the breaches until 1989 and 1990.

Peabody contends that the interpretation of the agreements depends on resolution of factual issues, because the agreements are ambiguous with respect to whether taxes should be deducted in arriving at "gross realizations." However, the agreements' definition of gross realization, *i.e.*, "gross selling price of all merchantable coal as invoiced F.O.B. mine to the customer or buyer," is clear and unambiguous. "Gross realization" is whatever the customer is charged on the invoice. The only deduction allowed by the Alston/Parrott Royalty Agreements is the cost of transporting coal to and loading it into barges. If the parties had wanted any other of the common, ordinary and usual expenses of doing business deducted, they could have expressly included such a provision. The parties did not, so we can only conclude they intended no such deduction.

Peabody makes much of the fact that the agreements do not specifically address the issue of taxes, and that coal taxes of the sort at issue were not in existence when the Royalty Agreements were made. However, where a contract is silent on a certain point, a court may properly imply such terms as would "give the contract the effect the parties would have agreed on if they would have considered the possibility of

subsequent events." *Old Republic Ins. Co. v. Ashley,* 722 S.W.2d 55, 58 (Ky. App. 1986). Based on the undisputed circumstances surrounding the making of the Royalty Agreements, we conclude that had the parties considered the possibility that subsequent taxes would be imposed and included in the cost of the coal to the customer, they would not have allowed deduction of those taxes in calculating "gross realization."

Simple economic analysis ratifies our conclusion. Peabody is quite correct in its position that the incidence of coal taxes upon the seller is of no real consequence in interpretation of the contract. The market determines who really pays and how much. The burden imposed by the incidence of a tax may fall on either the buyer, the seller, or more commonly on both, depending on the relative elasticities of supply and demand. More of the burden is borne by the seller if supply is relatively more inelastic than demand. The converse is true if demand is relatively more inelastic than supply: the burden shifts to the buyer.

Peabody seeks to contain its royalty exposure only to the "price" charged for the coal in its invoices. Price, however, is not defined by terms or line items used in an invoice. Price is the bottom line, the sum to be paid, regardless of how it is structured in a billing. Price can be composed of a charge for a commodity together with a tax, a handling charge, and any number of other charges and discounts. The true

price is the total amount due. The other figures are just window dressing.

Since only a free market can determine true price, the amount of a tax which is paid by either buyer or seller is determined only by the market, regardless of how an invoice is itemized and regardless of who the tax is nominally imposed on.

For example, suppose the market will sustain a price of $100.00 per ton. A tax is then imposed of $1.00 per ton. If Peabody is charging less than $99.00 per ton, it can pass on the entire tax. But if it is a prudent seller charging close to the market price, its ability to transfer the tax burden is dependent on a large number of factors comprising supply and demand. If it can pass on none of the tax, Peabody can either charge $100.00 per ton and pay royalties on that sum, or charge $99.00 per ton and $1.00 tax. It contends that its royalty exposure in the latter case is on the $99.00 per ton, even though the market will sustain the $100.00 per ton price and even though the true price of the coal is really $100.000 [sic] per ton. The analysis would be the same regardless of how much of the tax Peabody could pass on to buyers.

It is abundantly clear from the unambiguous terms of the Royalty Agreement that the parties intended to avoid all such possible questions and controversies by their definition of term "gross realization." Excepting only transportation cost of coal invoiced F.O.B. barge, "gross realization" is equivalent to the true price of the coal F.O.B. mine. Overhead,

taxes, depreciation and other "fudgeable" factors are irrelevant. There is no calculus for increased or decreased labor costs, gasoline costs, operating expenses, or the like. We are not inclined to add terms so as to complicate a magnificently simple agreement which was obviously designed to endure upon the simplest of foundations: the bottom line price of the coal as sold.

Because interpretation of the unambiguous agreement is a task for the court, there are no material issues of fact so as to preclude summary judgment on that contract interpretation. The Royalty Agreements do not allow Peabody to subtract taxes from the gross selling price in arriving at "gross realization," and it was a breach for Peabody to do so.

Despite our conclusion that the term "gross realization" precludes deduction of taxes, we cannot conclude that the Parrott plaintiffs are entitled to judgment on the entirety of the claim asserted in Count II. As to those breaches that occurred within the fifteen-year period[13] prior to February 21, 1990, the date this action was commenced, there is no material issue of fact. These claims were timely filed. However, as to those breaches occurring more than fifteen years prior, the statute of limitations question is not resolvable on summary judgment. Without deciding whether a simple "discovery rule" applies to

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[13] As an action on a written contract, plaintiffs have fifteen years to pursue a claim for breach. KRS 413.090.

toll the fifteen-year statute of limitations on a written contract, we conclude that facts material to the alleged concealment of the breach are in dispute.

We note that in 1983, plaintiff Petrie wrote to J. W. Blackburn, of Peabody's Eastern Division, seeking information as to coal quality and Peabody's royalty calculations. It is Division, seeking information as to coal quality and Peabody's royalty calculations. It is undisputable that Blackburn had reason to know and understood the potential problem with Peabody's "gross realization" calculations in 1983, because he had been involved in 1979 in resolving the dispute with Beaver Dam over the same issue. Later, by 1985, Blackburn certainly recognized that some royalty recipients "would take exception" to exclusion of taxes. (Exhibit 11 to Motion for Summary Judgment, at p. 1). Whether Blackburn's response to Petrie in 1983, or on other occasions, was an effort to conceal how "gross realization" was calculated remains unresolved. If Peabody "obstructed," even indirectly, the prosecution of this action, then the statute of limitations was tolled at the time of the obstruction. KRS 413.190(2). *Cf. Security Trust Co. v. Wilson,* 307 Ky. 152, 210 S.W.2d 336 (1948) (concealment of wrongful act tolls statute of limitations.) Whether these facts sustain a finding of knowing obstruction or concealment by Peabody of its breach presents a material issue of fact, precluding summary judgment in plaintiffs' favor as to those claims which accrued more than fifteen years prior to commencement of this action.

For those reasons, plaintiffs are not entitled to summary judgment on breach of contract that occurred more than fifteen years prior to commencement of this action.

A separate judgment will be entered in accordance herewith.

IT IS SO ORDERED this 3rd day of July, 1991.

/s/ Charles R. Simpson III
CHARLES R. SIMPSON III
UNITED STATES
DISTRICT JUDGE

cc: Counsel of Record

188 F.3d 510

NOTICE: THIS IS AN UNPUBLISHED OPINION.

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA6 Rule 28 and FI CTA6 IOP 206 for rules regarding the citation of unpublished opinions.)

United States Court of Appeals, Sixth Circuit.
Patricia Parrott WILLITS; William G. Parrott, Jr.; Donald G. Petrie, as Co-Trustee for PPW Royalty Trust; Robert W. Willits, Jr., as Co-Trustee for PPW Royalty Trust,
Plaintiffs-Appellants, Cross-Appellees,
v.
PEABODY COAL COMPANY,
Defendant-Appellee, Cross-Appellant.

Nos. 98-5458, 98-5527
Sept. 1, 1999.

On Appeal from the United States District Court for the Western District of Kentucky.

Before KRUPANSKY, SILER, and BATCHELDER, Circuit Judges.

BATCHELDER, Circuit Judge.

This case concerns overriding royalty interests of the Plaintiff-Appellees/Cross-Appellants in coal mined from various areas within Kentucky. For the reasons that follow, we affirm in part and reverse in part the judgments of the district court and remand the case for further proceedings.

I. FACTS

In 1946, W.G. Parrott conveyed to Beaver Dam Coal Company certain lands and mineral rights located within a 6000-acre tract in Ohio County, Kentucky. Beaver Dam immediately leased back to Parrott the coal mining rights on those lands. Parrott then assigned the coal leases to Rough River Coal Co., a company incorporated by Parrott; Rough River agreed to pay to Parrott and his wife an overriding royalty of 5% of the average gross realization from coal mined and sold by Rough River, its successors and assigns, from any lands in the First and Third Boundary, as described in the contract. Shortly thereafter, the parties amended the lease to add a surrender clause which provided that Beaver Dam had the right to make written demand on Rough River to release coal covered under the lease if Rough River did not intend to mine it. The amendment was made binding on both parties, their successors and assigns.

In 1947, Rough River assigned the coal leases to Alston Coal, another corporation controlled by William Parrott. The Parrotts entered into new royalty agreements with Alston in 1954; those agreements changed the royalty obligation to 2 ½% of gross-realization on strip-mined coal and 1% on coal mined by underground mining methods, and added a fourth boundary area; the Parrotts also released Alston from the obligations under the previous royalty agreement. The 1954 agreements granted royalty rights to the Parrotts on any coal mined by Alston, its successors and assigns from lands within the First,

Third, and Fourth Boundaries. At the time the 1954 agreements were executed, however, Alston owned or had mineral leases on only portions of the land within those areas.

Peabody Coal Co. acquired Alston Coal Co. in 1956, assuming its obligations and liabilities. The Parrotts assigned their overriding royalty interest to their children, the Plaintiffs, Patricia and William Jr. in 1959.

In 1963 Peabody acquired Riverview Coal Company and merged it into Peabody. Prior to 1963, Riverview had strip-mined coal from tracts Alston had surrendered in 1952 to Beaver Dam pursuant to the amended 1946 lease; those tracts were then leased to Riverview by Beaver Dam. When Alston surrendered the tracts, Beaver Dam agreed to pay Alston 5¢ per net ton of coal mined from those lands; initially, Riverview paid the 5¢ royalty directly to Alston; after Peabody acquired Alston, Riverview paid the royalty to Peabody, which paid it to Parrott. After the Riverview acquisition, Peabody continued to operate the Riverview strip mine and paid Plaintiffs 5¢ per net ton on Riverview production, instead of the 2 ½% of gross realization specified in the 1954 Royalty Agreements. The Riverview mine operated the Chandler, Kronos, Rockport, and III# 9 pits after 1973; none of the coal mined in these pits was originally leased by Riverview. The Riverview strip mine closed in December 1979.

In the 1970s, the Kentucky severance tax, the federal reclamation tax, and the federal black lung tax were imposed on the coal mining industry. Peabody passed these taxes on to its customers, but in calculating gross realization – the amount on which royalties were to be paid – Peabody did not include the portion of the gross selling price attributable to the taxes. Peabody also deducted from gross realization haulage costs incurred during the coal processing; the royalty agreements, however, permit Peabody to deduct from gross realization only the cost of transporting coal to the river and loading it onto barges for shipment to customers.

In 1976, Peabody mined coal from land referred to as the Hall property located within the boundaries, but no royalties were paid to Plaintiffs on this coal. In 1978-79, and later in the 1990s, pursuant to a demand by Beaver Dam, Peabody released some of its coal properties to Beaver Dam which, in turn, leased them to Pyramid Mining, Inc. Pyramid paid Peabody 25¢ per ton royalty on coal Pyramid mined from the released tracts. Peabody did not pay royalties to Plaintiffs on this coal mined by Pyramid.

II. PROCEDURAL HISTORY[1]

On February 21, 1990, Patricia Parrott Willits, William Parrott, Jr., and the two trustees for the PPW Royalty Trust, Don Petrie and Robert **Willits**, Jr. (collectively "Plaintiffs"), sued **Peabody** Coal Company ("Defendant" or "Peabody") in the United States District Court for the Western District of Kentucky. Plaintiffs' original complaint included claims for breach of contract and fraud related to Peabody's deduction of certain taxes and haulage costs from gross realization in the calculation of Plaintiffs' royalties ("tax deduction" and "haulage" claims). On March 9, 1990, Plaintiffs filed their First Amended Complaint, which added claims for breach of contract and fraud related to Peabody's transfer of certain mining rights to Pyramid Mining Company ("Pyramid claims"). After conducting further discovery, Plaintiffs filed their Second Amended Complaint on December 26, 1990, which added breach of contract and fraud claims related to Peabody's payment of five cents per ton royalties on some of the coal which Peabody mined and sold from Plaintiffs' royalty areas, instead of the

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[1] We note at the outset that the complaint included numerous claims which we do not attempt to detail because, although the Plaintiffs' Notice of Appeal includes among the orders appealed from the various orders disposing of these claims, they are nowhere mentioned in the Plaintiffs' briefs. We therefore consider that they have been abandoned. *Boyd v. Ford Motor Co.,* 948 F.2d 283, 284 (6th Cir.1991); *Wright v. Holbrook,* 794 F.2d 1152, 1157 (6th Cir.1986).

percentage of gross realization specified in the royalty agreements ("Riverview claims").

Peabody filed Answers and Counterclaims to the Complaints, asserting only two arguments relevant to this appeal: (1) that all or portions of Plaintiffs' claims were barred by the applicable statutes of limitations; and (2) that certain royalty interests asserted by Plaintiffs were void because they were created in violation of the rule against perpetuities.

On July 3, 1991, the district court issued an order (1) granting Peabody's motion to dismiss several of Plaintiffs' claims not relevant to this appeal; (2) denying Peabody's motion to dismiss Plaintiffs' claims for fraud and punitive damages; (3) denying Peabody's motion to dismiss the Pyramid breach of contract claim; (4) granting Plaintiffs' motion for partial summary judgment on the issue of liability for the tax deduction breach of contract claim; and (5) granting Plaintiffs' motion to dismiss Peabody's counterclaims premised on the rule against perpetuities.

