Peevyhouse v. Garland Coal & Mining Co.  
© Judith L. Maute


The Ballad of Willie and Lucille

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

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

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

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

Well, they dug up the coal from a big strip mine hole In what used to be our front lawn. Every day they would dig, and the hole got so big, Till one day the coal was all gone. I said, "Mr. Garland, man what is your plan To put all our dirt back in place?" He said, "You know it's funny - we just ran out of money And on your farm it would just be a waste." We picked a fine time to strip mine, Lucille. Make no mistake, hon, we got a raw deal, I never went to law school, I don't know the value rule, I thought sure we'd win our appeal, The Supreme Court done gyped us, Lucille.¹

A. Facts and Fiction of Contract Formation

1. Local Dominance of Coal and Stripmining Operations

After oil and gas, coal is Oklahoma's most important natural resource. Coal-bearing

¹ Parody lyrics © 1985 Todd Lowry and William Blodgett; sung to the tune “Lucille,” ©Roger Bowling & Hal Bynum. [Doug – do you think we need SONY’s copyright authorization for print version? I’ll also check with IP colleague here.]  The author gratefully acknowledges the work of prior generations of research assistants in preparation of this chapter, including Brian C. Childs (J.D. 2004? Suffolk); Jennifer Pruchnicki (J.D. 2004? University of Oklahoma) and Stacie Nicholson (J.D. 2005 University of Oklahoma).
formations cover about one-quarter of the state's total area, and coal seams underlie approximately 11% of the state. Historically, the McAlester coal district, which includes Haskell County, was the state's major coal producing area. The coal from Haskell County's rich lower Hartshorne vein, containing unusually hard bituminous coal, accounted for about 17% of all production, with the vast majority coming from the Stigler area.

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

Stripmining entails digging a long, open trench through the overburden to expose a part of the seam for removal. After the exposed coal is removed, the operator makes a second, parallel cut with the overburden placed as spoil material into the first cut. The operator continues with successive cuts until the remaining coal lies too deep below the overburden to be mined economically. The last cut leaves a pit, or open trench bounded on one side by the last spoil bank and on the other side by the highwall. By definition, the pit is the site of the last cut. If the bottom of the last cut is beneath the water table, the pit eventually fills with water and then is euphemistically called the "pond."
2. The Players

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

Lucille worked for a local canning company until she left to maintain the family farm. Besides the farm, Willie worked at an ammunition depot and later did construction work. When they signed the lease in 1954, they were twenty-seven years old and had a four-year-old son.

Garland Coal Company, based in Fort Smith, Arkansas, had mined extensively throughout southeastern Oklahoma and Arkansas since 1928. Garland maintained a local office in Stigler, the Haskell County seat. During the period covered by the lease, several different companies mined the area under a loose joint venture arrangement. They acquired mineral leases throughout the area and began stripping the rich Hartshorne vein. Garland Coal was, by far, the largest producer. Because of Garland Coal's prominent role in the local economy, the Stigler community was familiar with its key personnel and area mining activities. Burrow ("Burl") Cumpton, a civil engineer who had worked in Garland's Stigler office since 1952, negotiated the Peevyhouse lease for the company.

3. The Negotiations

The Peevyhouse land, while quite small in relation to the total acreage and quantity of coal Garland expected to mine, was key to a profitable mining operation. The targeted vein cut through the Peevyhouses' back twenty-acre parcel and a small portion of their forty-acre parcel. By leasing the Peevyhouses' sixty acres, Garland could move its mining operation efficiently from northwest to southeast.

Garland was strongly motivated to obtain the Peevyhouse lease in order to divert Cedar Creek from the mining site onto their land. Cedar Creek naturally ran north of the property, passing through the heavily mined land owned by the adjacent neighbors and eventually flowing onto the northeast corner of the Peevyhouses' forty-acre parcel. Diverting the creek was essential to avoid interference with mining operations. Even before the lease was executed in November 1954, Garland began pumping water from the creek onto their land.

The Peevyhouses were opposed to permitting any mining on their land. An earlier mining operation stopped at their property line, leaving behind the disturbed land, including a dangerous pit, highwall and unsightly overburden. Their reluctance, combined with Garland's need to divert the creek, undoubtedly enhanced their bargaining power. Nevertheless, there is no indication they used this power to exact unreasonably favorable contract terms. The Peevyhouses waived the right to payment of $3000 for surface damages in exchange for the promised remedial work. From Garland's perspective, the exchange appeared economically rational, avoiding immediate cash outlay of $3000; enabling prompt creek diversion; and obtaining rights to mine the Peevyhouse land. As an alternative, Garland might have bought the land in question. It bought a small parcel

---

2 This legally critical fact was not brought out during the litigation; apparently the Peevyhouse lawyer did not understand this aspect of the transaction or its significance to contracts doctrine.
from Thomas Laird, who owned land just south of the Peevyhouses and who refused to enter a lease agreement. Failing either of those options, Garland's mining operation could have skipped over their property and moved to the next leased property along the coal bed.

Lease negotiations between Cumpton and the Peevyhouses extended over several sessions. The two men dealt directly with each other while Lucille participated behind the scenes, assisting Willie in identifying issues and desired terms. It appears the Peevyhouses were an astute and careful negotiating team. While they lacked advanced education and sophisticated business experience, the final agreement reflects sound judgment and survival skills acquired from living off the land.

4. The Contract

The contract was signed November 23, 1954 in the Stigler law office of J.F. Hudson, Garland's local counsel. The Peevyhouses had no counsel. They signed the preprinted form lease containing some handwritten modifications and one typed page containing the specially-negotiated provisions insisted upon by the Peevyhouses.

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

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

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

(a) Standard Provisions

Paragraph six of the standard form contract granted Garland broad authority to alter the Peevyhouses' property without liability for damages. It provided:
It is understood that . . . the Lessors agree to furnish Lessee, in consideration of said royalty, all surface as may be necessary to be used by Lessee in the operation of strip pits, and may be used by Lessee for drainage ditches, haulage roads, spoil banks, tipples, tracks, and any other structures that Lessee finds necessary in the operation of said strip pit or pits or coal mine and the lessee agrees that all such structures shall be located consistent with good operating practice so as to cause the least damage or inconvenience to the owner or user of such surface; . . . .Lessors agree that they will save harmless and indemnify the Lessee from any claim or liability arising from any damage to the surface of these lands caused by such operations; it is further recognized the Lessee shall have the right without liability to the Lessor, wherever it may be necessary in conducting such operations, to change the course of any streams or water courses and to erect and maintain such drainage ditches as it shall deem advisable having due regard for the successful operation of said strip pit and damage to the remainder of the property.

(b) Specially Negotiated Terms

In contrast to the boilerplate indemnification clause, Paragraph seven obviously resulted from individualized negotiations. Three of the eight subparagraphs acknowledged lessors’ receipt of $2000 as an advance royalty payment; prohibited any transfer or assignment of the lease without lessors’ written permission; and provided that Garland would survey the property surveyed and fix boundary lines before starting to mine. The following five clauses specified Garland’s remedial obligations.

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

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

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

-7e-
Lessee agrees to build and maintain a cattle guard in the south fence of SW [fr1/4] SW [fr1/4] of Section 7 if an access road is made through said fence.

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

B. Performance

Garland began working near the Peevyhouse land in October 1954, a month before the lease was signed. The day after the lease was signed, Garland began blasting to dam Cedar Creek and build the channel that diverted the creek's flow onto the Peevyhouse land south of the current mining activity.

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

Actual mining on the Peevyhouse land was short-lived, lasting perhaps only three months. Garland began coal removal in February 1957. Exceptionally heavy spring rains broke a six-year drought, causing widespread flooding in April and May. Garland pulled the dragline from the worksite and resumed mining at a higher and drier site. When Garland prepared to stop mining, Burl Cumpton told Willie that the coal depth fell from forty-five to seventy feet below the surface shortly after the mining operation moved onto their land. Cumpton claimed that despite a ready market for coal, the price was not high enough to justify the increased costs of extracting the coal from the lower depth.

