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a reasonable excuse or good cause, explaining why a party is presently unable to offer evidence essential to justify opposition to the motion for summary judgment.[33]

If appellants believed they could not present evidence on the failure to keep a lookout and/or failure to slow or stop the train claim because they had not conducted discovery in that area, they could have requested a continuance under § 25-1335 at the time of the summary judgment final hearing. They did not. Under these circumstances, the issuance of the discovery order was not an abuse of discretion and did not result in reversible error.

V. CONCLUSION

The district court erred in finding that appellants' claim based on failure to slow the train was preempted and in finding that no genuine issue of material fact existed on that claim. We therefore reverse, and remand for further proceedings on that claim, but affirm the judgment of the district court in all other respects.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WRIGHT, J., not participating.

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[33] *Id.*

MARLENE BEDORE, PERSONAL REPRESENTATIVE OF THE ESTATE OF GEORGE JOHN VLASIN, DECEASED, ET AL., APPELLEES AND CROSS-APPELLANTS, V. RANCH OIL COMPANY, A COLORADO CORPORATION, AND BELLAIRE OIL COMPANY, A COLORADO CORPORATION, APPELLANTS AND CROSS-APPELLEES.

805 N.W.2d 68

Filed October 14, 2011. No. S-10-912.

1. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from the facts and that the moving party is entitled to judgment as a matter of law.

2. **Contracts: Judgments: Appeal and Error.** The meaning of a contract is a question of law, in connection with which an appellate court has an obligation to reach its conclusions independently of the determinations made by the court below.
3. **Damages: Judgments: Appeal and Error.** With respect to damages, an appellate court reviews the trial court's factual findings under a clearly erroneous standard of review.
4. **Judgments: Costs: Appeal and Error.** The standard of review for an award of costs is whether an abuse of discretion occurred.
5. **Appeal and Error.** Appellate courts do not generally consider arguments and theories raised for the first time on appeal.
6. **Contracts: Mines and Minerals.** Where the parties have bargained for and agreed on a time period for a temporary cessation clause, the agreed-on time period will control over the common-law doctrine of temporary cessation allowing a reasonable time for resumption of drilling operations.
7. **Leases: Mines and Minerals.** Oil and gas leases are to be strictly construed against the lessee and in favor of the lessor.
8. **Contracts.** The fact that the parties have suggested opposing meanings of a disputed instrument does not necessarily compel the conclusion that the instrument is ambiguous.
9. **Evidence: Appeal and Error.** An appellate court cannot consider as evidence statements made by the parties at oral argument or in briefs, as these are matters outside the record.
10. **Contracts.** A court is not free to rewrite a contract or to speculate as to terms of the contract which the parties have not seen fit to include.
11. **Leases: Mines and Minerals: Waiver: Time.** In oil and gas leases, it is well established that the acceptance of royalties by a lessor after the expiration of the primary term does not waive expiration of the lease or estop the landowner from claiming the lease is no longer valid.
12. **Damages: Appeal and Error.** An award of damages may be set aside as excessive or inadequate when, and not unless, it is so excessive or inadequate as to be the result of passion, prejudice, mistake, or some other means not apparent in the record.
13. **Damages.** The trier of fact may award only those damages which are the probable, direct, and proximate consequences of the wrong complained of.
14. **Damages: Proof.** A plaintiff's burden to prove the nature and amount of its damages cannot be sustained by evidence which is speculative and conjectural.
15. ____: ____. A claim for lost profits must be supported by some financial data which permit an estimate of the actual loss to be made with reasonable certitude and exactness.
16. **Attorney Fees.** If an attorney seeks a fee for his or her client, that attorney should introduce at least an affidavit showing a list of the services rendered, the time spent, and the charges made.
17. **Rules of the Supreme Court: Pretrial Procedure: Appeal and Error.** A ruling under Neb. Ct. R. Disc. § 6-326(b)(4)(C)(i) is reviewed for an abuse of discretion.

Appeal from the District Court for Hayes County: David Urbom, Judge. Affirmed.