Plaintiffs filed a Third Amended Complaint on January 5, 1993, which included all of their claims relevant to this appeal. These claims are listed below and when relevant, we have noted the complaint in which the claims were first alleged:

> Count I: sought an accounting of all coal mined by Peabody in the Plaintiffs' royalty areas, total gross revenues, and royalties due the Plaintiffs;

Count II: alleged breach of contract by Peabody in deducting certain taxes and haulage costs from the calculation of gross realization (asserted in initial Complaint);

Count III: alleged fraud based on misrepresentation and fraudulent nondisclosure by Peabody in relation to the deduction of taxes and haulage costs (asserted in initial Complaint);

Count IV: sought punitive damages for fraud alleged in Count III;

Count V: alleged breach of contract for payment of five cents per ton royalty instead of percentage of gross realization on certain mines, including Riverview mine and Kronos, Chandler, Rockport, and III# 9 pits (first asserted in Second Amended Complaint);

Count VI: alleged fraud based on misrepresentation and fraudulent nondisclosure by Peabody in relation to payment of five cents per ton royalty instead of percentage of gross realization on mines referred to in Count V (first asserted in Second Amended Complaint);

Count VII: sought punitive damages for fraud alleged in Count VI;

Count VIII: alleged breach of contract based on Peabody's failure to pay any royalties at all on certain property within Plaintiffs' royalty areas ("Hall Property" or "Omitted Property" claims) (first asserted in this Third Amended Complaint);

Count IX: alleged fraud based on misrepresentation and fraudulent nondisclosure by Peabody in relation to Peabody's failure to pay royalties on property referred to in Count VIII (first asserted in this Third Amended Complaint);

Count X: sought punitive damages for fraud alleged in Count IX;

Count XI: alleged breach of contract based on Peabody's failure to pay royalties to Plaintiffs on coal mined by Pyramid Mining Company (first asserted in First Amended Complaint);

Count XII: alleged fraud based on misrepresentation and fraudulent nondisclosure by Peabody in relation to Pyramid's mining of certain coal and Peabody's failure to pay royalties thereon to Plaintiffs (first asserted in First Amended Complaint);

Count XIII: sought punitive damages for fraud alleged in Count XII.

On July 29, 1993, the court ruled that Plaintiffs' breach of contract and fraud claims are governed by Kansas substantive law. On September 6, 1994, the court granted Peabody's motion to vacate the July 3, 1991, summary judgment order on the tax deduction breach of contract claim (Count II) and reinstated the claim for trial.

On July 12, 1995, the court granted Plaintiffs' motion for summary judgment on Peabody's statute of

limitations defense as it related to all of Plaintiffs' claims.

On September 21, 1995, the court denied Plaintiffs' and Peabody's motions for summary judgment on the Pyramid breach of contract claim (Count XI). On August 12, 1996, the court granted in part Peabody's motion for summary judgment on Plaintiffs' fraud claims, dismissing all of Plaintiffs' fraud claims based upon fraudulent nondisclosures (portions of Counts III, VI, IX, XII).

On September 17, 1996, the court granted summary judgment for Plaintiffs on Count II as it related to Peabody's deduction of certain haulage costs from the calculation of gross realization.

On March 28, 1997, the district court denied Peabody's motion for bifurcation of the trial of Plaintiffs' claims. On April 16, 1997, the court *sua sponte* reconsidered its earlier ruling and granted in part the separate trials previously proposed by Peabody. The court determined that the jury would first decide all claims except the fraud claim on the tax issue (Count III), and that the tax deduction fraud claim would be tried, if necessary, in phase two of the trial.

The trial began on April 17, 1997, and lasted for eleven days, spread over a period of six weeks. On May 15, 1997, before Plaintiffs had completed the presentation of their evidence, the court entered its order ruling on various aspects of the Pyramid breach of contract claim (Count XI), including a finding that Pyramid was neither a successor nor an assignee of

Peabody (the "Mid-Trial Order"). At the close of the evidence, the court denied Plaintiffs' Fed.R.Civ.P. 50(a) motions for judgment as a matter of law on the breach of contract claims. Plaintiffs' breach of contract claims were submitted to the jury, as were their fraud claims based on affirmative misrepresentations (except for the bifurcated fraud claim related to the tax issue).

On May 29, 1997, the jury returned a verdict in favor of the Plaintiffs on the Riverview breach of contract claim (Count V); and in favor of Peabody on the tax deduction breach of contract claim (Count II), on the Pyramid breach of contract claim (Count XI) and on the fraud claims based on affirmative misrepresentations (the remaining portions of Counts III, VI, IX, XII).

On June 12, 1997, Plaintiffs moved the court for entry of judgment and an award of prejudgment interest on the breach of contract claims on which they prevailed (Counts V and VIII). Plaintiffs also moved for entry of judgment on a portion of the Pyramid breach of contract claim that the parties had earlier agreed to bifurcate from the jury trial. On March 16, 1998, the court granted in part Plaintiffs' motion for prejudgment interest on the breach of contract claims on which they had prevailed, and denied the remainder of Plaintiffs' motions. On that same date, the court entered a final judgment.

Plaintiffs appeal from (1) the May 15, 1997, Mid-Trial Order relating to the Pyramid breach of contract

claim (Count XI); (2) the September 6, 1994, order setting aside the July 3, 1991, order granting summary judgment to Plaintiffs on the tax deduction breach of contract claims and denying Plaintiffs' motion for judgment as a matter of law on those claims (Count II); (3) the August 12, 1996, order granting summary judgment to Peabody on Plaintiffs' fraud claims based on fraudulent nondisclosures (portions of Counts III, VI, IX, and XII); (4) the April 16, 1997, order bifurcating the fraud claim relating to the tax deduction issue (portion of Count III); (5) the jury's verdict in favor of Peabody on the claim of fraud with regard to the Pyramid breach of contract claim; and (6) the failure of the district court to calculate in its final judgment the amount of prejudgment interest to be awarded to Plaintiffs.

Peabody cross-appeals from (1) the July 12, 1995, denial of Peabody's motion for summary judgment and grant of Plaintiffs' motion for summary judgment on Peabody's statute of limitations defense as it relates to all of Plaintiffs' claims; (2) the September 17, 1996, order granting summary judgment to Plaintiffs on their excess haulage breach of contract claims; and (3) the July 3, 1991, order dismissing Peabody's counterclaims predicated on the rule against perpetuities.

III. ANALYSIS

A. PYRAMID CLAIMS

Plaintiffs first contend that the district court erred in denying their motions for judgment as a

matter of law on their claim that Peabody breached the 1954 royalty agreements by failing to pay royalties to Plaintiffs on the coal mined by Pyramid in Plaintiffs' royalty areas. Those agreements required that Peabody (as Alston Coal's successor) pay royalties to Plaintiffs on all coal mined within the royalty areas by Peabody and its "successors and assigns." This court, sitting in diversity, reviews de novo legal determinations raised by a motion for summary judgment and a Rule 50 motion; de novo review is also appropriate for the legal determinations made by the district court in the May 15, 1997, opinion and order. *K & T Enters., Inc. v. Zurich Ins. Co.,* 97 F.3d 171, 176 (6th Cir.1996).

Plaintiffs contend that Peabody is obligated to pay royalties on coal mined from the Plaintiffs' royalty areas by Peabody's "successors" or "assigns;" that Peabody agreed to release temporarily its mining rights in the Parrott royalty areas "in direct exchange" for Pyramid's agreeing to pay royalties to Peabody on all coal Pyramid mined from those lands; and that Peabody agreed to lease to Beaver Dam lands and coal Peabody owned in fee, "in direct exchange" for royalties Beaver Dam was to receive under its lease of June 14, 1979, with Pyramid.[2]

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[2] Plaintiffs did not argue this distinct point in their briefs and did not raise in their complaint a claim involving land and isolated pockets of coal that Peabody owned in fee and leased to Beaver Dam. Plaintiffs' complaint with regard to Pyramid addresses only the released tracts.

(Continued on following page)

Plaintiffs assert that the evidence demonstrates that Peabody assigned its mining rights to Pyramid under the plain definition of "assign." Alternatively, Plaintiffs claim Pyramid was the successor to Peabody's mining rights. In either case, Plaintiffs say, Peabody breached the contract by failing to pay royalties on the coal mined by Pyramid.

Peabody argues that the royalty contract requires Peabody to pay the royalties on coal mined by Peabody, "its successors and assigns." "Successors and assigns," Peabody contends, is a legal term with a particular meaning, which does not include Pyramid. Even if the contract is construed as Plaintiffs construe it, however, Peabody contends that Pyramid is neither a successor nor an assignee of Peabody, and

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Moreover, Beaver Dam's lease of the released lands to Pyramid is distinct from Peabody's lease to Beaver Dam of the land and coal it owned in fee. We conclude that Beaver Dam's lease to Pyramid of those lands and coal pockets and lands jointly owned by Peabody and Beaver Dam was a sublease. The district court correctly found that under the royalty agreement, royalties are not due on coal mined under a sublease. As the court correctly observed, the 1954 Royalty Agreements bind the "heirs, legal representatives, successor or assigns." Sublessees are distinct entities and the terms are not to be applied interchangeably. "[A] conveyance by a lessee of an estate less than his own . . . is a sublease, while a conveyance which operates to transfer the entire interest of the lessee is an assignment." *Haynes v. Eagle-Picher Co.,* 295 F.2d 761, 763 (10th Cir.1961); *see also Heiner v. S.J. Groves & Sons Co.,* 790 P.2d 107, 112 (Utah Ct.App.1990) (reviewing the distinction between an assignment and a sublease; "If the entire interest passes, it is an assignment. If not, it is a sublease.").

stresses that Peabody and Pyramid are competitors, not affiliates. Peabody contends that it surrendered the strip mining rights to Beaver Dam as it was required to do under the lease, and that the surrender could not constitute an assignment because Pyramid received different leasehold rights from those previously held by Peabody. Peabody further asserts that Pyramid is an unaffiliated corporation that cannot be Peabody's successor by any definition. Finally, Peabody argues, a surrender pursuant to a surrender clause in a lease is not an assignment, and had the parties intended the overriding royalty obligation to survive a surrender, they could have included that requirement in the contract instead of limiting the obligation to successors and assigns.

We conclude that Pyramid is neither a "successor" nor an "assignee," nor within the meaning of "successor and assign." Pursuant to the surrender clause in the lease from Beaver Dam to Peabody, Peabody released its right to strip mine coal in certain of the leased lands. The right to strip mine those lands was then leased by Beaver Dam to Pyramid. Peabody analogizes its release of the strip mining rights to a tenant's vacating leased property that the owner subsequently leases to another; the property owner always owned the property, and when the tenant vacates or abandons the lease, the leasehold interest simply merges with the fee. The subsequent tenant is not an assignee, he is the lessee of the owner. Payment by the subsequent tenant to the original tenant to induce him to vacate does not change this

result. Here, Pyramid agreed to pay to Peabody an overriding royalty of 25¢ per ton on all the coal mined and removed from the properties by Pyramid, and Beaver Dam also agreed to pay to Peabody a royalty based on the royalty received by Beaver Dam from Pyramid. However, this does not change the fact that Beaver Dam at all times relevant to this case owned the coal that Peabody leased the right to mine. Peabody's release to Beaver Dam of the strip mining rights was not an assignment of those rights.

Under Kansas law, the law the district court correctly found applicable here, an assignment passes all of the assignor's title or interest to the assignee, and divests the assignor of control over the subject matter of the assignment. *Army Nat'l Bank v. Equity Developers, Inc.,* 774 P.2d 919 (Kan.1989); *Patrons State Bank & Trust Co. v. Shapiro,* 528 P.2d 1198, (Kan.1974); *see also Halbert v. Hendrix,* 95 N.E.2d 221, 223 (Ind.Ct.App.1950) ("An assignment merely transfers an *existing estate* into *new hands,* but a sublease creates a new estate. An assignment signifies parting with the whole unexpired term and all interest therein, [and] the transferor retains no right of any kind therein, but will be deemed a sublease if he reserves a rental or an overriding royalty.") (emphasis added). Here, Peabody surrendered only the right to strip mine the coal; it surrendered that right not into new hands but to the owner of the coal; and it did not surrender the right to deep mine, which was also included in its lease from Beaver Dam. It is not because Peabody released the strip mining rights

to Beaver Dam pursuant to the surrender clause that the release of those rights was not an assignment; it is because the release was of less than Peabody's entire interest, and was not to a new party but to Beaver Dam, that the release was not an assignment. Pyramid thus cannot be considered an "assignee" of Peabody's interest. Finally, there is no contention raised here that Pyramid is an "assign" of all of Peabody's rights and obligations as an entity.