Contrary to Garland's assertion, there was little, if any, difference in the coal depth on the Peevyhouse land as compared to adjacent areas that Garland fully mined. The operations map indicates mining on coal depths ranging from thirty to sixty feet from the surface, whereas the coal bed on the Peevyhouse land was about twenty-five to forty-eight feet deep. If Garland stopped working this segment because the coal depth increased extraction costs, this decision was based on generally applicable conditions and nothing unique about the Peevyhouse property. Moreover, the operations map suggests that Garland did not plan to go much deeper than forty-five feet on the Peevyhouse and immediately adjacent land. Perhaps Garland decided it could not profitably continue mining a coal bed it considered thin. In any event, Garland had not planned to make more than one or two additional cuts on their land. Garland offered no contemporaneous excuse for not performing the remedial work promised in Paragraph seven.

C. Breach and Settlement Negotiations

Garland had no contractual duty to remove a specific quantity of coal from the Peevyhouse land. It could quit at any time, for any reason. Nonperformance of the remedial work was the only
breach of contract. As Garland prepared to leave the site, Burl Cumpton and Willie discussed the remedial work. They tentatively agreed that Garland would simply smooth off the spoil banks, stabilize the highwall, redirect the creek into the pit and level the diversionary channel. A bulldozer spent one day smoothing off the sharp peaks on the spoil banks and building a dirt levee across the pit. More heavy rains interrupted these makeshift efforts. When saturated ground caused unstable conditions, Garland ceased all remedial efforts. Willie offered to accept $500 so he could hire a bulldozer and level the ground himself. Garland refused. Willie says he then told Cumpton that the price of settlement would increase by $500 each time he returned to Garland's Stigler office about the matter. Six fruitless visits later brought the settlement demand to $3000. Finally, Garland presented a check for $3000, conditioned on the Peevyhouses signing a release.

The Peevyhouses knew of attorney Woodrow McConnell because he was from Stigler and had represented a neighbor in a pending tort claim against Garland. McConnell had five years of legal experience in his small private practice when he filed the *Peevyhouse* suit. As a sole practitioner, he had to do the best he could with limited resources. He lacked both the time and resources available in a larger firm practice to spend on extensive research and fact-gathering, and most of his practice was at the trial court level. Throughout his thirty-five year legal career, he practiced torts and personal injury law, usually as a sole practitioner. His torts orientation was reflected in his view of *Peevyhouse*, that a party should not be able to walk away from a contract and escape punishment. The Peevyhouses went to Oklahoma City to discuss the proposed settlement with McConnell, who advised them against signing the release unless a certain paragraph was deleted. They recall his explanation: "If you sign [this], you take full responsibility to your neighbors for damage [being done to their land from the creek], and your neighbors will look to you." Settlement discussions ended when Garland refused to delete the objectionable paragraph.

D. Litigation
   1. Pretrial

On February 29, 1960, McConnell filed an action for money damages in Oklahoma County District Court, Oklahoma City. Although the breach occurred in spring of 1957, the five-year lease did not expire until November 23, 1959. The two-count complaint sounded in contract and tort. It identified only the specific parcels Garland had leased, mistakenly alleging that the Peevyhouse home was located on the leased premises. The contract claim demanded $25,000 as the cost to complete the remedial work promised in the breached provisions. The tort claim demanded recovery of $1750 for the damage to their home and water well caused by dynamite blasting performed in an unworkmanlike manner. This claim was later dropped because the tort limitations period had run.

It appears that specific performance was not seriously considered as a remedial option. The Peevyhouses do not recall. They say they wanted the work done, and that they did not need or want money instead of the promised remedial work. Eventually they gave up waiting for Garland to do the work. McConnell said they could have used money damages to have the work done. Quite possibly McConnell gave little thought to specific relief. Assuming he considered seeking equitable relief, he could have reasonably believed that it was unlikely, given equity's historical reluctance to supervise performance of construction. His professional orientation also may have influenced the decision. As one who primarily practiced tort law, he was accustomed to seeking
money damages. Moreover, because the case had been taken on a contingency basis, he had an interest in creating a fund from which he could recover a fee.

McConnell filed suit three years after Garland quit the site. Garland retained the Looney, Watts, Looney & Nichols law firm (hereafter, “Looney, Watts”), which had often represented it in its Oklahoma City litigation, including each of the prior suits brought by McConnell. It was a highly regarded defense firm, both for its work quality and its political connections. The firm defended damage suits of all kinds in state and federal court, including workers’ compensation and surety law. Clyde Watts, lead defense counsel, was, by all accounts, an outstanding litigator. When Peevyhouse was tried, Watts had nearly twenty years of litigation experience in federal and state courts and was named counsel in several reported appellate opinions relating to contract law, including cases in which he successfully invoked the parol evidence rule. Garland undoubtedly benefitted from his litigation expertise and specialized contract knowledge. Regardless of Plaintiffs’ reason for not seeking specific performance, defense counsel perceived that election as evidence of opportunistic, strategic behavior.

Garland answered by general denial, asserting the mining operations complied both with proper custom and practice and with the lease requirements. It further asserted that estoppel barred the plaintiffs’ suit because they did not object to the manner of operations in a timely fashion. Apparently no pretrial discovery took place, even though Oklahoma procedure allowed for depositions, interrogatories and production of documents. At the time, little emphasis was given to discovery. Depositions were probably not economically feasible for the plaintiffs. The pretrial conference order identified the case as a simple breach of contract action, involving neither negligence nor novel questions of law or statute. From all outward appearances, this case had no important policy or theoretical significance. Little did they know.

2. Trial

The Honorable W.R. Wallace, Jr. presided at the two-day jury trial. Plaintiffs' case focused almost exclusively on proving cost as the only possible damage measure and presented no alternative evidence to challenge defendant’s low figures on diminution in value. McConnell made a deliberate (albeit misguided) strategy choice to present only evidence on the cost measure of damages. He deemed irrelevant, and maybe prejudicial, the amount of royalties paid to the Peevyhouses. The record reflects neither that they received $2500 in royalties nor that they gave up the $3000 customarily paid to cover surface damages in exchange for Garland's promise of remedial work. These were material facts that should have changed the supreme court's legal analysis. It appears McConnell never accurately understood critical facts and relevant legal doctrines, both of which repeatedly doomed his zealous representation.

The parties stipulated that the defendant had not performed the remedial work. This stipulation, combined with strict application of the parol evidence rule, effectively excluded any testimony on contract formation, the context giving rise to the remedial provisions, and the parties’ understanding on the scope of work. The only issues to be decided related to the measure and proof of damages.

Willie testified about the current condition of the leased property and how it limited his use of the land. An engineer estimated that the remedial work would cost approximately about

---

3 The stipulation provided “that all covenants and agreements in the lease contract had been fully carried out by both parties, except the remedial work mentioned above; defendant conceded that this work had not been done.”
Garland’s defense focused on three points: (1) plaintiffs’ cost estimates were excessive and beyond the required scope of work; (2) the estimates were based on an erroneous survey because fills built on the true boundary lines would join together in the water, and thus serve no useful purpose; and (3) plaintiffs’ damages were limited to the diminution in value caused by the breach because the cost to perform the remedial work far exceeded actual harm. Although Cumpton’s testimony alluded to a possible impracticability defense, it was neither pled, supported by evidence nor argued on the main appeal to the Oklahoma Supreme Court. 4 Another defense witness testified that all reasonably necessary work complying with lease provisions could be done for $400, far less than the amount claimed by plaintiffs.

Garland presented four witnesses on diminution in value: a real estate appraiser, a banker and two neighbors of the Peevyhouses. While they differed on specific land values before and after mining, the witnesses generally agreed that the remedial work would add little value to plaintiffs' land.

Because the parties stipulated that the defendant had not performed the remedial work, Judge Wallace directed the jury to find for plaintiffs, but gave the jury wide discretion to fix damages. In determining what sum would reasonably compensate plaintiffs, the jury could consider the costs of doing each item of remedial work, "together with all of the evidence" offered by either party. After brief deliberations, the jury returned a verdict for $5000.

Considering Garland's potential liability, defense counsel viewed the low sum as a victory. As such, Garland's subsequent litigation moves were precautionary, guarding against the downside risk that the plaintiffs might prevail on appeal. Both sides filed motions for new trial, which, after argument and briefs, were overruled in December 1960. Garland claimed an emotional outburst by Lucille Peevyhouse denied it a fair trial by evoking jury sympathy to award excessive damages. Plaintiffs claimed the verdict was less than the proven damages, and that the court erroneously admitted evidence and instructed the jury on the diminution measure.