R.K. O'Donnell and James R. Korth, of McGinley, O'Donnell, Reynolds & Korth, P.C., L.L.O., for appellants.

Nancy S. Johnson, of Conway, Pauley & Johnson, P.C., and Thomas M. Rhoads, of Glaves, Irby & Rhoads, for appellees.

Heavican, C.J., Wright, Connolly, Gerrard, Stephan, McCormack, and Miller-Lerman, JJ.

McCormack, J.

I. NATURE OF CASE

George John Vlasin and Betty L. Vlasin, husband and wife, leased the oil and gas rights to their land to Bellaire Oil Company and its affiliate, Ranch Oil Company (collectively Ranch Oil). Ranch Oil operated on one-half of the land described in the lease. Byron E. Hummon, Jr., owner of Hummon Corporation (collectively Hummon), operated on the other one-half of the lease. After the primary term of the lease expired and the wells stopped producing oil, George and Betty entered into a new lease agreement with Hummon which encompassed the entirety of their land. Upon learning of the agreement, Ranch Oil took action to revive one of its dormant wells by drilling out the plug and inserting pumping equipment. Ranch Oil relied on a savings provision of the lease, which stated that "this lease shall not terminate provided lessee commences operations for drilling a well within sixty (60) days from such cessation." George and Betty did not believe Ranch Oil's actions saved the lease and, joined by Hummon, brought suit against Ranch Oil in 2005 for declaratory judgment, trespass, and conversion. After George's death in October 2008, Marlene Bedore was appointed as personal representative of George's estate. We will collectively refer to George (later Bedore), Betty, and Hummon as "the plaintiffs." The court ruled in favor of the plaintiffs, but awarded only nominal damages. Ranch Oil appeals, and the plaintiffs cross-appeal.

II. BACKGROUND

1. Leases

In 1980, George and Betty entered into an oil and gas lease with Murphy Minerals Corporation for approximately 1,052 acres of their land in Hayes County, Nebraska (Murphy-George/Betty lease). The Murphy-George/Betty lease was for a term of 10 years,

> and as long thereafter as oil, gas, casinghead gas, casinghead gasoline, condensate, or any of the products covered by [the Murphy-George/Betty] lease is, or can be, produced, and as long as provided in paragraphs 11, 12 and 14, and as long as any of the rights granted hereby are being exercised by lessee.

Paragraph 14 subjects the Murphy-George/Betty lease to all federal and state laws and regulations. Paragraph 11 provides:

> Notwithstanding anything in [the Murphy-George/Betty] lease contained to the contrary, it is expressly agreed that if lessee shall commence operations for drilling at any time while [the Murphy-George/Betty] lease is in force, [it] shall remain in force and its term shall continue so long as such operations are prosecuted and, if production of any of the minerals covered by [the Murphy-George/Betty] lease results therefrom, then as long as such production continues.

Paragraph 12 states:

> If within the primary term of [the Murphy-George/Betty] lease, production on the leased premises shall cease from any cause, [the Murphy-George/Betty] lease shall not terminate provided operations for the drilling of a well shall be commenced before or on the next ensuing rental paying date; or provided lessee begins or resumes the payment of rentals in the manner and amount hereinbefore provided. If after the expiration of the primary term of [the Murphy-George/Betty] lease, production on the leased premises shall cease from any cause, [the Murphy-George/Betty] lease shall not terminate provided lessee commences operations for drilling a well within sixty (60) days from such cessation, and [the Murphy-George/Betty]

> lease shall remain in force during the prosecution of such operations, and if production of any of the minerals covered by [the Murphy-George/Betty] lease results therefrom, then as long as such production continues.

At the same time, George's brother, Joseph Peter Vlasin, and his wife, Doris M. Vlasin, entered into a similar lease agreement with Murphy Minerals Corporation for their adjoining land.