Furthermore, as a matter of law, Pyramid was not Peabody's "successor," as that term is used in the contract. Each of the Royalty Agreements of 1954 requires that royalties be paid to the plaintiffs on all coal "mined . . . by [Peabody], its successors and assigns, from any of the lands . . . " Citing Black's Law Dictionary, Plaintiffs maintain that a "successor" is simply "one who succeeds or follows; one who takes the place that another has left, and sustains the like part or character; one who takes the place of another by succession." We do not disagree with that definition. The record in this case, however, clearly demonstrates that Pyramid did not take the place of Peabody, either by legal succession or in any other manner. Moreover, "successor," with reference to corporations, ordinarily means "another corporation which, through amalgamation, consolidation, or other legal succession, becomes invested with rights and assumes burdens of the first corporation." *Atchison Casting Corp. v. Dofasco, Inc.,* 889 F.Supp. 1445, 1459 (D.Kan.1995) (*quoting* BLACK'S LAW DICTIONARY 1431 (6th ed.1990)); *see also Southern Patrician*

Assoc. v. International Fidelity Ins. Co., 381 S.E.2d 98, 99 (Ga.Ct.App.1989) (contrasting a successor and assignee and defining successor by same terms as *Atchison Casting*); *Schmoele v. Atlantic City R.R. Co.,* 160 A. 524 (N.J.1932) (term successor as applied to railroad corporations ordinarily means corporate successor, and not independent corporation buying property). Pyramid cannot be considered Peabody's successor.

The district court held that Peabody's release of the right to strip mine these tracts was made pursuant to the demand provided for in the surrender clause of the December 30, 1946, amendment to the Alston lease; that under the surrender clause, Peabody was required either to determine that it would in fact strip mine those tracts or to release the lands to Beaver Dam; that such a surrender, if not done fraudulently, collusively or in bad faith, terminates the obligation to pay overriding royalties; that Peabody in fact surrendered the lands to Beaver Dam pursuant to the surrender clause; and that even if the surrender was not valid, no royalties were due Plaintiffs because Pyramid was not Peabody's successor or assign. Finally, the district court submitted to the jury Plaintiffs' claim that the surrender was fraudulent, collusive or in bad faith.

The district court correctly concluded that no royalties were due under the contract because Pyramid was neither a successor nor an assign of Peabody. Peabody's failure to pay royalties was therefore not a breach of the contract. That being the case, it is not at

all clear that it was necessary for the district court to reach the issue of fraud or bad faith. We further conclude, however, that to the extent that under Kansas law governing overriding royalties there is an "emerging duty of fair dealing required on the part of the lessee," *see Campbell v. Nako Corp.,* 402 P.2d 771, 777 (Kan.1965), the jury did not err in finding that Peabody had not acted fraudulently, collusively or in bad faith. Peabody had only two alternatives once Beaver Dam made the demand for surrender – it could determine that Peabody would in fact mine those areas or it could release its strip mining rights in those areas to Beaver Dam. Inasmuch as Peabody had no obligation to Plaintiffs to mine the areas itself rather than to release the rights to Beaver Dam, the jury had no basis on which to find that Peabody's release of the rights to Beaver Dam was fraudulent.

Plaintiffs complain that the district court erred in excluding evidence regarding Peabody's profits and shareholdings and its activities ten years after the surrender at issue here. We review the district court's evidentiary rulings for abuse of discretion. *Springston v. Consolidated Rail Corp.,* 130 F.3d 241, 246 (6th Cir.1997). The district court concluded, and we agree, that this evidence was not relevant to the issue of whether Peabody had surrendered the coal rights at issue in good faith. We find no abuse of discretion here.

Accordingly, the district court's judgment in favor of defendant Peabody on the Plaintiffs' claims for breach of contract to pay royalties on the coal mined

by Pyramid, including the jury's verdict in Peabody's favor on the claim of fraud, is AFFIRMED.

B. NONDISCLOSURE FRAUD ALLEGATIONS

First, we note that Plaintiffs do not appeal the jury verdict in favor of Peabody on Plaintiffs' claims that Peabody had defrauded them through affirmative misrepresentations with respect to the modified royalty rate for coal from the Riverview, Chandler, Rockport, Kronos and III# 9 pits, and the excess haulage cost deduction. Plaintiffs do, however, request a new trial on the affirmative misrepresentation claims should this court reverse the district court's order dismissing Plaintiffs' fraudulent nondisclosure claims.

According to Plaintiffs, Peabody, which was in a position of superior knowledge concerning all of the material facts relating to Plaintiffs' royalties, intentionally concealed material information regarding (1) its knowingly and wrongfully deducting taxes from gross realization for purposes of calculating royalties; (2) its knowingly and wrongfully deducting excess haulage costs in calculating royalties; (3) its transferring mining rights to Pyramid in exchange for royalties in conflict with Plaintiffs' royalty rights; and (4) its paying Plaintiffs a modified royalty rate on coal mined from the Riverview, Chandler, Rockport, Kronos, and III# 9 pits. Under the substantive law of

either Kentucky or Kansas,[3] we must affirm the district court's grant of summary judgment to Peabody on all fraud claims premised on nondisclosure because we conclude that Peabody had no duty of disclosure.

The district court quoted with approval *Flat-Marks Realty Corp. v. Silver's Lunch Stores, Inc.,* 74 F.2d 210, 211 (2d Cir.1934), "A lessee owes no duty to his lessor beyond those contained in the lease; he does not assume to act for him in any particular; only to perform the express promises which it contains," and held that Kansas courts have applied this principle specifically to mineral leases. *See Waechter v. Amoco Prod. Co.,* 537 P.2d 228, 248 (Kan.1975). The court held that the plain language of the Royalty Agreements did not evidence any intent by the parties to create a fiduciary relationship. The agreements did not create any duty on Peabody's part to act primarily for Plaintiffs' benefit in matters concerning the Lease Agreement; they did not impose an obligation on Peabody to disclose the exact method by which it calculated royalties; the agreements represent arm's length contracts between the parties. For these reasons, the court concluded that the specific obligations required under Kansas law for the formation of a fiduciary relationship were not

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[3] The Plaintiffs claim that Kentucky law is applicable to the fraud claims; Peabody claims that Kansas law is applicable. We decline to decide the issue, since we would reach the same conclusion under either state's law.

incorporated into the agreements and Plaintiffs' fraud claims predicated on a fiduciary duty must fail.

We think that the district court's reading of Kansas law is correct. We further conclude that Kentucky's law regarding fiduciary relationships is materially similar:

> [A]s a general rule, we can conclude that [a fiduciary] relationship is one founded on trust or confidence reposed by one person in the integrity and fidelity of another and which also necessarily involves an undertaking in which a duty is created in one person to act primarily for another's benefit in matters connected with such undertaking.

Steelvest Inc. v. Scansteel Serv. Ctr., Inc., 807 S.W.2d 476, 485 (Ky.1991). Accordingly, we conclude that the district court correctly held that there was no fiduciary relationship between Plaintiffs and Peabody.

Citing *Gillespie v. Seymour,* 796 P.2d 1060, 1067 (Kan.1990) and *DuShane v. Union Nat'l Bank,* 576 P.2d 674, 678 (Kan.1978) ("Actionable fraud may be based . . . upon a suppression of facts which the party is under a legal or equitable obligation to communicate and in respect of which he could not be innocently silent."), the district court further held that Plaintiffs' contention that Peabody's position of superior knowledge required Peabody to disclose material facts even in the absence of a fiduciary relationship clearly contradicts the well-established rule that there is no liability for failure to disclose material

facts unless there is a duty to do so. To establish an actionable case of fraud based upon suppression of facts, plaintiff must demonstrate (1) that defendant had knowledge of material facts which plaintiff did not have and which plaintiff could not have discovered by the exercise of reasonable diligence; (2) that defendant was under an obligation to communicate the material facts to the plaintiff; (3) that defendant intentionally failed to communicate to plaintiff the material facts; (4) that plaintiff justifiably relied on defendant to communicate the material facts to plaintiff; and (5) that plaintiff sustained damages as a result of defendant's failure to communicate the material facts to the plaintiff. *Lesser v. Neosho County Community College,* 741 F.Supp. 854, 863 (D.Kan.1990) (citing *DuShane v. Union Nat'l Bank,* 576 P.2d 674 (Kan.1978)); *OMI Holdings, Inc. v. Howell,* 918 P.2d 1274 (Kan.1996) (quoting elements in *Lesser v. Neosho County Community College*).

Under Kentucky law, to establish an actionable case of fraud based upon suppression of facts, plaintiff must demonstrate (1) that defendant had a duty to disclose the material facts, (2) that defendant failed to disclose same, (3) that defendant's failure to disclose the material facts induced him to act, and (4) that he suffered actual damages therefrom. *See Smith v. General Motors Corp.,* 979 S.W.2d 127, 129 (Ky.Ct.App.1998); *Faulkner Drilling Co., Inc. v. Gross,* 943 S.W.2d 634 (Ky.Ct.App.1997); *Wahba v. Don Corlett Motors, Inc.,* 573 S.W.2d 357 (Ky.Ct.App.1978). A duty to disclose may arise from a fiduciary relationship,

from a partial disclosure of information, or from particular circumstances such as where one party to a contract has superior knowledge and the other party relies on him to disclose that knowledge. *See Bryant v. Troutman,* 287 S.W.2d 918 (Ky.1956); *Dennis v. Thomson,* 43 S.W.2d 18 (Ky.1931); *Smith,* 979 S.W.2d at 129; *Faulkner,* 943 S.W.2d at 634.

The Plaintiffs have demonstrated no basis upon which the district court could have found that Peabody had the duty to disclose the information about which Plaintiffs complain. The relationship between the parties was entirely contractual, and the district court correctly found that the Royalty Agreements are arms-length contracts and do not establish a fiduciary relationship or contain bargained-for disclosure obligations. Because the Plaintiffs cannot establish a duty to disclose, which is an element of a fraudulent non-disclosure claim under either Kansas or Kentucky law, Plaintiffs cannot prevail on their fraudulent non-disclosure claims as a matter of law.

C. CLAIMS REGARDING DEDUCTION OF TAXES FROM GROSS REALIZATION

1. Contract Claims

Plaintiffs argue that the district court erred in denying their motion for judgment as a matter of law on their claim that Peabody breached the Royalty Agreements by deducting Kentucky severance, federal reclamation, and federal black lung taxes from gross realization for purposes of calculating royalties.

Questions of contract interpretation are generally considered questions of law subject to de novo review. *Golden v. Kelsey-Hayes Co.,* 73 F.3d 648, 653 (6th Cir.1996); *Dayton Power & Light Co. v. Federal Energy Regulatory Comm'n,* 843 F.2d 947, 954 (6th Cir.1988) (construction of contract and intent of parties); *Lancaster Glass Corp. v. Phillips ECG, Inc.,* 835 F.2d 652, 658 (6th Cir.1987) (interpretation of contract).

The 1954 Royalty Agreements explicitly define gross realization:

> The term "Gross Realization" as used herein means the gross selling price of all merchantable coal as invoiced F.O.B. mine to the customer or buyer; Provided, However, that the foregoing shall apply only to coal invoiced F.O.B. cars at the mine, and as to any coal produced from said lands and loaded on barges, in determining "Gross Realization" there shall be deducted from the F.O.B. barge price to the customer or buyer the reasonable cost of transporting (but not including the cost of loading into vehicles for transporting) such coal to the River and loading same into barges.

Plaintiffs contend that Peabody breached the Royalty Agreements as a matter of law by calculating Plaintiffs' royalties based on a gross realization figure from which it had deducted the taxes which it passed along as part of the price it charged its coal

purchasers. Plaintiffs argue that the term "gross realization" as defined in the 1954 Royalty Agreements is clear and unambiguous; that the district court correctly held as much in its order of July 3, 1991; and that the district court erred in vacating that order in its order of September 6, 1994, and in permitting this issue to go to the jury.

In *Hemenway v. Peabody Coal Co.,* 159 F.3d 255 (7th Cir.1998), the Seventh Circuit held that Peabody had breached a similar agreement – which required that Peabody pay a royalty based on the coal's sales price[4] – by deducting the federal reclamation fee and the federal black lung tax from the sales price before calculating royalties. *Id.* at 261 ("[W]e hold that the excise taxes are included in the 'sales price' for purposes of the 1969 lease."). *Hemenway* rejected Peabody's argument that because federal excise taxes on coal were introduced after 1969, when the parties entered into the agreement, the contract must be considered ambiguous, pointing out that "contracts often handle contingencies." *Id.* at 259.

Peabody argues before us that because these taxes were enacted subsequent to the execution of the Royalty Agreements, those agreements are ambiguous.[5] Peabody contends that read as a whole,

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[4] Defined in the *Hemenway* lease as the average invoice price of coal mined, removed and sold. 159 F.3d at 257.

[5] Kentucky levied a severance tax on coal in 1972. The Reclamation Fee provided for in the Federal Surface Mining and Control Reclamation Act became effective on August 3, 1977; the

(Continued on following page)

Hemenway affirmed summary judgment in the plaintiff's favor not because the contractual language was unambiguous but because Peabody had offered no objective evidence to prove that the contracting parties intended to exclude excise taxes from the royalty base. *Id.* By contrast, Peabody asserts that here they offered objective evidence which the jury considered.

We find Peabody's attempt to distinguish *Hemenway* unconvincing and, adopting the Seventh Circuit's reasoning in *Hemenway,* we reverse the district court's judgment for Peabody on this issue. The contract definition of "gross realization" includes a deduction under certain circumstances for "the reasonable cost of transporting (but not including the cost of loading into vehicles for transporting) such coal to the River and loading same into barges." Clearly, the parties were able to exclude some costs but not others in defining the gross realization. As the Seventh Circuit noted, "[i]t would not have required prescience for parties to subtract taxes as well, had they wanted to do so; even in 1969, death and taxes had a certain inevitability." *Id.* at 260. While we concede that the inevitability factor may have been slightly less with regard to taxes in 1954, we think the point is still well-taken.