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

Mr. Watts: Mr. Cumpton, did you strip all the coal from under that pit that you were able to get? Mr. Cumpton: No, we didn't. Mr. Watts: Why? Mr. Cumpton: Well, the machine, for one thing, was a little small for any deeper than we did go. And we ran into some thin coal on that southwest. Mr. Watts: Down this area here? Mr. Cumpton: There's a fault in there. Mr. Watts: Did you go toward the southwest as far as, in this direction, as you officially could? Mr. Cumpton: No. If this coal hadn't turned out thin on that 40 acres in the southwest-southwest, we would probably have made another pit or two in there.

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

Mr. McConnell: Isn't it true Mr. Peevyhouse insisted upon those provisions being included in that lease? Mr. Cumpton: That's true.

Mr. McConnell: Before he agreed to sign it? Mr. Cumpton: That's right. Mr. Watts: May I have the same objection? The Court: The objection will be sustained in that connection. The contract speaks for itself. Mr. McConnell: Mr. Cumpton, when you negotiated and obtained that lease from the Peevyhouses, did you intend to comply with the terms of that contract, those specific terms of the lease that are included in there? Mr. Cumpton: Yes, we did. Mr. McConnell: Your company hasn't complied with those terms of that lease? Mr. Cumpton: No, that's right. Mr. McConnell: Could you, with the equipment you have, could you have complied with those terms of that lease? Mr. Cumpton: Yes, we could, but I want to qualify that statement.

Watts pursued the matter on redirect. Mr. Watts: ... I will ask you if you had been able to mine further coal toward the southeast, would you have been able to establish that fence on the spoil bank? Mr. Cumpton: Yes, we could have. Mr. Watts: Having stopped when you ran out of coal down in here, can you now establish that fence line without putting in a very useless and expensive fill? Mr. Cumpton: No.

March 17, 2006

9
3. Appeal: Tilting at Windmills

Kenny Rogers’ song, “The Gambler,” offers litigants such as the Peevyhouses wise counsel: “You got to know when to hold them, [and] know when to fold them.” Although both parties filed appeals, dissatisfaction on the plaintiffs' side is what propelled the case forward to the Oklahoma Supreme Court. Thereafter, the wheels of appellate justice turned slowly: initial briefing dragged on for sixteen months; the Oklahoma Supreme Court finally disposed of the case a year later. Such delays were then quite common, with lawyers routinely obtaining several extensions for the briefs. In many ways, the briefs are a study in contrasts: in technical writing style, polish, and rhetoric.

Plaintiffs’ brief was ineffective at best, and at worst – harmful to their case. It was verbose and enhanced testimony adverse to their substantive arguments. It addressed statutory limits too little and too late. By placing the diminution argument first, their brief got off to a weak start from which it did not recover. The Peevyhouses' only basis for successful appeal depended upon persuading the court to adopt the cost measure of damages. They needed to convince the court that the statute prohibiting "unconscionable and grossly oppressive damages" did not preclude the cost measure. Ultimately, the court interpreted this as a mandatory, policy-based limit on recovery.

Substantively, the plaintiffs' brief cited relevant, helpful precedent, but did not effectively use the cases to develop reasoned arguments. It made little of the policy issues that modern contracts scholars consider important, such as a landowner’s personal and idiosyncratic values, and the undervaluing of such concerns by use of market values. For example, the last third of the brief relied heavily on Groves v. John Wunder Co., to support the cost measure of damages, characterized as "the majority rule . . . unquestionably supported and followed in Oklahoma." The brief's strongest argument, also near the end, urged that Garland's willful and bad faith breach "should not . . . be handsomely rewarded." If damages were limited to diminution in value, Garland "could enter into similar contracts, reap the benefits to be realized from the mining operations by removing the mineral deposits, dispose of them and pocket the money, and then limit liability by selecting their own method of compensation to the injured party." The consequence of assessing such nominal damages "would open the door for the legal practice of fraud . . .”

As Oklahoma precedent for the cost measure of damages, the brief quoted extensively from Ardizonne v. Archer, involving a breached agreement to drill a test well. Although lacking proof that the well could produce oil, protection of the promisee's subjective expectation interest dictated use of the cost measure. Dictum in Ardizonne foreshadowed the significance the Peevyhouse court would give to the main purpose of a contract, stating that contractual purpose is

---

5 See KENNY ROGERS, The Gambler, on KENNY ROGERS, GREATEST COUNTRY HITS (EMI Records 1990). Unless they predicted a high probability of recovering cost-based damages, plaintiffs should have folded, accepting the $5000 compromise verdict.

6 286 N.W. 235 (Minn. 1939).

7 178 P. 263 (Okla. 1919).

8 Id. at 266. “It does not lie with the plaintiffs in error, who engaged and were compensated for drilling the well, to say that their performance would not be beneficial to the lessee. It has been held that the loss may be sustained in a legal sense for the breach of a contract, notwithstanding it can be shown that the performance would have been a positive injury, as in the case of a failure to erect a useless structure upon another’s premises.”
a fact question determined by the jury in deciding whether the contract was substantially performed or breached. This *dictum* represented a missed opportunity for the Peevyhouses to present evidence at trial establishing the economic realities of their lease with Garland Coal. Had accurate facts been presented and argued, the Supreme Court could not have found the parties' main purpose was mutually profitable extraction of coal. The Peevyhouses expressly gave up a $3000 advance payment for surface damages as consideration for Garland's promised remedial work. They received only $2500 in royalties for the coal removed from their land. By contrast, Garland obtained increased mining efficiency, the right to divert a bothersome creek onto the Peevyhouse land and up to $34,000 in profits from the sale of coal removed from their land. Plaintiffs' first suggestion of this economic analysis came much later, in the reply brief.

Given the perception that the remedial work would have only increased the land value by $300, Looney, Watts junior associate attorney Tom Capshaw viewed the proposed expenditure of $30,000 as "appalling social waste." Capshaw was unaware that the standard contract omitted any reclamation work and thought it strange the contract placed no dollar limits on the remedial work.

Garland’s brief provided the analytical framework for the appellate court, focusing on how to formulate a balanced measure of damages. It acknowledged that cost of performance was the usual measure of damages for breached promises to restore land after mining, but argued that such recovery was limited to the amount by which the remedial work would increase the land's value. In that respect, *Peevyhouse* presented a case of first impression because the cost of performance far exceeded the increased value to the property. Because an Oklahoma statute limited recovery to the amount plaintiffs could have gained from full performance, and never more than reasonable damages, defendant requested that the Oklahoma Supreme Court reverse and remand the judgment below with directions to grant remittitur for $4700.

Garland conceded it did not complete the promised remedial work and offered no legal justification that would excuse the breach. The sole question on appeal concerned damages. Its legal argument mislabeled a valuation figure, which ultimately misled and confused the court. Because the plaintiffs refused to present their own valuation testimony, the error was perpetuated in the court's opinion. Sound economic analysis of the case was thereby hampered. The brief summarized testimony relating to the loss in value caused by mining: before mining, the land was worth $60 per acre; after mining, the value dropped to $11 per acre. In parentheses, it calculated "(60 acres at $49.00 per acre is $2,940.00)." This sum represented the loss in value caused by the mining. Regarding diminution of value caused by the breach, the brief stated that if the repairs were done, the land value would have increased only by $2 to $5 an acre, or $300 for the leased acreage. Standing alone, each calculation accurately portrayed evidence presented at trial: the mining stripped $2940 in market value from the leased acreage, and the remedial work would increase the present value of that land by $300.

As developed in Garland's legal arguments, the brief erroneously characterized $2940 as representing either the pre-mining or the post-mining value of the leased acres (as opposed to the loss in value caused by the mining). The $2940 sum became central to Garland's main argument, that plaintiffs' recovery was limited to $300, representing the "total difference in the market value before and after the [promised remedial] work was performed." Both labels were wrong. Using Garland's figures, the pre-mining value of the leased acreage was $3600; its post-mining value was $660. The promised remedial work would have increased the post-mining land value by almost 50%. When one considers that mining stripped $2940 in value from the land and other
financial aspects of the bargain, the economic waste analysis appears quite different.

(a) Plaintiffs’ Reply Brief

Plaintiffs' reply was more effective than their initial brief. It dismissed diminution precedent as both outmoded and distinguishable, where the breaches were immaterial and nonwillful breaches. Plaintiffs had insisted upon the remedial provisions in order to assure their continued right to the use of their land in connection with their stock farming operations. Economic analysis of the transaction warranted the cost measure: the Peevyhouses received minimal royalty payments while Garland’s reaped about a half million dollars in gross sales from the coal removed from plaintiffs’ land.