2. Assignment of Leaseholds

In 1986, Harvard Petroleum Corporation, successor in interest to Murphy Minerals Corporation, assigned its lease with Joseph and Doris to Hummon (Hummon-Joseph/Doris interest). Harvard Petroleum Corporation also assigned to Hummon approximately one-half of the 1980 Murphy-George/Betty lease (Hummon-George/Betty interest). The other one-half of the Murphy-George/Betty lease was retained by Harvard Petroleum Corporation. In 1999, this one-half interest of the Murphy-George/Betty lease was conveyed to Ranch Oil (Ranch Oil-George/Betty interest).

3. Pooling Agreement and Wells

Hummon drilled and operated two wells on the Hummon-George/Betty interest: well No. 1, drilled in 1985, and well No. 2, drilled in 1987. Hummon drilled one well on the Hummon-Joseph/Doris interest, well No. 1-34, in 1987. Hummon also drilled and maintained other wells in the area under leases with neighboring landowners.

Ranch Oil operated three wells on the Ranch Oil-George/Betty interest. Well No. 34-22 was drilled in 1989. Well No. 34-23 was drilled in 1986. Well No. 34-31 was drilled in 1990. These wells were drilled by its predecessor in interest, Harvard Petroleum Corporation.

(a) Pooling Agreement

Before Hummon was able to drill well No. 1-34 in 1987, the Vlasin parties entered into a pooling agreement so that well No. 1-34 would be within a 40-acre legal subdivision, as required by the rules and regulations of the Nebraska Oil and

Gas Conservation Commission (NOGCC).[1] The pooling agreement created a 40-acre "communitized area" for the production, storage, processing, and marketing of the oil and gas produced from the land on which well No. 1-34 would be located. The royalty proceeds from the oil production on communitized areas would be divided in proportion to the parties' relative acre contributions. The pooling agreement stated:

> It is understood and agreed that . . . well [No. 1-34] as previously described, if completed as a producing oil and/or gas well m[a]y be produced for the benefit of the parties hereto under the provisions of this pooling agreement . . . and the production of oil and/or gas from said land shall constitute production in commercial quantities under the terms and conditions of each of the Oil and Gas Leases committed hereto.

Well No. 1-34 was drilled on land owned by Joseph and Doris and covered by the Hummon-Joseph/Doris interest. However, approximately 11 acres of the communitized area for well No. 1-34 was land described in the Hummon-George/Betty interest.

(b) Ranch Oil Well No. 34-31

Ranch Oil's well No. 34-31 appears to have been the last of the Ranch Oil wells to produce oil on the Ranch Oil-George/Betty interest. It became inactive in 1997. Well No. 34-31 became the subject of the trespass and conversion action currently before us, when it was reopened by Ranch Oil in 2005.

According to the director of NOGCC, before becoming inactive, well No. 34-31 was a "producing oil well from the Basal Sand from the openhole interval of 4,324 to 4,335 feet." Because of concerns that leaks from the well were invading and damaging the basal sand oil reservoir for the area, the operator of well No. 34-31 at that time positioned a sand plug in the well from 4,315 to 4,335 feet. The operator subsequently also placed a drillable cast iron bridge plug at a depth of 4,000 feet. In order to return well No. 34-31 to production following

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[1] See 267 Neb. Admin. Code, ch. 3, § 13(b) (1981). See, also, Neb. Rev. Stat. §§ 57-908 and 57-909 (Reissue 2010).

installation of the plugs, it would be necessary to drill out the cast iron plug at 4,000 feet and then drill out the sand plug from 4,315 to 4,335 feet.

(c) Hummon Wells Nos. 1-34 and 2

Hummon's well No. 1-34, located on the Hummon-Joseph/Doris interest, but within the 40-acre communitized area covering land on the Hummon-George/Betty interest, was plugged and abandoned sometime around April 14, 2005. It is unclear when, prior to that time, well No. 1-34 had ceased production. Hummon's well No. 2 was the last working well located on the Hummon-George/Betty interest. It ceased production and, in December 2005, was plugged.