Federal Black Lung Excise Tax became effective on April 1, 1978.

2. Active Fraud Claim[6]

First, we find no abuse of discretion in the district court's decision to bifurcate the tax fraud claim from the rest of Plaintiffs' claims. *See In re Bendectin Litig.,* 857 F.2d 290, 307 (6th Cir.1988). (Affirming a district court's decision to trifurcate an action.) Rule 42(b) of the Federal Rules of Civil Procedure provides that in order to promote convenience and economy or avoid prejudice, a district court "may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue . . . " The Sixth Circuit stated, "[t]he decision whether to try issues separately is within the sound discretion of the court. . . . It follows, therefore, that a decision to try an issue separately will be affirmed unless the potential for prejudice to the parties is such as to clearly demonstrate an abuse of discretion." *Bath & Body Works, Inc. v. Luzier Personalized Cosmetics, Inc.,* 76 F.3d 743, 747 (6th Cir.1996) (*quoting In re Bendectin,* 857 F.2d at 307-08). Given the complexity of this case, the court's motive to prevent jury confusion and the need for judicial economy, the bifurcation cannot be considered an abuse of discretion.

Second, to the extent that Plaintiffs' Third Amended Complaint can be read to raise an active fraud claim with regard to Peabody's basing the

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[6] We have already concluded that Plaintiffs' claim of fraudulent non-disclosure with regard to the deduction of taxes from gross realization, like Plaintiffs' other fraudulent non-disclosure claims, was properly dismissed.

calculation of royalties on a gross realization figure from which taxes had been deducted, *i.e.,* a claim of fraud by affirmative misrepresentation, and to the extent that Plaintiffs' brief on appeal can be read to argue that they were entitled to judgment on such a claim, we hold that Plaintiffs are mistaken. Even though the district court erred in failing to grant summary judgment for Plaintiffs on the tax breach of contract claim, Peabody was entitled to judgment as a matter of law on Plaintiffs' claim that Peabody's deducting the taxes from gross realization for purposes of calculating royalties was active fraud. Here again, the discussion in *Hemenway* is instructive. Though the *Hemenway* court determined that plaintiffs' complaint alleged only deceptive omissions, the court concluded that the district court's dismissal of the fraud claim was appropriate for the additional reason that Peabody's conduct was "best characterized as mistaken rather than fraudulent;" the court said that "Plaintiffs' fraud claim fails because they were not lied to, because their contract specifies what information Peabody was to disclose (and when), and because there really is legal uncertainty about the meaning of the contract." 159 F.3d at 262-63.

Likewise, we hold that Plaintiffs have demonstrated no actual fraud on the tax issue despite our determination that the calculations on the monthly royalty statements were incorrect as a matter of contract interpretation. Peabody relied upon its mistaken interpretation of the contract to calculate royalties due to Plaintiffs but in doing so did not make

fraudulent misrepresentations via the monthly statements. Plaintiffs' own allegations of fraud make it clear that those monthly statements did not contain *any* representation of what the actual gross realization or gross selling price was, and Plaintiffs do not complain that the statements misrepresented the tonnage mined, the multiplier used for calculating the royalty or the amount of the royalty being paid.

D. STATUTE OF LIMITATIONS

Peabody assigns as error the district court's conclusions regarding the statute of limitations applicable to all of the Plaintiffs' claims for breach of contract. The district court held that under the Kentucky borrowing statute, the causes of action for breach of contract accrued in Missouri and thus, the Missouri ten year statute of limitations applied to those claims. Interpreting the Missouri statute, the district court concluded that under the "continuing injury" doctrine set forth in *Sabine v. Leonard,* 322 S.W.2d 831 (Mo.1959)(en banc), none of the Plaintiffs' claims for damages was barred. This ruling allowed Plaintiffs potentially to recover for damages based on Peabody's failure to make proper payment of royalties as far back as 1963.

Both parties concede that the district court appropriately utilized the Kentucky borrowing statute, KY.REV.STAT. § 413.320, because a federal court sitting in diversity must apply the procedural law of the forum state, including its statutes of limitations.

See Electric Power Bd. v. Monsanto Co., 879 F.2d 1368, 1375 (6th Cir.1989). The Kentucky statute of limitations borrowing statute states:

> When a cause of action has arisen in another state or country, and by the laws of this state or country where the cause of action accrued the time for the commencement of an action thereon is limited to a shorter period of time than the period of limitation prescribed by the laws of this state for a like cause of action, then said action shall be barred in this state at the expiration of said shorter period.

KY.REV.STAT. § 413.320; *see also Boyd v. LaMaster,* 927 F .2d [sic] 237, 240 (6th Cir.1991). The Kentucky borrowing statute requires a three step analysis: (1) we must determine whether the cause of action accrued in another state; (2) if the cause of action did accrue in another state, we must determine whether that state's statute of limitations for the particular cause of action is shorter than Kentucky's; (3) if the accrual state's statue [sic] of limitations is shorter than Kentucky's, we apply the statute of limitations of the accrual state; however, if the statute of limitations for the cause of action in that state is longer than Kentucky's, we apply Kentucky's shorter statute. The parties do not dispute that Kentucky's statute of limitations for contract actions is 15 years. KY.REV.STAT. § 413.090(2).

1. Accrual of the Breach of Contract Claims

In determining *where* the cause of action for breach of contract accrued, we apply Kentucky law. *See Cope v. Anderson,* 331 U.S. 461, 466-67 (1947) (applying the law of the state of the borrowing statute to determine where a cause of action accrued); *see also, e.g., In re Master Mortgage Inv. Fund, Inc.,* 151 B.R. 513, 516 (W.D.Mo.1993) ("The determination of where a cause of action accrued is not a conflict of laws question. . . . It is, rather, a question of interpreting the meaning and application of [Missouri's borrowing statute]. By enacting [this statute], the Missouri legislature has effectively precluded application of choice of law principles to the statute of limitations issue.").[7]

However, there is little or no law in Kentucky concerning *where* a breach of contract action accrues. Kentucky courts have looked at *when* a cause of action accrues: "Usually an action accrues at the time of infliction of a wrong or breach of a contract." *Hoskins' Adm'r v. Kentucky Ridge Coal Co.,* 305 S.W.2d 308, 311 (Ky.1957). Considering the issue as a general matter, this Court has previously noted:

> The time when a cause of action arises and the place where it arises are necessarily connected, since the same act is the critical

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[7] Therefore, to the extent that both parties cited cases from other states to support their arguments of where these causes of action accrued, we will not address most of them.

> event in each instance. The final act which transforms the liability into a cause of action necessarily has both aspects of time and place. It occurs at a certain time and in a certain geographical spot.

Helmers v. Anderson, 156 F.2d 47, 51 (6th Cir.1946), *aff'd sub nom. Cope v. Anderson,* 331 U.S. 461 (1947). Both parties cite cases from several courts to establish that a cause of action accrues when and where the breach occurs and the injured party holds the right to sue. *See, e.g.,* 51 AM.JUR.2D *Limitation of Actions* § 71 (1970) ("[A] cause of action upon a contract arises where the contract is to be performed, where the breach occurs, rather than the place where the contract was executed. . . ."). Here, the parties appear to agree that the cause of action accrues where the breach occurred. However, that begs the question – where did the breach occur?

Other Kentucky statutes of limitations are instructive in determining *when* Kentucky law considers a breach of contract to have occurred. Kentucky's statute of limitations for contracts of sale under the UCC, for example, provides in part: "A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach." KY.REV.STAT. § 355.2-725(2). Therefore, it appears that a breach can occur before the aggrieved party actually knows of it and is damaged by it. This supports the district court's conclusion that the causes of action accrued in Missouri, where Peabody improperly calculated the royalties and from whence

Peabody mailed out the royalty payments to the Plaintiffs in their various states of residence.

Peabody cites several cases in support of its argument that a cause of action for breach of contract accrues where the damages are sustained; however, each of these cases required payments to be made at a location defined in the contract. *See In re Master Mortgage Inv. Fund, Inc.,* 151 B.R. at 517 (payable at plaintiff's business location in Kansas); *Bank of Boston Int'l v. Arguello Tefel,* 626 F.Supp. 314, 317 (E.D.N.Y.1986) (promissory note payable in Boston with language "at the head office of the First National Bank of Boston, in Boston, Massachusetts"); *Aviation Credit Corp. v. Batchelor,* 190 So.2d 8, 11 (Fla.Dist.Ct.App.1966) (promissory note payable in Florida); *Stanbury v. Larsen,* 803 P.2d 349, 353 (Wyo.1990) (note payable in Wyoming by specific language: " 'Payable at Riverton, Wyo. on demand by maker S.J. Stanbury." '); *Baker v. First Nat'l Bank,* 603 P.2d 397, 398 (Wyo.1979) (noting that "[t]he indebtedness was to be paid in Colorado at a specified time. It was not then and there paid. The cause of action accrued at that time and at that place. It was 'the time and place where that is not done which ought to be done." '); *see also Helmers,* 156 F .2d [sic] at 51-52 (under Ohio law, breach occurred at location of receiver's office when bank shareholders failed to pay their assessment). *Helmers* also involved the obligations of many to pay at one location, whereas in the case before us here, we have the opposite – the failure of one correctly to pay many in diverse locations.

Finally, none of these cases applies Kentucky law, which governs the question of where the cause of action accrued in this case.

As a practical matter, the royalty agreements simply provided that for each month that royalties were due for coal mined from the lands, Peabody's obligation was to calculate the royalties and pay them to the Plaintiffs; although Peabody argues otherwise, the royalty agreements do not specify a place of payment, and the locations of the Plaintiffs were immaterial to the obligation to pay the royalties. Peabody was required to pay the Plaintiffs whether the Plaintiffs showed up at Peabody's Missouri office, or were living in Kansas or had just moved to China.[8]

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[8] Our reasoning is also consistent with the analysis in an older Kentucky case. In *Western Union Telegraph Co. v. Lacer,* a Kentucky court had to decide whether a cause of action for breach of contract against Western Union for failing to make timely delivery of a telegram to the brother of a dying man accrued in Indiana, where Western Union affixed an incorrect address to the telegram, or in Kentucky, where the telegram was untimely delivered. 93 S.W. 34 (Ky.1906). The court noted that the contract was for the service of "expeditiously deliver[ing] the correct message to the addressee at the point addressed." *Id.* at 35. Therefore, the court concluded that the breach occurred in Kentucky because Western Union's performance was finished only after the message reached that location.

In our case, because there was no named destination for the Plaintiffs' royalty payments, Peabody's performance was complete when they calculated and sent the payment to the Plaintiffs, wherever they were located. There was no specific obligation to deliver to a particular location.

Peabody calculated the royalties at its office in Missouri, and sent the payments from that office. To the extent that the calculations and the resulting payments were a breach of Peabody's obligation, that breach occurred in the office in Missouri. It would be unworkable and irrational to hold that the cause of action accrued wherever each Plaintiff happened to receive his or her deficient check. In a continuing injury case such as this, if a Plaintiff moved several times over the course of the years, she would have separate causes of action in each state in which she lived. Moreover, all of the alleged wrongful conduct occurred at the Peabody offices in Missouri.

Peabody argues that Kentucky applies a "most significant contacts" test to determine the appropriate statute of limitations, a test similar or seemingly identical to that applied for purpose of choice of law. However, this is not consistent with the language of Kentucky's borrowing statute, Kentucky case law, or the purpose of such statutes. The fact that the contract was executed in Kansas by parties who were Kansas residents at the time is not dispositive of where the causes of action *accrued.*

Finally, Peabody is incorrect in arguing that the analysis in *Haeberle v. St. Paul Fire & Marine Ins. Co., Inc.,* 769 S.W.2d 64 (Ky.Ct.App.1989), controls this case. In *Haeberle,* the court applied Kentucky's shorter statute of limitations to a collection on a bill of exchange, even though the bill was executed in Georgia while appellant was a resident there. *Id.* at 65. However, the analysis that Peabody attributes to

this case is not there. The Kentucky court conducted no analysis as to whether or why the Georgia statute would apply, because the borrowing statute did not allow it to borrow Georgia's longer statute of limitations. *Id.* at 66.

We conclude that the district court properly found that the causes of action for breach of the 1954 Royalty Agreements accrued in Missouri.

2. Application of the Missouri Statute of Limitations

Missouri has two potentially applicable statutes of limitations for breach of contract actions. The first, MO.REV.STAT. § 516.110, requires "[a]n action upon any writing, whether sealed or unsealed, for the payment of money or property" to be commenced within ten years. The second, MO.REV.STAT. § 516.120, requires that "[a]ll actions upon contracts, obligations or liabilities, express or implied, except those mentioned in section 516.110" must be brought within five years. The district court determined that the royalty agreements were contracts for the payment of money, and therefore the ten year statute of limitations in MO.REV.STAT. § 516.110 applies. We agree. Finally, because Missouri's ten year statute of limitations is shorter than the applicable Kentucky statute of limitations, the Kentucky borrowing statute requires that we apply the Missouri statute.