E. Supreme Court Decision

Confidential court records demonstrate that this case, involving relatively low stakes, commanded unusual attention by the Oklahoma Supreme Court. Peevyhouse was discussed in conference eight times in as many months. This sharply contrasts with the typical case presented and finally decided in one court conference. Whatever the cause, it was a troublesome case for the court. On December 11, 1962, the Oklahoma Supreme Court affirmed judgment on liability, but reduced plaintiffs' damages to $300. The case was initially decided by a five-to-three vote, with Justice Williams voting with the majority, and Justice Welch not participating. The majority accepted Garland's view that harm to plaintiffs' expectation interest could be determined by the effect of breach on current fair market value. Accordingly, the court did not consider future appreciation in value or potential land use that could occur only through performance of the remedial work. Counsels' filtering, shaping, and sometimes distorting the facts facilitated several mistaken assumptions by the court. The majority opinion assumed that the Peevyhouses leased their entire farm to Garland Coal and that after mining, the farm was worth approximately $3000, which remedial work costing $29,000 would increase by only $300. It assumed the damage estimates on both cost and diminution were reasonably accurate. Most critical, it assumed the parties' primary purpose for the contract was mutually profitable recovery and sale of coal and that the remedial provisions were "merely incidental" to the main object involved.

1. Petitions for Rehearing

On February 1, 1963, seven weeks after the initial decision, ten highly regarded local attorneys and academics filed an amicus brief urging the court to reconsider and award plaintiffs the cost measure. They claimed to represent clients who enter contracts with comparable risks projected into the future and their concern with proper legal development. In three short pages, the amicus forcefully argued for the sanctity of contracts. Days later, the plaintiffs petitioned for rehearing and oral argument. McConnell's verbose brief buried otherwise viable arguments in excess prose or in abrasive attacks on the court. Substantively, it addressed the factual errors arising from the deficient record, such as the excluded evidence of plaintiffs' personal acreage, and sought remand for full hearing on the lost value to plaintiffs in view of the economic benefits they expected from the remedial work.

Finally, on March 25, with all nine justices voting, the court denied rehearing on a five-to-four vote. Justice Williams had switched his vote to the dissent. Justice Welch, who had
not previously participated in a dispositive vote in the case, cast the deciding vote for Garland Coal. Had he not voted, the resulting 4:4 split could have left intact the $5000 verdict.\(^{10}\)

McConnell refused to accept defeat, and filed a second petition for rehearing. Now the supporting brief fought desperately to preserve the $5000 verdict, arguing that the supreme court should not have accepted verbatim defendant's diminution figure, and at least should hear oral arguments in the case. Watts’ reply brief, for the first time in the litigation, asserted impossibility as justification for the breach. Garland’s breach was not arbitrary and unreasonable. Cumpton's testimony indicated that at time of contracting, Garland intended in good faith to fully comply with its terms. Only after partial performance did it become apparent that the amount of coal under the leased property was limited, and the operations were not extended far enough toward the southeast to permit economic compliance with the terms of the lease requiring remedial work. Two weeks after Garland's reply the court denied the second petition for rehearing.

2. Post Appeal Maneuvers

McConnell fought on. He petitioned for writ of certiorari to the United States Supreme Court, asserting unconstitutional impairment of contract, due process and equal protection violations. It was denied in short order. McConnell then sued in federal court, seeking specific performance, or in the alternative, money damages. The district court granted summary judgment; res judicata barred any further action. The Tenth Circuit affirmed. After six years of litigation, the case was finally over.

II. Legal Analysis

The majority opinion focused on the "main purpose" of the contract as central to determining the measure of damages. Had the facts been competently presented they should have significantly altered doctrinal and policy analysis. Besides the remedial questions, the unearthed facts would impact analysis of three major issues: (1) contract interpretation; (2) materiality of the breach and substantial performance doctrine; and (3) excuse of Garland's nonperformance under mistake and impracticability doctrines.

A. Interpretation and Parol Evidence Rule

In any contracts litigation, the primary focus should be to determine the parties' intent—what they intended to accomplish through the agreement—as fundamental to ascribing the meaning given their words of agreement. Standard interpretive process focuses on the exact words of agreement, especially when the agreement is reduced to writing. Notwithstanding the parol evidence rule, courts routinely admit evidence that puts the agreement in context, to best discern the parties’ probable intent. Recognized exceptions to the parol evidence rule permit

---

\(^{10}\) Had Justice Welch formally recused from participating in the case because of his close connections with the defense firm, Oklahoma law would have required the governor appoint a substitute judge; this undoubtedly would have caused further delay in disposition of the case.

\(^{11}\) As a practical skills exercise, students could be assigned to formulate and present arguments to the state supreme court on two issue: 1) whether the trial court erred in excluding the testimony of Mr. Peevyhouse under the parol evidence rule, and 2) identifying and applying the maxims relevant to proper interpretation of the written contract. Doug: don’t know if you wanted to insert possible exercises in the actual text. This will need some refinement if it stays.
extrinsic evidence on surrounding circumstances, and to explain any ambiguities.

The barren trial record left few clues on the underlying circumstances which resulted in the specially negotiated remedial provisions. Because plaintiffs’ counsel did not adequately understand the underlying transaction and resulting impact on application of contract law, he was unprepared to argue for admissibility of evidence on the surrounding circumstances to explain and interpret the remedial provisions. The trial court, presumably finding the contract a clear and complete integration, excluded any testimony of the personal acreage, the circumstances explaining why the remedial provisions were included, what they were intended to accomplish and details on the intended scope of work.

Even after counsel’s stipulation to breach, this evidence should have been admitted as relevant to interpreting the parties’ intent and its bearing on the proper measure of damages. Given the lack of a merger clause, the contract's relative informality, and the side agreement regarding surface damages, the written contract was only a partial integration. Moreover, the conflicting language in lease paragraphs 6 and 7 created a facial ambiguity that would support admission of extrinsic evidence to aid interpretation. If plaintiffs' counsel better understood the parol evidence rule and its many exceptions, perhaps they could have persuaded the judge to permit this evidence in aid of interpretation. It is however, quite possible that the trial court's evidentiary rulings bear witness to a deep-seated judicial reluctance to allow time-consuming evidence on extended background information. When courts generously admit contextual evidence to show the parties' intent, they lose much control to streamline issues, to shape the law, and to determine outcome. The modern textualist movement reflects that judicial attitude.

The court's holding, limiting recoverable damages to the diminution in value, is premised on its interpretation that the breached provisions were "merely incidental to the main purpose in view." The opinion recognized “the property owner's right [sic] to do what he will with his own . . .” Where such result is in fact contemplated by the parties, and is a main or principal purpose of those contracting, the measure of damages for breach would ordinarily be the cost of performance. By imputing contract intent without any individualized focus on the actual bargain or evidence of actual intent, the court's opinion negates this passing nod to freedom of contract. Its interpretive efforts were pure abstractions without regard to the parties' actual intent.

The scant trial record made it easier for the supreme court majority opinion to reach its own conclusion on the primary purpose of the contract. While acknowledging that Garland "specifically agreed" to perform certain remedial work, the majority opinion did not examine the actual contract language or invoke other rules of interpretation to determine what the parties sought to accomplish. Instead, it treated contract purpose as an abstract finding that could be imputed to the parties – and not a factual question warranting closer examination of the specifics. "The primary purpose of the lease contract . . . was merely to accomplish the economical recovery and marketing of coal from the premises to the profit of all parties. The special provisions of the lease contract pertaining to remedial work were incidental to the main object involved.’’

It was apparently obvious to the court that mutually profitable extraction of mineral resources was the main purpose; no reference was made to the record, to the actual writing, or to standard rules of interpretation. Before reaching this fact-based conclusion, the majority should have examined the actual writing and circumstances surrounding its execution. It ignored conspicuous differences between the printed lease and the typewritten addendum and the interpretive maxim that places greater weight on individually negotiated remedial provisions. It
ignored evidence of surrounding circumstances, including Garland's admission that the Peevyhouses insisted upon the remedial provisions as a condition of entering the lease.\textsuperscript{12} Despite reasonable inferences that Garland drafted the actual contract language, including the remedial provisions, the court disregarded the usual interpretive guideline that any ambiguities would be construed against the drafter. Although sparse, there was ample evidence in the record to support a contrary conclusion – that the remedial provisions were a material part of the exchange.