4. New Lease Between George and Betty and Hummon

Upon closure of well No. 1-34 on April 14, 2005, George and Betty considered all interests conveyed under the Murphy-George/Betty lease to be expired. Although Ranch Oil did not expressly acknowledge the Ranch Oil-George/Betty interest had expired, Ranch Oil did attempt to negotiate a new lease during the first week of April. According to George and Betty, when Ranch Oil told them that it intended only to pump a preexisting well and had no intention of drilling new wells on the land, they declined to enter into a new lease agreement with Ranch Oil.

Hummon, having concluded that the Hummon-George/Betty interest had expired through nonproduction, attempted to negotiate a new lease with George and Betty around the same time. On April 14, 2005, George and Betty entered into a new lease agreement with Hummon which gave Hummon exclusive drilling and operating rights on all of George and Betty's land previously described in the Murphy-George/Betty lease. This included the part of the land that had been the subject of the Ranch Oil-George/Betty interest.

The new lease agreement between Hummon and George and Betty (hereinafter Hummon-George/Betty lease) was recorded in the office of the Hayes County clerk. George sent Ranch Oil correspondence on April 14, 2005, advising Ranch Oil of the Hummon-George/Betty lease and that Ranch Oil's rights as

lessee had expired. On April 21, Hummon sent correspondence to the NOGCC explaining its understanding that Ranch Oil had failed to further extend its lease by production and that the Ranch Oil-George/Betty interest in George and Betty's land was null and void. Hummon advised the NOGCC that Hummon had negotiated the Hummon-George/Betty lease and that Hummon would be reporting to the NOGCC as the new lessee.

5. Attempts to Preserve Ranch Oil-George/Betty Interest

Ranch Oil immediately attempted to take action to preserve the Ranch Oil-George/Betty interest and to prevent the Hummon-George/Betty lease from going into effect. Ranch Oil sent correspondence to Hummon, as well as George and Betty, asserting that the Ranch Oil-George/Betty interest was still in full force and effect and that George and Betty could not lease that land to Hummon. Ranch Oil relied on paragraph 12 of the Murphy-George/Betty lease, which stated that it "shall not terminate provided lessee commences operations for drilling a well within sixty (60) days from such cessation." Ranch Oil claimed the relevant cessation of operations occurred on April 14, 2005, when Hummon plugged well No. 1-34 and that Ranch Oil was in the process of reestablishing production operations within 60 days from that date.

(a) Drilling

Without seeking permission to do so, on May 3, 2005, Ranch Oil moved a drilling rig to the location of well No. 34-31, with the intention of removing the cast iron and sand plugs and restoring well No. 34-31 to production. Hummon immediately sent Ranch Oil a letter, dated May 4, 2005, asserting that Ranch Oil was trespassing on the land.

Ranch Oil refused to vacate the property. On May 13, 2005, Ranch Oil began swabbing the well and recovered three barrels of swab oil. Ranch Oil recovered four barrels of swab oil on May 14. Ranch Oil filed reports with the NOGCC reflecting "production" as of May 13, 2005.

On May 16, 2005, Ranch Oil began using the drill rig to break up the bridge plug into small pieces. A bailer was then

used to drill out the debris and remove the debris from the wellbore. At one point, the drilling was halted because the drill was unable to remove the hard fill at 4,315 feet. Ranch Oil eventually was able to use a "cutrite mill" to drill it out. The president of Ranch Oil described this as "the remaining 20 feet of fill." He stated that the "drilling operation" in well No. 34-31 "opened up the productive oil sand from 4324 to 4335 feet." According to the testimony of the director of the NOGCC, Ranch Oil's operations did not drill well No. 34-31 any deeper than it was before, explaining that "basal sand is about as deep as anybody is going to drill there."

During June 2005, Ranch Oil continued swabbing oil from well No. 34-31. The swab oil initially contained small percentages of oil. It progressed to larger percentages until, by June 18, Ranch Oil swabbed 10 barrels of 100-percent oil. On June 29, Ranch Oil was able to place an insert pump in well No. 34-31. Ranch Oil started pumping the well on July 1.