In applying Missouri's statute of limitations, we must determine *when* the Plaintiffs' causes of action

accrued. Missouri's accrual statute, MO.REV.STAT. § 516.100, provides, in pertinent part:

> [F]or the purposes of sections 516.100 to 516.370, the cause of action shall not be deemed to accrue when the wrong is done or the technical breach of contract or duty occurs, but when the damage resulting therefrom is sustained and is capable of ascertainment, *and, if more than one item of damage, then the last item, so that all resulting damage may be recovered, and full and complete relief obtained.*

MO.REV.STAT. § 516.100 (emphasis added). As a general matter, the Missouri Supreme Court has noted that "[i]n an action on contract, '(o)rdinarily a plaintiff's cause of action accrues upon a defendant's failure to do the thing at the time and in the manner contracted, and a statute of limitations begins to run when a suit may be maintained therefor."' *Davis v. LaClede Gas Co.,* 603 S.W.2d 554, 555 (Mo.1980) (en banc) (quoting *Baron v. Kurn,* 164 S.W.2d 310, 316 (Mo.1942)).

Plaintiffs argue that Missouri's accrual statute, MO. REV. STAT. § 516.100, and cases interpreting it, operate to allow them to recover for all underpayments based on the deduction of taxes from gross realization, dating back to 1972, as well as all underpayments based on the deduction from gross realization of excess haulage costs. The district court correctly noted that the language of § 516 .100 [sic] applies to various types of agreements, if they are

analogous to installment contracts. *See Sabine v. Leonard,* 322 S.W.2d 831, 838 (Mo.1959) (en banc). However, we conclude that the district court erred in holding that the royalty agreements at issue here are analogous to installment contracts and therefore governed by the rule enunciated in *Sabine.*

Sabine involved a mortgagee who failed to make monthly payments of $20 on his second mortgage. *Id.* at 833. Having decided that the second mortgage was still valid after a foreclosure and subsequent reacquisition of the property by the mortgagee, the court addressed the defendant's statute of limitations argument:

> If the payments on the instant note had been made according to schedule the last principal payment would have been made on May 1, 1938. This action was commenced on March 27, 1948, which was less than ten years from the date the last payment became due.[9] The remaining point briefed by defendants is that the statute of limitation ran on each installment ten years after it became due so that all installments had been barred by the statute at the time the suit was filed, except the last two installments of principal, and certain interest, all of which totaled $52.50.

Id. at 837. After noting that the "general rule" is that the statute of limitations runs on each installment as

[9] At the time of this case (as well as currently), the Missouri statute of limitations for actions on a promissory note was ten years.

it becomes due, the court found that Missouri's recently enacted accrual statute changes this result for installment contracts:

> The legislature, probably for the purpose of avoiding a multiplicity of suits, as we construe Section 516.100, has seen fit to provide that in suits upon contracts where there is 'more than one item of damage' (installment) 'the cause of action shall not be deemed to accrue' (for the purpose of certain sections, including 516.110) until the last item of damage is sustained (last installment becomes due) so that all damages (installments) 'may be recovered, and full and complete relief obtained' in one action. Defendants have cited the case of *Allen v. Allen,* 364 Mo. 955, 270 S.W.2d 33, but that case is so factually different from the instant case that it has no application to the question before us.

Id. at 838.

In the case before us, the district court applied *Sabine* to find:

> Plaintiffs' breach of contract claims will be deemed to have accrued at the time of the last item of damage. Given that plaintiffs' relationship with Peabody was of a continuous nature until at least 1986 and because the last item of damage did not occur before 1986, none of Plaintiffs' breach of contract claims is barred by the ten-year Missouri statute of limitations.

However, the district court failed to recognize what is patently clear from the language of *Sabine* quoted above – the court in *Sabine* limited its holding to actual installment contracts, where the "damages" would be ascertainable and certain when the contract was over. Therefore, unless later cases have broadened *Sabine* to apply to contracts without a fixed time period for payment or fixed sum due, *Sabine* does not control here.

Prior to *Sabine,* the Missouri Supreme Court had decided two other cases relevant to this issue which the court in *Sabine* did not purport to overrule, either as to their analyses or their results. *See Allen v. Allen,* 270 S.W.2d 33 (Mo.1954); *Coleman v. Kansas City,* 182 S.W.2d 74 (Mo.1944) (en banc). In fact, the court plainly stated that *Allen v. Allen* was wholly inapposite to *Sabine* because of its facts. In *Allen,* a woman sued her former husband for past child support for which he had no contractual obligation, but for which a statutory obligation existed. *Allen,* 270 S.W.2d at 37. The court noted other courts had taken two approaches to the question of when a cause of action accrues on a child support obligation:

> [T]here are two views as to the nature of the husband's obligation and the applicability of the statute of limitations. 'It has been held that the duty of a father to support his minor child, and his quasi contractual obligation to compensate others who, in his default, expend money to support the child, is an entire and continuing obligation, so that the statute

> of limitations will not begin to run, on an action to recover for expenditures for the support of the child, until the child reaches his majority or the obligation otherwise terminates; but it has also been held that a separate cause of action accrues for each expenditure, and the statute of limitations begins to run with respect thereto from the date of each separate expenditure.' 54 C.J.S., Limitations of Actions § 160, p. 107.

Id. at 37-38. The court went on to distinguish the cases from *Allen,* because *Allen* involved a statutory obligation to pay the support, rather than a contractual one. Therefore, the court held that the cause of action accrued each month and that the statute of limitations barred any obligations prior to five years before suit. *Id.* at 38-39. It is true that the *Allen* court's statement that

> a separate cause of action accrues when each payment is made, and the statute of limitations as to each cause of action runs from the date of the particular payment, as in the case of salaries payable monthly. Under the statute, a plaintiff may wait until all installments are due and then being [sic] one action, 'but, if while waiting some installments have been due for the period of limitation, they will be barred,'

id. at 38 (citing *Stark Bros. Co. v. Gooding,* 162 S.W. 333, 334 (Mo.Ct.App.1914) (citations omitted)), was based on reasoning from the *Stark Bros.* case which the Missouri Supreme Court held in *Sabine* had been

overruled by the accrual statute. However, *Allen* remains important for its recognition that cases which have found the father's obligation to be a continuing one, and therefore the statute of limitations does not begin to run until the obligation terminates, have done so upon a premise that the obligation continues until the child reaches her majority or the obligation otherwise terminates. This implies that some degree of finality of the obligation is needed to implicate the *Sabine* doctrine.

The *Coleman* case, also decided before *Sabine,* similarly appears to support this distinction. In *Coleman,* the Missouri Supreme Court found no error when the trial court applied a five-year statute of limitations to bar earlier recovery on alleged underpayment of salaries. *Coleman,* 182 S.W.2d at 78. The court rejected the employees' contention that their salary was more in the nature of an "open and current account" and went on to find that "[t]he salaries were payable monthly and a right of action accrued to the employee at the end of each month." *Id.*

Cases construing and applying *Sabine* also imply that there must be some finality in the underlying contract in order for *Sabine* to extend the statute of limitations to allow for recovery of all damages. One case specifically noted that the *Sabine* rule applies "if the contract is to be construed as providing for a series of installments." *Kansas City v. Kansas City Transit, Inc.,* 406 S.W.2d 18, 25 (Mo.1980).

In 1980, the Missouri Supreme Court, sitting en banc, decided *Davis v. LaClede Gas Co.,* 603 S.W.2d 554 (Mo.1980), a case alleging both continuous contractual and tort injury. The plaintiff was a dry cleaning and pressing plant which was serviced by gas supplied by the defendant. *Id.* at 555. In 1965, the parties agreed that the indoor meter was dangerous and plaintiff alleged that they orally contracted for defendant to move the meter outside. *Id.* However, in that same year, defendant instead installed a vent pipe, which made plaintiff's presses inoperable. *Id.* Although plaintiff made numerous demands upon defendant to fix the condition, defendant did not do so until 1970. *Id.* In 1973, plaintiff brought an action against the defendant, alleging breach of the 1965 oral contract and negligence in installing the vent pipe. *Id.* When defendant pled the defense of the five year statute of limitations, the plaintiff argued that

> 'his injury [was] continuous from December 18, 1965 (when the vent pipe was installed) to July 13, 1970, when he got relief from defendant that he had been persistently demanding." He then reasons that under § 516.100, *supra,* 'the cause of action, viewed either as breach of contract or tort, accrued on July 13, 1970, within five years of filing suit, because only then was the damage * * * capable of ascertainment * * * .'

Id. at 556. The court found that plaintiff had successfully pled a continuing injury, so as not to bar his entire claim, but that recovery of damages incurred outside the limitations period was barred. *Id.* In so

holding, without any citation to *Sabine,* the court distinguished between two types of injury:

> [I]f the wrong done is of such a character that it may be said that all of the damages, past and future, are capable of ascertainment in a single action so that the entire damage accrues in the first instance, the statute of limitation begins to run from that time. If, on the other hand, the wrong may be said to continue from day to day, and to create a fresh injury from day to day, and the wrong is capable of being terminated, a right of action exists for the damages suffered within the statutory period immediately preceding suit.
>
> We agree with appellant that the petition can be construed as attempting to plead a continuing breach of contract and a continuing tort. In these circumstances, appellant is entitled to attempt to allege and prove a cause of action for the period January 17, 1968 to January 17, 1973.

Id.

Under this analysis, even where a party alleged a continuous breach and resultant continuing injury, the Missouri Supreme Court would allow recovery of only those damages incurred within the limitations period preceding the filing of the suit. This case did not purport to overrule *Sabine;* rather, it dealt with a claim of breach of a contract not claimed to be an installment contract, and the fact that it makes no reference whatsoever to *Sabine* confirms the

inapplicability of *Sabine* outside the installment contract realm.

In the years since *Sabine* and *Davis,* the Missouri appellate courts and the federal district court in Missouri have addressed the accrual statute in a variety of situations. *See, e.g., Vogel v. A.G. Edwards & Sons, Inc.,* 801 S.W.2d 746 (Mo.Ct.App.1990) (holding that a cause of action for churning accrues at the time plaintiffs discover that trading in plaintiffs' account is for stockbroker's, rather than plaintiffs' benefit; under *Davis* rule, each repetition thereafter is a separate cause of action for which suit must be brought within the statutory period for the respective trade); *M & D Enters., Inc. v. Wolff,* 923 S.W.2d 389 (Mo.Ct.App.1996) (holding that plaintiffs' reading of § 516.100 to mean that legal malpractice action did not accrue until plaintiffs settled the underlying litigation, more than five years after they discharged defendants as counsel, would permit plaintiffs in general to manipulate the accrual of causes of action and unilaterally extend limitations periods); *Morrill v. Becton, Dickinson & Co.,* 564 F.Supp. 1099 (E.D.Mo.1983), *aff'd in pertinent part,* 747 F.2d 1217 (8th Cir.1984) (holding that no part of action for breach of 17-year contract to pay royalties for use of plaintiff's patent and fraudulent underpayment of those royalties was barred by statute of limitations because action was brought within five years of plaintiff's discovery that royalties had been underpaid and last item of damage, *i.e.,* last underpayment, occurred shortly before suit was filed); *Reed v. Rope,*

817 S.W.2d 503 (Mo.Ct.App.1991) (holding that action for breach of antenuptial agreement brought immediately following death of spouse not limited to claims for damages occurring within statutory period immediately preceding filing of suit, because under rule in *Sabine,* plaintiff was entitled to recover damages for all breaches committed during the agreement's term.)

Having carefully reviewed these cases, we are persuaded that the Missouri Supreme Court would not adopt the *Sabine* doctrine in the context of a royalty agreement indefinite as to term and amount, but would hold that the accrual of the causes of action for breach of the royalty contracts at issue here is governed by *Davis.* As the Missouri courts have stated many times, "[b]ecause statutes of limitations are favored in the law, exceptions must be enacted by the legislature. These exceptions are strictly construed. Courts are not at liberty to extend them even in cases of hardship." *Langendoerfer v. Hazel,* 601 S.W.2d 290, 290 (Mo.Ct.App.1980) (citing *Neal v. Laclede Gas Co.,* 517 S.W.2d 716, 719 (Mo.Ct.App.1974)).

The wrongs suffered by the Plaintiffs because of Peabody's unauthorized deduction of taxes and excess haulage costs[10] from gross realization "continue[d]

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[10] We note that although Peabody's notice of appeal indicates an intent to appeal from the district court's determination on the merits of plaintiffs' claim for breach of contract due to the deduction of excess haulage costs, Peabody has briefed only the statute of limitations issue with regard to the excess haulage breach of contract claim.

from [month to month], and . . . create[d] a fresh injury from [month to month];" because "the wrong [was] capable of being terminated, a right of action exists for the damages suffered within the statutory period immediately preceding suit." *Davis,* 603 S.W.2d at 556. Therefore, under the plain language of the Missouri statute and under the reasoning of *Davis,* Plaintiffs' claims for damages for breach of the royalty agreements by reason of these underpayments occurring more than ten years before Plaintiffs filed suit on such breach would be barred. Because Peabody agreed on December 12, 1989, to a tolling from that date forward of the applicable statute of limitations with respect to the breach of contract claims arising from Peabody's deduction of taxes and excess haulage costs from gross realization, the statute would apply to bar recovery for those claims which accrued before December 12, 1979.