\textbf{B. Material Breach or Substantial Performance?}

Substantial performance doctrine applies to exchanges where one party performs services to be compensated by the other. If the service provider essentially completes performance, but insignificant defects or incomplete items remain, it can recover the unpaid contract price, less any damages owed the payor from defective or incomplete performance. Equitable principles allow the contractor’s recovery notwithstanding its immaterial breach. Assuming substantial performance essentially fulfills the payor’s principal purpose for the contract, the antiforfeiture doctrine protects the contractor's expectation interest. Conversely, if the remaining work is significant, the defects serious, or the breach willful, courts may determine the breach was material. Material breach doctrine would allow the payor, as the injured party, to cancel the contract and seek damages. Usually the contractor’s right to recover depends on a fact-specific inquiry as to whether the injured party received substantially what it sought to obtain in entering the contract, and whether its disappointed expectations can be compensated adequately with money damages measured by either cost or diminution. Correct doctrinal application requires the court to interpret whether any of the breached provisions were material elements of the exchange that would defeat the injured party’s intended purpose for the contract.

Once again the \textit{Peevyhouse} majority glossed over standard methods of interpretation, this time to invoke the substantial performance damage formula. Its conclusory analysis – that the breached provisions were incidental to the main purpose of the contract – enabled it to assume that Garland substantially performed. Citing \textit{Jacob & Youngs v. Kent}\textsuperscript{13} and McCormick's damage treatise, the court used the doctrine as precedent for adopting a "relative economic test" to deny recovery for work costing an amount "grossly and unfairly out of proportion to the good to be attained.” It again avoided any particularized focus on the actual bargain to determine the materiality of the breach to the underlying exchange.

\textit{Peevyhouse} is not a substantial performance case. It does not fit the pattern triggering the antiforfeiture doctrine. Garland had already received full performance from the Peevyhouses and was not at risk of forfeiting agreed compensation for work done under the contract. Garland materially breached by not performing the remedial work for which it received valuable consideration; The Peevyhouses sought damages for their defeated contract expectations. The case is analogous to a construction dispute where the contractor abandons without cause a half-completed building. No court would find this constitutes substantial performance and require the owner to pay the remaining contract price, less any diminution in value between the completed and half-completed structure. Unless the owner receives a substantially complete and serviceable

\begin{footnotesize}
\footnotetext{12}{See Cumpton testimony reprinted in note 2.}
\footnotetext{13}{129 N.E. 889 (N.Y. 1921).}
\end{footnotesize}
building, substantial performance doctrine does not apply. Garland's failure to perform essential duties deprived the Peevyhouses of the benefit they reasonably expected to obtain from the agreement. Other factors, including Garland's willful breach and plaintiffs' risk of undercompensation further warrant a finding that Garland materially breached. In this situation, the nonbreaching owner should recover the reasonable costs to complete.

C. Nonperformance Excused by Mistake or Impracticability

Contract duties are generally absolute, requiring that each party perform as promised or respond with damages. However, a contract may allow for escape by making a duty conditional or subject to discharge upon occurrence of specified events. Absent such a provision, the law of mistake or impracticability will occasionally excuse a party's liability for breach of nonperformance. To establish mistake or impracticability, the party claiming excuse must show that the mistake or supervening event went to a basic assumption of the contract, that it severely increased the burden of performing, and that the burdened party did not bear the risk of its occurrence.

The record includes limited testimony and a brief but tardy appellate argument that impracticability excused Garland's failure to complete the remedial work. Citing these excerpts, some commentators suggest that unexpected difficulties excused Garland's liability for breach. Two related factual matters might raise issues of mistake or impracticability to excuse Garland's liability for breach: (1) the presence and location of sufficient coal on Peevyhouse land; and (2) the location of the northern Peevyhouse boundary. Garland presented meager evidence at trial that might support an excuse, but it did not expressly assert this defense. Nor were the issues directly raised on appeal to the supreme court. Garland first alluded to impracticability after the court's original decision, in its brief opposing plaintiffs' second rehearing petition. Examination of the available data reveals no factual basis for excuse doctrine.

1. Basic Assumption to the Contract

The claimed mistake of fact or changed circumstances must relate to a basic assumption on which the contract was formed. This elusive term considers whether the incomplete information so altered the essential nature of the bargain such that without the assumption, the parties would not have traded, even with a change in terms. Was there a basic assumption that the Peevyhouse land would contain a minimum quantity of coal accessibly situated? If so, was that assumption mistaken? Did the parties further assume that Garland would continue mining until the spoil banks reached the northern property line, so Garland need only construct one fill? To each question, the answer is no.

Under the standard form lease, Garland had no duty to remove a minimum quantity of coal or pay a minimum royalty. It had few future obligations: pay royalties for coal removed beyond the $2000 advance, survey the land and perform the remedial work. Only the remedial work remained unperformed and was the basis for liability. Established precedent found that either mistake or impracticability could excuse a lessee-mining operator from a minimum payment obligation when there was insufficient quantity of ore to feasibly mine. Courts granting relief did so by construing that the agreements were premised on the assumption that the land contained an adequate supply of accessible mineral deposits. Unless the operator was legally excused, contract

14 See Cumpton testimony, supra, n.2.
enforcement would require the operator to pay the minimum royalty even though it could not remove the ore, and thus get nothing in return for the royalty. As a result, the mistaken assumption greatly increased one party's burden of performance and conferred a relative gain on the other.

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

Suppose that sufficient accessible coal was a basic assumption of the contract. What kind of showing would be required for Garland to correctly assert an excuse defense? Analysis of test borings on Garland's own operation map shows there was no appreciable difference in the coal depth on the Peevyhouse land as compared to other properties that it mined more extensively. This casts grave doubt on whether there was any factual basis for a mistake or impracticability claim. Garland probably signed the lease reasonably believing that it would mine enough coal to recoup the advanced royalty and that it could divert Cedar Creek onto Peevyhouse land. Garland got what it bargained for.


Mistake and impracticability doctrines are limited exceptions to the maxim, pacta sunt servanda ("agreements are to be observed"). A mere increase in one party's cost of performance will not suffice. Assume arguendo: (1) that a mistake or destructive event defeated a basic assumption to the contract; (2) that the parties contracted assuming there was sufficient accessible coal that Garland could continue mining indefinitely; and (3) that inadequate access to coal forced Garland prematurely to stop mining because it could not economically continue.

Presumably the smaller quantity of retrievable coal would leave less overburden for Garland's use in constructing the promised fills. The record is silent on whether this affected the cost to perform. Because the pit represents the last cut, and cuts are comparable in size, the precise location where the mining stops does not affect the distance across the pit. Had Garland made additional cuts, it would have had more overburden and spoil banks to grade. The reduction in available fill material would have been offset by the expanded scope of work required, and would have a negligible effect on performance costs.

Garland's nascent impracticability defense must have focused on the increased costs of constructing fills along both property lines. Repeated reference in the contract to plural "fills' makes it very unlikely that it was a basic assumption Garland would stop mining on the northern boundary in order to construct just one fill. A more reasonable interpretation would have required fills along any property lines that intersect a pit, for the full distance across the pit. Given where Garland stopped, performance would have required two fills, with that on the east-west property line to span the full distance across the pit.

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

3. Risk Allocation

Excuse doctrine can excuse liability for breach only if the party did not bear the risk of mistake or the increased burden of performance caused by the disruptive event. Similarly, impracticability doctrine allocates risk based both on the express contract provisions and implied intent to perform when a disruptive event was foreseeable but not expressly excused. Even if a disruptive event is both unforeseen and unavoidable, courts may deny relief because the obligor is the cheaper insurer. Allocating to the contractor the risk of mistake or impracticability would deter opportunistic behavior, where the contractor claims a feeble excuse as an attempt to rewrite what is now an unfavorable contract.

A court would most likely find that Garland bore the risk of increased performance costs, both by contractual risk allocation and because it is the superior risk-bearer. Paragraph 7 is cast in absolute language, granting Garland no relief from its remedial obligations should the coal prove scarce. Garland apparently drafted the final language; it reasonably could have predicted a dramatic increase in its performance costs if the coal ran than on the Peevyhouse land. Nevertheless, nothing in Paragraph 7 allowed escape from those duties. Assuming that Garland initially planned to do the work promised, it might have feared that insisting on an escape clause would have been a deal-breaker.