Similarly, Plaintiffs' claims that Peabody breached the royalty agreements by failing to pay royalties on coal mined from the Hall properties and by paying royalties at the wrong rate on coal from the Riverview mine, are limited to the 10-year period immediately preceding the filing of the complaints raising those claims. Plaintiffs did not assert their claim of breach of contract relative to the royalties never paid on coal mined from the "Hall" properties until their Third Amended Complaint, filed on January 5, 1993; they do not argue that the claim related back to the First or Second Amended Complaints; and there is no dispute that Peabody ceased any mining on those

properties some thirteen years before the Third Amended Claim was filed. Plaintiffs' breach of contract claims for underpaid royalties for coal mined at Peabody's Riverview mine, including the original Riverview tracts, and the Chandler, Kronos, Rockport and III# 9 tracts, were first raised in the Plaintiffs' Second Amended Complaint on December 26, 1990; Plaintiffs do not claim that the amendments with respect to these claims relate back to the filing date of the original complaint; Peabody's letter agreeing to toll the statute applied only to the taxes and haulage claims; and the Riverview mine closed in 1979. The Riverview and Hall claims are therefore entirely barred by the statute of limitations.

Accordingly, we reverse the district court's ruling that the Missouri statute of limitations does not act to bar any portion of Plaintiffs' damages.[11] Plaintiffs are entitled to recover only those damages resulting from underpayment of royalties due to the deduction of taxes and excess haulage costs from gross realization occurring after December 12, 1979.

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[11] Although the district court did not address the issue and Plaintiffs did not argue equitable tolling to this Court, we note that any argument previously asserted by Plaintiffs that Peabody fraudulently concealed material facts and thus, Mo.Rev.Stat. § 516 .280 [sic] operated to toll the statute of limitations must fail. Because we have found that Peabody had no duty to disclose the facts at issue and did not perpetrate any fraud upon the Plaintiffs, it must follow that Peabody did not fraudulently conceal those facts so as to toll the statute of limitations.

E. RULE AGAINST PERPETUITIES

We affirm the district court's ruling with regard to the inapplicability of the rule against perpetuities to Plaintiffs' royalty interest in property or mineral rights acquired by Alston or Peabody after the 1954 Royalty Agreements. However, we decline to base our holding on the district court's reasoning that the perpetual nonparticipating royalty interests at issue are contractual rights, as opposed to interests in property. Rather, we find persuasive the reasoning and holding of the Missouri Court of Appeals in *Commerce Bank v. Peabody Coal Co.,* 861 S.W.2d 569 (Mo.Ct.App.1993).

Commerce Bank presented the same issue as is presented by the case before us today. As a matter of Kentucky law, the court found that the royalty interest vested when it was created, even though it was uncertain in the enjoyment. *Id.* at 576. We agree. The royalty holder owns a fee simple interest in Peabody's contingency. Therefore, none of Plaintiffs' claims or damages is precluded by the operation of the rule against perpetuities.

F. PREJUDGMENT INTEREST

The question of prejudgment interest in a diversity action is governed by the law of the forum state; thus the statutory rate of Kentucky, rather than Kansas (as held by the district court) applies to the calculation of such interest. *Diggs v. Pepsi-Cola Metro. Bottling Co.,* 861 F.2d 914, 924 (6th Cir.1988);

Rhea v. Massey-Ferguson, Inc., 767 F.2d 266, 270 (6th Cir.1985). On remand we direct the district court to calculate the prejudgment interest, in accordance with Kentucky's statutory rates, on the damages to which Plaintiffs may be found to be entitled on the breach of contract claims that remain.

IV. CONCLUSION

For the foregoing reasons, we (1) AFFIRM the district court's May 15, 1997 Mid-Trial Order granting judgment to Peabody on the Pyramid breach of contract claims; (2) REVERSE the September 6, 1994, Order granting judgment to Peabody on the tax deduction breach of contract claim and reinstate summary judgment for the Plaintiffs on that claim; (3) AFFIRM the August 12, 1996, Order granting summary judgment to Peabody on Plaintiffs' fraudulent nondisclosure claims; (4) REVERSE the July 12, 1995, Order granting summary judgment to Plaintiffs and denying summary judgment to Peabody with regard to the statute of limitations defense, and hold that the ten-year Missouri statute of limitations bars all of Plaintiffs' Hall and Riverview breach of contract claims as well as those portions of Plaintiffs' claims for breach of contract due to improper deduction of taxes and excess haulage costs from gross realization for purposes of calculating royalties occurring more than ten years before the filing of the complaint; (5) AFFIRM the July 3, 1991, Order dismissing Peabody's counterclaims premised on the rule against perpetuities.

Accordingly, we remand this case to the district court for further proceedings consistent with this opinion.

MISSOURI CIRCUIT COURT
TWENTY-SECOND CIRCUIT
(City of St. Louis)

PATRICIA WILLITS, et al.,	)	
Plaintiffs,	)	
	)	No. 0822-CCO2072
v.	)	Div. 18
PEABODY COAL CO., etc., et al.,	)	
Defendants.	)	

MEMORANDUM, ORDER AND JUDGMENT

(Filed Mar. 29, 2010)

Plaintiffs seek damages from defendants for breach of contract and declaratory relief regarding obligations of defendants to pay royalties in the future by reason of coal mining royalty agreements dating from 1954, concerning coal fields in Ohio County, Kentucky. Plaintiffs have filed a motion for partial summary judgment on the issue of liability. Defendants have filed cross-motions seeking judgment in their favor on the ground that they have no liability under the royalty agreements.

Plaintiffs are Patricia Parrott Willits, William G. Parrott, Jr., and Donald Petrie as trustee of the PPW Royalty Trust. The individual plaintiffs are the descendants of W. G. Parrott and Pauline Parrott. Defendants are Peabody Coal Co., LLC, Peabody Energy Corp., Peabody Development Co., LLC, Peabody Holding Co., LLC, Central States Coal Reserves of Kentucky, LLC, Beaver Dam Co., LLC, Western

Diamond, LLC, and Armstrong Coal Co. All of the defendants other than Western Diamond and Armstrong are affiliated with Peabody Coal Co. and are collectively referred to as the "Peabody defendants"; Western Diamond and Armstrong are collectively referred to as the "Armstrong defendants."

Reviewing the voluminous and somewhat convoluted record, the Court finds and concludes that there is no genuine issue of material fact concerning the defendants' liability, and that the defendants are entitled to judgment as a matter of law.

In the beginning, there was Beaver Dam and W.G. Parrott (whose heirs are the plaintiffs). As described by the United States Court of Appeals for the Sixth Circuit in earlier litigation between plaintiffs and the Peabody defendants, (*Willits v. Peabody Coal Company,* 188 F.3d 510, 1999 WL 701916 (6th Cir. 1999)):

"In 1946, W.G. Parrott conveyed to Beaver Dam Coal Company (Beaver Dam) certain lands and mineral rights located within a 6000-acre tract in Ohio County, Kentucky. Beaver Dam immediately leased back to Parrott the coal mining rights on those lands. Parrott then assigned the coal leases to Rough River Coal Co., a company incorporated by Parrott; Rough River agreed to pay to Parrott and his wife an overriding royalty of 5% of the average gross realization from coal mined and sold by Rough River, its successors and assigns, from any lands in the First and Third Boundary, as described in the contract."

"In 1947, Rough River assigned the coal leases to Alston Coal Co. (Alston), another corporation controlled by William Parrott. The Parrotts entered into new royalty agreements with Alston in 1954: those agreements changed the royalty obligation to 2½% of gross realization on strip-mined coal and 1% on coal mined by underground mining methods, and added a fourth boundary area; the Parrotts also released Alston from the obligations under the previous royalty agreement. The 1954 agreements granted royalty rights to the Parrotts on any coal mined by Alston, its successors and assigns from lands within the First, Third, and Fourth Boundaries."

"Peabody Coal (Peabody) acquired Alston in 1956, assuming its obligations and liabilities. The Parrotts assigned their overriding royalty interests to their children, the Plaintiffs, Patricia and William Jr. in 1959."

From 1956 until 2005, the Parrott/Rough River/ Alston lease (hereinafter the "Parrott lease") was assigned to several Peabody entities. In 2005, the lease was assigned to Central States Coal Reserves of Kentucky, LLC (Central States). At all times from 1946 until 2005, the land subject to the Parrott lease was held in fee by Beaver Dam, and the reversionary interest in the Parrott leases was likewise in Beaver Dam.

The original royalty agreement between Parrott and Rough River also embraced certain tracts owned by Rough River as a tenant in common. These tenancies

in common were also conveyed to Alston by Rough River. Alston at that time was controlled by Parrott. The 1954 royalty agreements between the Parrotts and Alston also embraced these additional tracts.

In 2002, a Peabody subsidiary, Peabody Holding Company, LLC acquired Beaver Dam. By 2005, the Peabody defendants had also acquired Alston's tenancies in common. In 2007, Beaver Dam, as owner and lessor, and Central States, as lessee, cancelled the lease. Beaver Dam and the Peabody defendants then sold all of their land, property rights and equipment located in Ohio County, Kentucky during 2008, conveying these interests in fee to Western Diamond, one of the Armstrong defendants.

The voluminous pleadings in this case cloud the fact that the Court has been asked to decide a relatively simple question. As the Plaintiffs note in their "Memorandum in Opposition to the Armstrong Defendants Motion for Summary Judgment, and in Support of Plaintiff's Cross-Motion for Partial Summary Judgment," the central argument in this case hinges upon whether the 1954 royalty agreements between Alston Coal Co. and William and Pauline Parrott are a product of and dependent upon the Beaver Dam lease and the properties then held by Beaver Dam and Rough River as tenants in common. Memorandum, p. 4. Plaintiffs have asserted the position that pursuant to the express language of the royalty agreements, the plaintiffs have the right to be paid royalties on coal mined and sold after December 1, 1954 by Alston, it *successors* and *assigns* (emphasis

added), from "any of the lands" lying within the three Boundaries in Ohio County, Kentucky.

The Armstrong defendants assert that their acquisition of title in fee simple after the termination of all leases pertaining to the coal fields in question necessarily extinguishes plaintiffs royalty interests, as there are only three theories upon which the Plaintiff's may base their claim: (a) that the Armstrong defendants are in privity of contract with the Peabody defendants as the royalty agreements were specifically assigned to them; (b) that the royalty agreements are covenants running with the land as to the fee simple estate; or (c) that the Armstrong defendants are the successor of the Peabody Defendants as such term is applied to corporations. They argue that as a result of the legal principle that a party may not encumber or convey a greater interest in real estate than he owns, the grantors, as owners of only the subservient joint tenancy and leasehold estates, could not, as a matter of law, have created a royalty obligation that encumbers the dominant fee simple estate now owned by the Armstrong defendants.

The Peabody defendants' argument follows a similar line. The Peabody defendants assert that the property transfers between Peabody and Western Diamond were sales rather than assignments. They also support the Armstrong defendants' position that Alston Coal Co. is the only party obligated under the royalty agreements and that Alston (and Peabody as its successor) was relieved of the obligation when the

lease was cancelled in 2007 and the fee simple estates were conveyed to Western Diamond.

As a preliminary matter, the Court notes that the royalty agreements were executed in Kansas, created interests in mineral rights in Kentucky, and were performed or to be performed at least in part in Missouri (where the Peabody defendants are headquartered). The parties apparently are in agreement that either the law of Missouri or the law of Kentucky should control, but do not insist on one or the other. No one argues for the application of Kansas law. The Court has been unable to descry any "controlling authority" in either Missouri or Kentucky, and has been forced to rely on general law.

From the foregoing, it is clear that there is no issue of fact here. The chain of title, as it were, is a matter of record. There is no ambiguity in the royalty agreements. There is no allegation of fraudulent conduct on the part of any defendant.

The first question, in the Court's view, is whether the 1954 royalty agreements are "overriding royalties" or "nonparticipating royalties." Overriding royalties are not possessory interests, but are interests carved out of a lessee's mineral interests. They are distinguished from "nonparticipating royalties" in that the latter are carved out of mineral interests of the owner. See generally 28B *Words & Phrases* 27 & 30A *Words & Phrases* 481 (and cases cited therein) (2003). In this case, the royalty agreements pertain both to the interests under the Parrott lease (obviously

an overriding royalty) and interests under the Alston tenancies in common. The royalty interest in the latter seems to the Court to be in the nature of a nonparticipating royalty, as it is carved out of the owner's interest.

The plaintiffs correctly note that there is no provision in the 1954 royalty agreements that limits plaintiffs' royalty interest to coal mined by entities which obtain mining rights by assignment of the lessee's interest under the Parrott lease. However, the Armstrong defendants have succeeded in convincing the Court that the plaintiffs are focused on the wrong question. Rather than attempting to reach a conclusion as to *who* is obligated by the royalty agreements, the plaintiffs instead focus on *what* land is encumbered by the royalty. As a matter of law, the royalty obligation cannot encumber anything greater than the estate held by Alston Coal Co. at the time the agreement was entered into and may only obligate future assignees to the extent that the Alston interests continue to exist.

"The general conclusion which may be drawn from the few cases which thus far have dealt with the matter is that an overriding royalty interest, whether or not defined as an interest in real estate, is in its nature subject to the terms and incidents of the lease upon which it is founded, so that, ordinarily, when the lease terminates, either by reason of its own terms or in some other regular manner consistent with good faith, the royalty itself comes to an end." Annot., 135 A.L.R. 557 (1941). As far as the Court can determine,

this analysis represents an accurate précis of the state of the law today with regard to overriding royalties. Thus, insofar as plaintiffs seek to enforce the 1954 royalty agreements as to mining pursuant to the Parrott lease, they can succeed only if the Parrott leasehold still exists.

The parties agree that Rough River, and subsequently Alston, were the owners of a one-half undivided interest in certain properties and were leaseholders in others within the boundaries of the royalty agreements. The Armstrong defendants note that they did not address the properties held as tenancy in common in their own Motion for Summary Judgment as mining is not occurring at these properties, and therefore there is not "a case or controversy at issue that is ripe for this Court's adjudication." Armstrong Reply Memorandum at 8. The Court is unwilling to conclude, as the Armstrong defendants posit, that this matter is not ripe for adjudication. Plaintiffs seek relief as to the 1954 royalty agreements in their entirety. They have demonstrated the existence of a controversy regarding the performance or breach of those royalty agreements. Adjudication of their claims need not await future breaches by the Armstrong defendants. See, e.g., *Dodson v. City of Wentzville,* 133 S.W.3d 528 (Mo.App.E.D. 2004).

A tenancy in common is a form of ownership in which each co-tenant owns a separate fractional share of undivided property. *United States v. Craft,* 535 U.S. 279, 279-280 (2002). Each cotenant also possesses the right to unilaterally alienate his interest

through sale, gift, or encumbrance; to exclude third parties from the property; and to receive a portion of any income derived from the property. *Id.* at 280. In *J.M. Schober Farms, Inc. v. Merrill,* 115 A.2d 384 (Pa. 1955), the plaintiff was the assignee of a royalty agreement created by the defendant's predecessor in title. The Court found that a royalty created by a tenant in common could not be binding upon a subsequent fee simple owner of the same parcel. In other words, when tenancies in common are joined in a single owner, the prior undivided fractional interests are extinguished, merged as it were, in the subsequent fee. The Pennsylvania view appears to accord with the common law of property, applicable in Missouri by virtue of §1.010, RSMo 2000 & Supp. As Blackstone puts it, a tenancy in common is characterized by unity of possession, but not by unity of interest, title or time; but such a tenancy is dissolved by "uniting all the titles and interests in one tenant, by purchase or otherwise; which brings the whole to one severalty." 2 Bl.Comm. *194.

The plaintiffs analogize their case to several cases in which courts have found that perpetual nonparticipating royalty agreements were created by assignment. In *Boley v. Greenough,* 22 P.3d 854, 856 (Wyo. 2001), the fee owners of the surface and mineral rights of a family ranch executed and delivered to their children documents entitled "Assignment of Royalty." The royalty agreements contained language identifying them as "OVER-RIDING" agreements which were accepted "subject to the terms of the

lease, leases," etc. *Id.* However, the parties agreed that the granting parties owned fee interests, and not leasehold interests, in 64,000 acres of land at the time of the assignments. *Id.* at 857, 858. The Court found that the royalty agreement reflected "the grantor's obvious intent to assign a perpetual non-participating royalty interest in all the lands covered by the assignment," and that interpreting the conveyances as over-riding royalty interests would render meaningless "the clause which granted 'all right, title and interest' in a certain percentage" of the oil and gas produced from the land. *Id.* at 859.

Plaintiffs attempt to analogize the present case to *Boley,* but elide the fact the Court found that it would have been impossible for the fee owners of the property to grant an overriding royalty. Without any lease in effect at the time of the assignment, the language of the assignment makes clear that a perpetual nonparticipating royalty was granted. In the present case, Alston Coal Co., as lessee or tenant in common, lacked the capacity to grant anything but an overriding royalty. As a lessee and tenant in common, rather than a fee owner, Alston could only encumber the subservient estate which it held at the time.

The New Mexico Supreme Court found that a seller was the rightful owner of a royalty interest reserved in a deed of sale in *Duvall v. Stone,* 213 P.2d 212, 216 (N.M. 1949). The Court found that "where a royalty is not limited to the product removed from the land under a particular lease, it is a perpetual interest in oil and gas to be thereafter produced from the

land at any time." *Id.* at 216 [internal citations omitted]. However, in arguing that the 1954 royalty agreements are similarly constructed, the plaintiffs have again failed to consider the parties who constructed the agreements. Alston Coal Co., as grantor of the royalty, lacked the capacity to obligate subsequent fee simple landowners "of all the coal lands" as it was nothing more than a lessee or tenant in common at the time the royalty agreement was created. In *Duvall,* the Court did not find that the lessee had the capacity to grant a perpetual nonparticipating royalty, but rather found that the fee owner (lessor) was entitled to reserve a portion of his future royalties in a sale of the fee estate without regard to current leases.

The 1954 royalty agreements are not covenants running with the land as to the fee simple estate. Alston Coal Co. created the royalty agreements based on its holdings in a leasehold estate and a tenancy in common. Once those estates extinguished, so did the royalty agreement. See R. Hemingway, *Law of Oil and Gas* §9.11, p. 648 (1991).

In substance, the plaintiffs' royalty interest depends on the existence of the original Parrott mineral lease and the tenancies in common. The Parrott lease was assigned first to Rough River and then to Alston. As the royalty interest therefore depended on the continuance of the lease, rather than on the fee simple estate, the Court concludes that the royalty interest did not survive the 2007 lease

termination by Beaver Dam Coal Co. and Central States Coal Reserves of Kentucky, LLC.

The Court is persuaded that *La Laguna Ranch Co. v. Dodge,* 114 P.2d 354 (Cal. 1941), provides the most persuasive guidance here. In *La Laguna,* the Court found that as interests in real property created by leaseholders, overriding royalties were "determinable interests limited to the duration of the existing lease." *Id.* at 355. "Termination of the oil and gas lease would result in the termination of the interests created under it." *Id.*

In *Wier v. Glassell,* 44 So.2d 882, 885 (La. 1950), yet another court considered the question of whether an overriding royalty depends upon the existence of the lease to which it is attached and expires with the termination of that lease; or if the overriding royalty attaches to the land itself and continues to exist and attaches to any future leases taken by the assignee on the property. In *Wier,* the Court found that "royalty, by its very nature, when created by a lessee, is dependent for its existence upon the lease under which it is created" and could have "no greater life than the lease itself." *Id.* at 887.

This Court likewise concludes that the Peabody defendants' obligation to pay a royalty to the plaintiffs by reason of the Alston tenancies in common was also extinguished when the whole of the properties were sold in fee simple to the Armstrong defendants.

Given that plaintiffs' overriding royalty is a property interest, see 3A W. Summers, *The Law of Oil*

and Gas §577 (1958) (discussing Kentucky law), plaintiffs' reliance on the "successors and assigns" language in the royalty agreements is misplaced. In the context of corporate parties, the phrase "successors and assigns" takes the place of "heirs and assigns" in a conveyance, since corporations cannot have heirs, but only successors; in other words, these are words of limitation signifying the intention of the grantor of an interest. See 2 Bl.Comm. *108-*109; C. Tiedeman, *The American Law of Real Property* §30 (1924). The phrase does not denote a liability or covenant running with the land or interest conveyed. As the Sixth Circuit Court of Appeals has previously concluded, "'successor' with reference to corporations, ordinarily means 'another corporation which, through amalgamation, consolidation, or other legal succession, becomes invested with rights and assumes burdens of the first corporation.'" *Willitts v. Peabody Coal Co.,* 188 F. 3d 510 at *7. In other words, "successors and assigns" as used in the 1954 royalty agreements can only mean an entity taking the place of the predecessor corporation *qua* corporation. It does not signify a successor in a chain of title.

Albeit Central States, as assignee of the Alston interest in the original Parrott lease, is most certainly Alston's "successor and assign," it does not follow that the Armstrong defendants are the successors and assigns of the Peabody defendants.

The plaintiffs attempt to analogize the case at bar to cases in which courts found parties to be "successors" to obligations of predecessors in interest.

In *Van Deusen v. Ruth,* 125 S.W.2d 1, 3-4 (Mo. banc 1931), the Missouri Supreme Court found that a businessman was the successor to a defunct corporation engaged in the sale of lots in a subdivision, for purposes of construing a restrictive subdivision indenture. In that case, the question was the meaning of "successor" for purposes of enforcing the covenant restriction, and the answer turned on the facts and circumstances of the case. Here, the term "successor" appears in an overriding royalty agreement, and the term must be given meaning in that context. The Armstrong defendants, being wholly independent of the Peabody defendants, could not be their "successors" for purposes of the obligations created by the royalty agreements, when those obligations could not survive the termination of the lease on which they were dependent.

The Court finds no evidence that the Armstrong defendants (whether viewed as one entity, as favored by the plaintiffs, or as multiple entities) are in any way a successor to the Peabody defendants. The Court agrees that the Armstrong defendants did not "take the place" of the Peabody defendants with relation to their purchase of the land in question. The Court finds that the sale of a fee simple interest in land from one corporate entity to another does not create successor liability on the record here.

The plaintiffs argue that the Peabody defendants' sale of surface tracts and coal within the boundaries of the Royalty Agreement to the Armstrong defendants was not only a sale, but also an assignment.

Again, the phrase "successors and assigns" as used in the 1954 royalty agreements will not bear the construction sought by plaintiffs. It is doubtless true that a sale is a species of assignment. However, there was no assignment of the obligations of the royalty agreements as there was no assignment of the leasehold on which they depended nor was there any continuation of the tenancy in common from which they derived. The leasehold became extinct, the tenancy in common was dissolved, and the 1954 royalty agreements died with it. Beaver Dam was the owner in fee of the lands subject to the original Parrott mineral lease, but Beaver Dam could not be obligated by the royalty agreements to which it was not a party, nor could its reversionary interest in the mineral rights be affected by the transactions between Parrott and Alston. Similarly, Alston was a tenant in common of certain tracts and mineral interests, but an interest deriving from the tenancy in common since dissolved.

It is elementary that an assignee stands in the shoes of the assignor and acquires no greater rights than the assignor; a *fortiori,* an assignee's obligations cannot be greater than the assignor's. Cf. *East Attucks Community Housing, Inc. v. Old Republic Sur. Co.,* 114 S.W.3d 311 (Mo.App.W.D. 2003). Here, the original assignor of the mineral lease which was subject to the overriding royalty agreements was Parrott *pere* himself. Parrott had a lease, not the fee simple ownership of the mineral rights. His assignees could acquire no greater estate than he

held. Therefore, Alston and Central States could acquire only a leasehold in the mineral rights of the subject tracts. The reversion was always in Beaver Dam. When Beaver Dam and Central States terminated the lease (and plaintiffs do not allege fraud, breach of fiduciary duty, or any other impediment to the termination of the lease), the overriding royalty ceased. No mineral lease was assigned in the transaction whereby the Armstrong defendants acquired the lands and mineral interests at issue here, because there was no longer any lease to be assigned. As noted, that lease had been terminated prior to the conveyance of the fee to the Armstrong defendants.

It is true that the royalty agreements are referenced in the conveyances from the Peabody defendants to the Armstrong defendants. Defendants contend that this was merely a reference to a title exception and not an acknowledgment of an assumption of an obligation. The Court agrees that the mere conveyance "subject to" the royalty agreements does not establish the continuing enforceability of those agreements. The conveyance was "subject to" those agreements only to the extent that they could be enforced. As demonstrated above, they cannot be enforced.

ORDER AND JUDGMENT

In light of the foregoing, it is

ORDERED that plaintiffs' motions for partial summary judgment be and the same are hereby

denied, and defendants' motions for partial summary judgment be and the same are hereby granted; and it is

FURTHER ORDERED, ADJUDGED AND DECREED that defendants have judgment against plaintiffs on the issue of liability as claimed in the first amended petition, and that it is declared that defendants Peabody Coal Co., LLC, Peabody Energy Corp., Peabody Development Co., LLC, Peabody Holding Co., LLC, Central States Coal Reserves of Kentucky, LLC, Beaver Dam Co., LLC, Western Diamond, LLC, and Armstrong Coal Co. have no further obligation to pay royalties to plaintiffs on coal mined on or after January 31, 2007 pursuant to royalty agreements entered into on November 17, 1954 by and between The Alston Coal Company as first party and W. G. Parrott and Pauline Parrott as second parties as appearing of record herein; and it is

FURTHER ORDERED, ADJUDGED AND DECREED that, the determination of liability as set forth herein having disposed of the issue of the liability of the defendants herein, all remaining claims of plaintiffs for an accounting and recovery of royalties be and the same are hereby dismissed with prejudice; costs taxed against plaintiffs.