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

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

D. Remedial Issues

Peevyhouse is all about remedies. The Peevyhouse majority limited damages to diminution by finding that the breached provisions were collateral to the contract and that the lessor's minimal economic benefit from full performance was grossly disproportionate to the cost of performance. For years commentators have "damned, praised and rationalized" this holding. Peevyhouse critics abound, including some notable legal economists. Aside from questions of excuse, few commentators defend either the result or reasoning. Most rationalizations equivocate, tending to damn with faint praise. Factual explanations for the diminution measure point to uncertainties about the value of restoration to plaintiffs and suggest the court deemed their demand for the cost

March 17, 2006 18
measure as evidence of opportunistic bargaining behavior. Indeed, awarding the cost measure gave no assurance it would be used to obtain substitute performance. The net recovery, after deducting attorneys' fees and costs, could not fund complete restoration. The Peevyhouses might instead use the money for a dream vacation to Hawaii. Apart from these plausible justifications for the decision, few commentators endorse the decision on policy grounds.

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

1. Economics of the Exchange Then and Now

Litigation deficiencies left the Peevyhouse court with an incomplete or inaccurate understanding of the parties' exchange. Suppose these matters were fully litigated. The economics of the exchange might be depicted as follows, allowing latitude for credibility judgments and valuation difficulties.

The Peevyhouses bought land in 1947 for $12 per acre; in 1954, when the parties entered the lease, each acre was worth $50. Accordingly, their 120-acre ranch was worth $6000 before the mining. The Peevyhouses' negotiation behavior in rejecting the customary advance surface damage payment signaled that they valued the sixty leased acres for more than its $3000 market value. Just how much more, in dollar terms, will remain a mystery. Nevertheless, the Peevyhouses clearly communicated their subjective (or idiosyncratic) values to Garland, which could somewhat anticipate their probable loss from breach and hence gauge appropriate breach precautions.

Moreover, Garland representatives knew they were not rich and yet rejected a lucrative cash payment readily accepted by their neighbors. Because present cash is worth more to poorer persons, Garland must have known at the time of contracting that the Peevyhouses valued the future remedial performance at a sum much higher than $3000 in present value.

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

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

While Garland captured significant gains from its breach, the Peevyhouses' special bargaining efforts left them worse off than they would have been if they accepted the default provisions. Had they refused to bargain with Garland, their untouched 120 acres would have been valued at about $7200 in 1960. Instead, their total farm was worth perhaps $4260. If restored, based on 1995 property values, it could have been worth around $45,000. Thirty years later, in 1993, the remedial work would have cost somewhere between $52,000 and $96,000.

2. Doctrinal Structure for Protecting Contract Expectations with Money Damages

Contracts remedial doctrine seeks to protect the injured party's defeated expectations with money damages as a substitute for the promised performance. That damage liability is typically the only legal consequence of breach reflects both amoral Holmesian positivism and a materialism that deems money an acceptable substitute for recognized legal interests. Traditional rubric states that, where money damages are deemed adequate, equity cannot intervene to grant specific performance.

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

A wealthy injured party can prove with certainty its subjective loss in value by purchasing substitute performance from a third person and presenting the bills in court. In cases like Peevyhouse, where plaintiffs do not (or cannot) purchase a comparable substitute, courts are left to speculate on their subjective loss in value. While contract doctrine supposedly prefers to compensate plaintiffs' subjective loss in value, litigants can seldom prove this measure with the required certainty. Thus, they are relegated to cost or diminution as alternative measures to protect their lost expectancy. Lacking reasonably certain proof of subjective loss, Section 348(2) of the

---


14 *Groves v. John Wunder Co.*, 205 Minn. 286 N.W. may be such a case.
Second Restatement allows a plaintiff to recover at most the reasonable costs of repair or completion, or at least the diminution in market value caused by the breach. The cost measure might give the plaintiff a windfall exceeding actual loss, while punishing the defendant for what might have been an efficient breach. Diminution reverses the situation, risking undercompensation to the plaintiff while possibly rewarding the breaching defendant, who is allowed to retain the surplus performance costs. The Restatement formulation prefers the cost measure, providing that sum "is not clearly disproportionate to the probable loss in value" to the injured party.

(a) Diminution in market value as token substitute for subjective loss in value

Damages for diminution in value are deemed adequate protection for defeated contract expectations. Diminution represents the lowest possible loss in value to the injured party who might not specially value the property but could sell it on the open market. When property owners like the Peevyhouses contract for specific improvements, they seek (and pay for) actual performance and not merely an increase in market value. Consider the amounts homeowners spend on landscaping, remodeling, and other long-term improvements that enhance their quality of life but do not necessarily produce corresponding increased values. A contractor's material breach deprives these property owners of the benefit of their bargain unless they are compensated for what it costs to obtain substitute performance.

The Restatement formulation theoretically prefers the cost measure over diminution except when it results in "unreasonable economic waste" or recovery "clearly disproportionate to the [injured party's] probable loss in value . . . ." This policy preference promotes contract stability, encouraging full performance on both sides. The diminution alternative directs courts to consider whether a plaintiff's likely subjective harm from breach is disproportionately small in relation to the probable cost to complete, so as not to punish the breaching defendant and allow a windfall to the plaintiff.

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

In resorting to the diminution measure, the court ignored strong indications in the record of plaintiffs' higher subjective value for the land. Despite deficiencies in the official record, it was obvious that the leased parcel joined land on which plaintiffs lived. By definition, homestead property embodies personal, moral, and aesthetic concerns distinguishing it from real estate held for commercial purposes. The court should have inferred that the mining impaired both the going concern value of the entire farm and the plaintiffs' personal valuation of their homestead.
record showed the plaintiff-landowners rejected the standard or "off the rack" agreement, giving valuable consideration to obtain the promised remedial work in order to protect their idiosyncratic moral and aesthetic values. Cynics might suggest that courts construe, or manipulate the record evidence as needed to protect the economic interests of important state industries.

(b) Cost to complete: Sometimes risk of overcompensation

Numerous policy reasons support theoretical preference for the cost measure, despite the possibility of windfall to the injured party. Damages based on cost better fit the expectation principle, which enables the injured party to buy equivalent performance. Because cost is usually less than the injured party's subjective loss in value, the mitigation principle limits recovery to the cost of obtaining substitute performance. Moreover, it deters inefficient breaches prompted only by a party's interest in avoiding the costs of performance. Stability and confidence in the enforceability of contracts supports breach deterrence as a secondary remedial goal that should properly guide judicial selection among the remedial alternatives.

Serious objections to the cost measure arise when the injured party's windfall becomes substantial. If the cost to complete far exceeds (that is, is "clearly disproportionate to") the injured party's probable loss in value from the breach, recovery will be limited to the diminution in market value caused by the breach. The essential difficulty lies in determining when cost confers an intolerable windfall. Unequivocal evidence definitely proving a plaintiff's subjective loss of value seldom exists. Nevertheless, courts can properly evaluate certain factors indicative of a plaintiff's higher preference in obtaining the promised performance relative to market value. Thus, where a property owner contracts for improvements to one's homestead property, on matters affecting aesthetics, long-term utility, or personal or moral values, a strong presumption should favor the cost measure of damages as a remedy for the contractor's material breach.