SO ORDERED:

/s/ Robert H. Dierker
Robert H. Dierker
Circuit Judge

Dated: 3/29, 2010
cc: Counsel/Parties pro se

[SEAL]

In the Missouri Court of Appeals
Eastern District

DIVISION THREE

PATRICIA WILLITS, et al.,	)	No. ED94777
Appellants,	)	Appeal from the Circuit Court of the City of St. Louis
vs.	)	
PEABODY COAL COMPANY, LLC, et al.,	)	Hon. Robert H. Dierker
Respondents.	)	FILED: December 28, 2010

Patricia Willits, William G. Parrott, Jr., and Donald Petrie, Trustee of the PPW Royalty Trust, collectively "Plaintiffs" appeal from the judgment of the trial court denying their motion for partial summary judgment and granting the motions for summary judgment of the Peabody Defendants and the Armstrong Defendants.[1] Finding no error, we affirm

In 1946, W.G. Parrott, father of William G. Parrott, Jr. and Patricia Willits, conveyed certain lands and mineral rights located within a 6,000-plus acre tract in Ohio County, Kentucky, to the Beaver Dam

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[1] The Peabody Defendants consist of: Peabody Coal Company, LLC, Peabody Energy Corporation, Peabody Development Company, LLC, Peabody Holding Company, LLC, Central States Coal Reserves of Kentucky, LLC, and Beaver Dam Coal Company, LLC. The Armstrong Defendants consist of: Armstrong Coal Company, Inc. and Western Diamond, LLC.

Coal Company ("Beaver Dam Coal"). Beaver Dam Coal promptly leased the coal mining rights on those lands back to W.G. Parrott, who then assigned the coal leases ("Beaver Dam Lease") to the Rough River Coal Company ("Rough River"), a company incorporated by W.G. Parrott. Rough River agreed to pay W.G. Parrott and his wife an overriding royalty of five percent of the average gross realization from coal mined and sold by Rough River, its successors and assigns, from any land in the First and Third Boundary, as described in the contract. In 1947, Rough River assigned the coal leases to the Alston Coal Company ("Alston Coal"), another corporation controlled by W.G. Parrott. W.G. Parrott and his wife entered into new royalty agreements with Alston Coal in 1954 ("1954 Royalty Agreements") that changed the royalty obligation to two percent of gross realization on coal produced by strip-mining, and one percent on coal mined by underground mining methods, and added a fourth boundary area. The Parrotts also released Alston Coal from its obligations under the previous royalty agreement. The 1954 Royalty Agreements granted royalty rights to the Parrotts on any coal mined by Alston Coal, its successors and assigns from lands within the First, Third, and Fourth Boundaries. At the time of the execution of the 1954 Royalty Agreements, Alston Coal did not have a fee simple interest in any of the land within the boundaries set forth in the 1954 Royalty Agreements.

Peabody Coal ("Peabody") acquired Alston Coal in 1956, and assumed its obligations and liabilities. The Parrotts assigned their overriding royalty interests to their children in 1959. From 1956 to 2005, the Beaver Dam Lease was assigned to several Peabody entities. In 2005, the Beaver Dam Lease was assigned to Central States Coal Reserves of Kentucky, LLC ("Central States"). At all times during the period from 1946 until 2005, the lands subject to the Beaver Dam Lease were held in fee simple by Beaver Dam Coal, the lessor. However, in 2002, Peabody Holding Company, LLC, a Peabody subsidiary, acquired Beaver Dam Coal. On January 18, 2007, Beaver Dam Coal, the lessor, and Central States Coal Reserves of Kentucky, the lessee of the Beaver Dam Lease, terminated those leases by agreement.

There were also properties held as tenants in common. W.G. Parrott and Pauline Parrott conveyed one-half interests in two tracts of land, the Bernheim property and the Green River property, to both Rough River and to the Beaver Dam Coal Company as tenants in common as to both properties. Rough River conveyed its one-half tenancy in common interests in the Bernheim and Green River properties to Alston Coal in 1947. Alston Coal owned these one-half tenancy in common interests at the time that it executed the 1954 Royalty Agreements, which encompassed those properties. By 2005, the Peabody Defendants had also acquired Alston Coal's tenancies in common. On September 13, 2007, Beaver Dam Coal and Central States Coal Reserves, which had acquired the

Alston tenancies in common, sold them to Cyprus Creek Land Resources ("Cyprus Creek") one of the many Peabody companies, thereby joining the co-tenancies. On March 31, 2008, Cyprus Creek, sold the fee simple to Western Diamond, one of the Armstrong Defendants. Since April 2008, neither the Peabody Defendants nor the Armstrong Defendants have paid royalties to the Plaintiffs on coal mined and sold by the Armstrong Defendants.

On May 28, 2008, the Plaintiffs filed a petition against the Peabody Defendants and the Armstrong Defendants that asserted breach of contract claims based on the 1954 Royalty Agreements for failure to pay royalties, and also seeking a declaratory judgment regarding future royalty payments. The Peabody Defendants and the Armstrong Defendants separately filed motions for summary judgment, and Plaintiffs filed a motion for partial summary judgment. After a hearing on these motions, the trial court granted summary judgment in favor of the Peabody Defendants and the Armstrong Defendants, and denied Plaintiffs' motion for partial summary judgment. Plaintiffs now appeal from this judgment.

Appellate court review of a summary judgment is essentially *de novo*. *Moore Automotive Group, Inc., v. Goffstein,* 301 S.W.3d 49, 52 (Mo. banc 2009). Summary judgment is proper only where the movant has demonstrated that "'there is no genuine dispute as to the facts'" and that "'the facts as admitted show a legal right to judgment for the movant.'" *Id.* quoting *ITT Commercial Financial Corporation v. Mid-America*

Marine Supply Corporation, 854 S.W.2d 371, 380 (Mo. banc 1993)). It is the movant's burden to establish both a legal right to judgment and the absence of any genuine issue of material fact necessary to support the claimed right to judgment. *Id*.

The parties do not dispute the facts, but rather the legal effect of the facts.[2] We will consider Plaintiffs' first and second points relied on together. In their first point relied on, Plaintiffs contend that the trial court erred in granting summary judgment in favor of Defendants because their royalty rights are not limited to coal mined under the Beaver Dam Lease, in that the 1954 Royalty Agreements, provide that their royalty rights extend to all coal mined from any of the lands in the boundaries by Alston Coal, its successors, and assigns. In their second point relied on, Plaintiffs assert that the trial court erred in granting summary judgment in favor of Peabody Defendants and the Armstrong Defendants because their royalty rights "are not limited to the land or coal

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[2] The trial court found that the royalty agreements were executed in Kansas, created interests in mineral rights in Kentucky, and were performed or to be performed at least in part in Missouri, where the Peabody defendants are headquartered. All of the parties apparently agreed that "either the law of Missouri or the law of Kentucky should control, but do not insist on one or the other." The trial court was "unable to descry any 'controlling authority' in either Missouri or Kentucky," and relied on "general law." Plaintiffs and Armstrong Defendants appear to agree that the relevant substantive law of contractual interpretation of Missouri and Kentucky is essentially the same. The Peabody Defendants do not argue this issue.

mining rights in the boundaries which Alston Coal Company owned or leased on November 17, 1954, in that:" the 1954 Royalty Agreements state expressly that their royalty rights extend "to all coal mined from any of the lands in the boundaries by Alston Coal Company, its successors and assigns" and there is no law of property that prevents the Plaintiffs from enforcing the 1954 Royalty Agreements in accordance with the express terms of those agreements.[3]

As the trial court observed, quoting from a memorandum filed by Plaintiffs, " 'the central argument in this case hinges upon whether the 1954 royalty agreements between Alston Coal Co. and William and Pauline Parrott are a product of and dependent upon the Beaver Darn lease and the properties then held by Beaver Dam and Rough River as tenants in common.' " As to the nature of the royalty interests, we agree with the trial court's determination that the royalty interest based on the Beaver Dam Leases is an overriding royalty interest. An overriding royalty interest is created out of the working interest in a

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[3] In the argument section of their brief, Plaintiffs argue that the Peabody Defendants and the Armstrong Defendants failed to raise what the Plaintiffs term "their erroneous 'tenancy in common' defense" in their motions for summary judgment, but rather raised this issue in their reply briefs in support of their motions, and that the trial court erroneously considered this issue. Plaintiffs did not raise this issue in their points relied on, and we need not consider this issue as it is not preserved for appellate review. Rule 84.04(e); *Husch & Eppenberger, LLC v. Eisenberg,* 213 S.W.3d 124, 131 (Mo. App. 2006).

mineral lease. *See Olson v. Continental Resources, Inc.,* 109 P.3d 351, 354 (Okla. Civ. App. 2004). "It is an interest in the lease out of which it is carved, and cannot be a property interest of greater dignity than the lease itself." *Id*. Accordingly, the overriding royalty interest cannot survive termination of the lease, absent fraud, breach of a fiduciary relationship, or an agreement otherwise. *Id*. *See also Ritter v. Bill Barrett Corporation,* 210 P.2d 688, 690-91 (Mont. 2008) ("if a party wishes an overriding royalty to survive the expiration of the lease or sublease, he must include an express provision stating such."). The royalty interest based on the Beaver Dam Leases cannot survive the termination of those leases. There is no allegation of fraud or breach of a fiduciary relationship, and there is no express provision otherwise, despite the arguments of Plaintiffs for a broad reading of the 1954 Royalty Agreements.

Regarding the Bernheim and Green River properties, there is no dispute about the facts of the creation of the tenancies in common, the property transfers, or the creation of the royalty interest in the tenancies in common in those properties by Alston Coal in the 1954 Royalty Agreements. In a tenancy in common, each co-tenant owns a separate, fractional share of undivided property. *United States v. Craft,* 535 U.S. 274, 279-80, 122 S.Ct. 1414, 1421, 152 L.Ed.2d 437 (2002); *State v. Hoskins,* 208 S.W.2d 221, 222 (Mo. 1948). Each co-tenant has the right to unilaterally alienate his interest through gift, sale, or encumbrance; to exclude third parties from the

property; and to receive an appropriate portion of any income derived from the property. *Craft,* 535 U.S. at 279-80, 122 S.Ct. at 1421. There is no dispute that all of the tenancies in common for the Bernheim and Green River properties were sold to Cyprus Creek, thereby uniting the interests in one owner. Uniting the interests in one owner terminated the tenancy in common, creating a fee simple interest in severalty. *See Davis v. Broughton,* 369 S.W.2d 857, 859 (Mo. App. 1963); *Sigman v. Rubeling,* 271 S.W.2d 252, 255 (Mo. App. 1954). *See also Shelton v. Vance,* 234 P.2d 1012, 1014 (Cal. App. 1951); *Sullivan v. McLenans,* 2 Iowa 437 (Iowa 1856); *Smith v. Smith,* 107 S.E.2d 530, 535-37 (N.C. 1959); 86 C.J.S. *Tenancy in Common* section 15 (2009) and 2 Bl.Comm. 194.

The issue is what becomes of a royalty interest granted by a tenant in common, Alston Coal, to a third party and its assigns, the Plaintiffs, when the tenancies in common are extinguished by severalty ownership of the fee simple, where there is no claim of fraud, bad faith, or lack of fair dealing that might rouse concerns in equity. It is a basic principle that tenants in common are not principal and agent to each other, and they are not partners, and accordingly, neither tenant in common can bind the estate or person of the other by any act relating to the common property when dealing with third parties. *Timothy v. Hicks,* 164 S.W.2d 99, 105 (Mo. App. 1942) (quoting 62 C.J., Section 209, page 533). Consequently, when Alston Coal granted a royalty interest from its tenancies in common for the Bernheim and Green River

properties, it did not bind its tenant in common, Beaver Dam Coal or its interest in its tenancies in common. What then, becomes of the royalty interest granted by Alston Coal, binding on its ownership interest, but not that of its tenant in common, when the tenancy in common is terminated? This precise question does not appear to have been addressed by Missouri or Kentucky courts. The closest case on point is *J.M. Shober Farms, Inc. v. Merrill,* 115 A.2d 384 (Pa. Super. Ct. 1955), which essentially held that a royalty interest created by a tenant in common could not bind the subsequent fee simple owner of the entire interest in the parcel. The trial court explained it by stating "when tenancies in common are joined in a single owner, the prior undivided fractional interests are extinguished, merged as it were, in the subsequent fee." The trial court further noted that the Pennsylvania appellate view was in accord with the common law of property, and that the common law of property applies in Missouri pursuant to section 1.010 RSMo 2000. We agree.

Plaintiffs cite a number of cases for the proposition that the 1954 Royalty Agreements granted them perpetual non-participating royalties that should have survived the extinguishment of the Beaver Dam Leases and the tenancies in common of the Bernheim and Green River properties. Those cases are distinguishable. As the trial court stated, "[t]he leasehold became extinct, the tenancy in common was dissolved, and the 1954 royalty agreements died with it," Alston Coal could not grant greater rights in mineral

interests than it held as less than a fee owner. Points denied.

We need not address Plaintiffs' third and fourth points relied on, which raise issues as to whether the Armstrong Defendants are the assigns or successors to the Peabody Defendants and the obligations arising from the 1954 Royalty Agreements. We held above that the royalty interests of Plaintiffs terminated with the termination of the Beaver Dam Leases and the termination of the tenancy in common, when the interests were held by the Peabody Defendants. If the Peabody Defendants have no liability, the Armstrong Defendants, even if successors and/or assigns of the Peabody Defendants could not be liable.

The judgment of the trial court is affirmed.

/s/ Clifford H. Ahrens
CLIFFORD H. AHRENS,
Judge

Sherri B. Sullivan, P.J., concurs.
Lawrence E. Mooney, J., concurs,