(c) Economic and policy considerations support cost measure

In the real, imperfect world, legal rules matter. Although they only apply absent contrary agreement, default rules strongly influence incentives to bargain in good faith and to perform as promised. Enforcement costs may grossly imbalance what seemed a perfect (and efficient) agreement, if voluntarily performed. Moreover, as Peevyhouse powerfully demonstrates, courts may not strictly enforce agreements even where parties have explicitly bargained around an existing legal rule to reach an efficient outcome reflecting their preferences. Legal rules should serve as disincentives to strategic or opportunistic behavior. Where parties bargain in the shadow of law that encourages performance except when breach is truly efficient, most contracts are fully performed. Where the legal consequence of breach is liability to compensate fully the injured party for any gains expected from performance, the promisor stands to gain nothing from breach. An inefficient default rule can reverse the situation, providing strong incentives to breach. Ian Ayres and Robert Gertner rekindled the normative interest of legal economists in constructing a theory of default choice. A contract might be incomplete because:

Courts . . . should give parties incentives to negotiate ex ante by penalizing them for inefficient gaps. One party might strategically withhold information that would increase the total gains from contracting . . . in order to increase her private share of the gains . . . By changing the default rules of the game, lawmakers can . . . reduce the opportunities for
A penalty default rule would give the better informed party an incentive to reveal information to the less informed party during the bargaining process. By purposely setting the default at what the better informed party would not want, that party is forced to share this information in order to negotiate an efficient solution. Instead, lawmakers might adopt an immutable rule -- one that cannot be varied by agreement to avoid social harm in situations where those affected cannot adequately protect themselves. Should the transaction costs in negotiating around a default rule become extremely large, the default mode appears immutable. Ayres and Gertner contend that the *Peevyhouse* opinion disingenuously creates either an immutable rule or a strong default rule without adequate guidance on how parties could contract out of it. The resulting uncertainty undermines the stability and efficiency goals. The high transaction costs are likely to deter most contracting parties from attempting a private bargain that better serves their preferred values.

Consider the effects of a strong, practically immutable default provision limiting to diminution the landowner's damages. Contrary to policies promoting stability and good faith in the formation and performance of contracts, the rule encourages operators to promise restoration work fraudulently, knowing that they would only be held liable for diminution. By keeping this information secret from the landowners, operators would exact somewhat smaller price concessions from landowners, albeit still for empty promises. The resulting bargain is grossly inefficient. To the extent landowners give consideration for the remedial promises, they unwittingly give surplus benefits to the operators. The price concessions bear little relation to the operator's projected performance costs (minimal, absent intent to perform). Moreover, operators have no incentives to take reasonable precautions against events that could cause a breach.

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

A perfect contract, that is, one in which the parties' bargain achieves an efficient outcome, will encourage the promisor to take precautions against breach-causing events. According to Cooter and Ulen, "incentives for precaution by the promisor are usually efficient" when the promisor is liable to the promisee for full expectation damages in the event of breach. Where the remedy makes the breaching promisor liable for the full surplus that the promisee expected from performance, "the law induces the promisor to internalize the full surplus." Thus, before contracting, the operator would take precautions in estimating performance costs, including geological surveys and test boreholes to determine project feasibility. After contracting, the operator could take precautions against breach by retaining a landscape architect, buying topsoil,

---


and taking other actions evidencing intent to perform.

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

3. Restitution Alternative: Preventing Unjust Enrichment

Although traditional doctrine strongly prefers money damages to approximate defeated expectations, the *Peevyhouse* facts would also support restitution and specific performance as viable alternative forms of relief. If Garland's failure to perform the remedial work constituted a material breach and was not substantial performance, then the Peevyhouses were entitled to treat the contract as discharged and to seek restitution for benefits conferred that would unjustly enrich Garland. Restitution could have provided an alternative to the nominal recovery for lost market value. Because Garland owed future duties of performance (and not merely the payment of money), the expectation principle would not fix an upper limit on their recovery.

Three distinct restitution claims were possible. Under the first theory, the Peevyhouses were entitled to recover, at a minimum, the $3000 they relinquished as advance payment for Garland's promised remedial work. Had they proven the true bargain and claimed restitution, basic equitable principles would have required Garland to disgorge this amount in light of its failure to perform. Arguably, the Peevyhouses' recovery under the second restitution theory could exceed the cost of completion. If they could have shown that Garland fraudulently induced the contract with false promises of remedial work, then they might have sought contract rescission. Because such fraud would vitiate contract consent, Garland's mining activities could support claims of tortious breach or wrongful conversion. Under such a theory, the Peevyhouses might have recovered the fair market value of the coal, less the value added by Garland's labor. As a condition to this relief, the injured party must return any benefit received under the contract. Finally, under modern contract theory, the Peevyhouses of today might assert the disgorgement claim proposed by Allan Farnsworth to redress abuse of contract. Garland failed to perform the remedial work even though it received advance payment as consideration. It thereby realized a gain from its breach while leaving the Peevyhouses with defective performance. Because they had already fully performed their contract duties, they could not use the consideration paid Garland to obtain a substitute. Disgorgement of gain resulting from such an abuse of contract is necessary to prevent undercompensating the injured party. If, during the bargaining process, Garland accurately estimated and reflected the cost to perform in the price terms, its breach could realize a gain equal to the avoided performance costs. Unless required to disgorge this sum, Garland is unfairly enriched while badly undercompensating the Peevyhouses. Even if Garland's cost estimates were inaccurate, its breach avoided the expense of performing or of modifying the contract to buy out of the remedial provisions. Although it could be burdensome to fix damages under Farnsworth's proposed standard where the damage liability is less than the cost measure, it could be used by courts averse to the cost-based expectation measure.

---

4. Equitable Protection of Contract Expectations: Specific Performance

Plaintiffs raised no claim to equitable relief in the trial court. Regardless whether they made an informed decision to seek money damages, it probably was correct. Courts then (and now) were likely to find damages an adequate legal remedy, thus avoiding difficulties in fashioning an equitable remedy and supervising its performance. Some modern courts might be persuaded by scholarship endorsing specific relief, as preferable on moral and economic grounds. It is the remedy best calculated to protect contract expectations through performance or post-breach settlement for an amount reflecting the injured party's lost value.

Contract duties have moral content deserving of legal protection. Where parties have reached a fair bargain, the law should hold them to their agreement. In the event of breach, justice demands that the injured party's reasonable expectations receive meaningful protection, whether legal or equitable in nature. If damages do not enable replacement performance and further permit the breacher to save the performance costs, the legal remedy upsets the agreed exchange. Where the contract called for Garland to perform remedial work, the Peevyhouses fairly expected to receive either performance or cost of obtaining comparable substitute performance. After deducting for enforcement costs, even the cost measure nets less than that needed to replace the breached services. Absent litigation cost-shifting mechanisms, only specific relief can assure the replaceability of Garland's performance.

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

At least in the context of postmining restoration, specific relief protects the public interest in a manner comparable to environmental law. If coal operators can avoid reclamation obligations with damage payments, society's long-term preservation interests remain unsatisfied. Federal and state statutes have already struck the balance, dictating that the work shall be done, with administrative enforcement mechanisms to handle supervisory burdens. Where a private breach of contract creates public risk of harm that may be remedied at public cost, the parties should not be allowed to relinquish reclamation obligations in exchange for payment to the landowners.
III. Strains on the Quality of Justice

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

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

By definition, the adversary process requires partisan presentation of evidence and legal argument. Each side presents its strongest case under the facts and law and tries to rebut the opponent's contrary assertions. The impartial judge or fact-finder passively receives what is presented and, when thus informed by the parties, renders a considered judgment. Impartiality is an essential element, requiring both absence of bias and nonparticipation in presentation of the case. Justification for the adversary system assumes that each party can participate effectively, usually through counsel. It assumes that counsel are roughly equal in legal skill and dedication to their client's cause and have equivalent resources to support the litigation. *Peevyhouse* illustrates how capability problems strain the quality of justice and the flawed assumptions underlying the adversary system.

The client's financial resources, business and social connections, and prior experiences as a litigant influence who is retained as counsel and the fee arrangement. The fee arrangement, in turn, often affects the dedication and time counsel spends on the case. For one-time, individual litigants, the Peevyhouses knew a good bit about Woodrow McConnell before retaining him. While they knew of few lawyers, they were aware that he came from Stigler and that he had successfully prosecuted claims for neighbors against Garland. Like most occasional litigants (and some lawyers), they did not sufficiently appreciate the impact of doctrinal distinctions between tort and contract law. McConnell's accumulated legal knowledge and expertise concerned tort law, which did not translate to adequate knowledge of contract law.

McConnell represented the Peevyhouses and most of his clients on a contingent fee basis. This probably influenced the representation, both in terms of initial output of energy and of the strategic choice to pursue cost damages as a means of producing a fund for the payment of fees. On appeal, McConnell demonstrated exceptional, at times quixotic, dedication to their cause, valiantly fighting a losing battle to reverse the court's initial decision. Sadly, the effort came too late. Had more time been spent gathering facts, researching, and preparing for trial, the record would not have left room for the grossly inaccurate assumptions made by the court. The

---

Peevyhouses' limited resources and McConnell's legal skill, effort, and knowledge were no match for Garland's strong defense team.

By contrast, Garland had direct experience with Looney, Watts, which had successfully represented it in prior lawsuits. As a repeat litigation player, Garland could better evaluate whether the firm had the advocacy skills and legal knowledge and professional resources to mount an effective defense.

Premised as it is on partisan advocacy, the adversary system assumes a fair fight with litigants roughly balanced in their ability to present their sides effectively. Overall, a significant disparity in dedication, skills, and resources can tilt the outcome. Judged by modern standards of competence, McConnell's representation fell short in three areas: fact-gathering, legal knowledge, and advocacy skills. A lack of financial and other resources to aid the litigation furthered the imbalance. From the outset, it appeared that McConnell lacked sufficient grasp of the relevant facts and law, both essential to theory development.

McConnell filed the initial complaint at the end of the five-year lease term, long after the blasting harmed the personal acreage not leased to Garland. If McConnell had understood that the Peevyhouses did not lease their personal acreage, he should have realized that the tort claim was time-barred. Although he could do nothing to revive the claim, he could have framed the pleadings more carefully to allege the breach caused lost utility and value to the entire farm including acreage not leased to Garland. In any event, the complaint would have differentiated between the leased and unleased parcels and specifically alleged the separate consideration the Peevyhouses gave to obtain the remedial promises. This trade-off in lieu of payment for surface damages strongly related to contract interpretation and substantial performance doctrine. The competent advocate would have anticipated parol evidence objections and acquired mastery over the legal issues key to admission: nonintegration of the writing, the failure of consideration challenged the existence of a legally enforceable contract, and the general admissibility of evidence of surrounding circumstances to aid interpretation.

By contrast, Watts understood Garland's viewpoint enough to suggest the impracticability excuse and property line dispute, both of which triggered waste considerations and risk allocation. McConnell never stood "toe to toe" with Watts on these issues and failed to pierce the defense with demands for proof. If plaintiffs' side had adequately understood the law of impracticability and mistake, it could have gathered information before trial to defeat those claims. Further research on contract law, damages, and policy would have helped them develop a coherent theory and trial plan to create a strong record and supporting legal arguments. The Peevyhouse opinion would be quite different if the trial record clearly established the parties' actual intent and revealed data showing the relative economic and other benefits sought to be achieved by the contract.

Availability of adequate resources to support the litigation strongly affects the quality of representation. If a litigant cannot pay in advance for the services and costs, it must depend on counsel's resources to pay or obtain credit. Garland and its defense firm clearly had superior resources devoted to the litigation as compared to plaintiffs. No clear distinction can be made between quality differences affected by disparities in resources or legal skills. Garland's professionally drawn maps and aerial photos were more helpful and persuasive than plaintiffs' snapshots and sketch of the affected land. The defendant's more polished presentations at trial and on appeal reflected extensive investments of professional time — by Watts and associates working behind the scenes and also by Cumpton and Curry, the engineers who testified.

March 17, 2006
There were significant disparities between the advocacy skills of the parties' respective counsel. Watts was well-prepared. He adeptly planned a trial strategy with supporting witnesses and documentation, knew the weaknesses in his case, and formulated a plan to limit unfavorable evidence. In short time, Watts obtained dismissal of the tort claim and stipulations that limited evidence to proving damages to the leased acreage caused by the breach. Watts's aggressive tactical maneuvers may have blind-sided plaintiffs' counsel. By drastically limiting triable issues, perhaps he upset their trial strategy, leaving them little to present. Both McConnell his co-counsel were fairly skilled in questioning witnesses, despite occasional awkward or unclear questions. They seldom responded to Watts's frequent objections, even when strong contracts arguments supported admissibility. Overall, their litigation style seemed characteristic of lawyers who shoot from the hip. Litigators adopting this style develop an intuitive sense about how the trial should proceed, formulate a general trial strategy, and obtain the necessary witnesses who receive limited preparation for their testimony. They defer most research until needed to prepare documents filed with the court. Those with great instincts may thrive without the painstaking efforts of their more compulsive colleagues. Many clients, however, bear the brunt of their lawyers' lackluster preparation.

IV. The Supreme Court Bribery Scandal: Tantalizing Speculation Questioning The Quality of Justice

Was Peevyhouse tainted by the Oklahoma Supreme Court bribe scandal? Definitive proof is impossible. There is no evidence that a bribe was paid in Peevyhouse or that Ned Looney sought favorable treatment from the court. However, the evidence strongly suggests that Justice Welch voted in favor of interests represented by the Looney, Watts law firm, especially in close cases where his vote could make a difference. Peevyhouse is such a case. In examining Justice Welch's overall voting pattern, there is a moderate, statistically significant correlation reflecting a pro-Looney, Watts bias. This bias is most striking in the seventeen close cases decided by the Oklahoma Supreme Court where his vote could have affected the outcome. Welch voted in every close case, and in all but one, he supported the interest represented by the Looney, Watts firm. In each case where the Looney, Watts interest lost, Welch dissented. In seven of the eight cases where the Looney, Watts interest prevailed, Welch voted with or authored the majority opinion. He was consistently loyal to the firm interest when it mattered. He never voted dispositively to defeat a Looney case, and he cast the deciding vote in three cases, including Peevyhouse. Welch's conference votes in Peevyhouse suggest that he stayed his hand and did not participate in any dispositive vote until necessary for Garland to prevail. An answer to the question of whether Peevyhouse was tainted, thus, depends upon how one defines that concept. If the definition is limited to bribery, Peevyhouse is probably unblemished. If one considers suspect all cases with outcomes affected by improper judicial bias, then Peevyhouse appears tainted.

V. Conclusion

Zeal on a client’s behalf does not necessarily translate into competent representation within legal bounds. At its best, a legal education equips students with the technical skills needed...
for competence, a firm grounding in lawyers’ ethical obligations, and a passion to have their professional lives make a positive difference in the legal system. Lawyers must have a passion for justice in order to develop the legal skills to understand a case in its industrial, economic and theoretical context in order to represent clients competently.

VI. Epilogue

Federal courts were uncertain about whether Peveyhouse remained the law in Oklahoma. A federal court certified to the Oklahoma Supreme Court the question concerning what damages measure applied for breach of a settlement agreement to reduce water pollutants following an oil and gas drilling operation. In 1994, in Schneberger v. Apache Corp., the court reaffirmed Peveyhouse with little consideration of policy issues or federal environmental law mandating remediation regardless of market value. Despite Schneberger decision, the issue remains in doubt. Meanwhile, the opposing forces pressed for legislative changes to damages from exploitation of mineral resources. Unfortunately, the reaffirmed Peveyhouse principle appears now to have broader application. It is of dubious origin, made possible by the vagaries of the adversary process, yet has remarkable longevity against the weight of criticism. Peveyhouse opponents must patiently await another opportunity to seek its reversal.

Mr. and Mrs. Peveyhouse still live on that land. Time has not healed the wounds inflicted by the mining which ended nearly fifty years ago. When last visited in 2004, the diversionary channel was badly eroded and overgrown with aggressive bramblebush. Steep embankments on the spoil banks were unstable and muddy. Its condition in 2004 was significantly worse than when

---

Doug: I’d like to insert 2d photo of this same location, with caption indicating that above photo was taken in 1988, and what is powerpoint slide # 11 [whole presentation being emailed to you along with manuscript] taken in 2004.

2090 P.2d 847 (Okla. 1994).
I had last seen it several years ago. Mr. Peevyhouse said he hadn’t been on that land in years; about thirty acres is completely useless. The last time I spoke with Lucille (back in 1994??), she was bitter and distrustful of the legal system. Willie still wants the land fixed: "It's just not right to do something with land that makes it useless for the future."

The Porter family owned and operated Sallisaw Stripping, or its successor, Garland Coal Company since the middle 1950s. An acrimonious strike produced ongoing labor disputes, ultimately prompting Garland's president, J.F. Porter III, to sell the Haskell County operations to Alpine Construction Company around 1982. When Garland stopped mining, it incurred withdrawal liability to the United Mine Workers Trust Fund. Payment disputes caused the trust fund to file an involuntary Chapter 7 bankruptcy petition against Garland in 1984. In 1986, the bankruptcy court found Garland was insolvent and entered an order for relief. Thereafter, Porter decided to liquidate the company and move on to other pursuits. In an extraordinary turn of events, the trustee paid in full all claims filed in the bankruptcy case, and a surplus of $1.4 million was returned to Garland Coal shareholders.