(b) Production

Lease operating statements for the period from May 2005 to May 2006 show that Ranch Oil did not sell any oil extracted from well No. 34-31 until August 2005, when it sold 122 barrels for $7,149. No sales were recorded for September or October. In November, Ranch Oil sold 139 barrels for $7,421. After that, the next sale was not until May 2006, when Ranch Oil sold 128 barrels for $7,928. From those sales, Ranch Oil paid $2,812 in royalties, $472 in severance tax, and $5,334 in operating expenses, not including the investment involved in reopening the well.

From June to December 2006, lease operating statements show no oil revenue and show $18,622 in operating expenses. Lease operating statements appear to show production of 4 barrels of oil in July, 34 in August, 15 in September, 1 in October, 13 in November, and 1 in December.

6. The Plaintiffs File Suit Against Ranch Oil

In June 2005, affidavits were filed with the Hayes County clerk's office averring that no well had been drilled and that

there had been no production of oil or gas since April 14, 2005, on the Murphy-George/Betty lease. On August 25, the plaintiffs filed suit against Ranch Oil seeking declaratory judgment that the Murphy-George/Betty lease and the Ranch Oil-George/Betty interest in the Murphy-George/Betty lease were null, void, and of no further force and effect. The plaintiffs also alleged damages from trespass and conversion.

Ranch Oil raised several affirmative defenses to the lawsuit, including waiver, laches, estoppel, unclean hands, consent, and accord and satisfaction. Ranch Oil counterclaimed for quiet title of their leasehold interest, injunctive relief, breach of contract, conspiracy to defraud, and tortious interference with contract rights.

George and Betty accepted a royalty payment from Ranch Oil on October 4, 2005, in the amount of $872.18 for production on well No. 34-31. On October 26, George and Betty's attorney advised Ranch Oil that George and Betty's acceptance of royalty payments was not to be construed as a ratification or endorsement of the validity of the Ranch Oil-George/Betty interest; it was simply acknowledgment of their right to be compensated for minerals severed from their land. Also on October 26, George and Betty's attorney requested that the distributor of the oil suspend the further payment of proceeds attributable to the working interest and overriding royalty interest in production from well No. 34-31, until the dispute concerning lease rights was resolved. George and Betty accepted two more royalty checks from Ranch Oil: $905.35 on January 19, 2006, and $967.24 on July 12.

(a) Declaratory Judgment for the Plaintiffs

Ranch Oil filed a motion for partial summary judgment asking the court to determine that the Ranch Oil-George/Betty interest had been held in production until April 15, 2005, by virtue of the operation of Hummon's well No. 1-34 and that well No. 34-31 began producing oil on May 13, within the 60-day period referred to by paragraph 12 of the Murphy-George/Betty lease. Ranch Oil asked that the court declare the Murphy-George/Betty lease in effect and the April 14, 2005, Hummon-George/Betty lease void. Ranch Oil also filed a motion for

partial summary judgment in favor of the affirmative defenses that the plaintiffs' claims were barred by waiver and estoppel, based on George and Betty's acceptance of royalty payments. Finally, Ranch Oil filed a general motion for summary judgment in its favor and against the plaintiffs.

The plaintiffs filed a general motion for summary judgment in their favor and against Ranch Oil as to all issues except for damages. The plaintiffs argued that Ranch Oil's commencement of operations was not for "'the drilling of a well'" and that, in any event, the cessation of production in well No. 1-34 did not inure to the benefit of Ranch Oil and did not provide the relevant date for the 60-day period described in paragraph 12. The plaintiffs also considered the small amounts of oil produced from well No. 34-31 to be insufficient "production" to maintain the Murphy-George/Betty lease, but they considered the facts of production contested and inappropriate for summary judgment. All parties agreed that there was no factual dispute as to most matters except damages and possibly the issue of whether Ranch Oil's operations of well No. 34-31 produced oil in paying quantities or were profitable in nature.

The district court denied Ranch Oil's motions and granted partial summary judgment in favor of the plaintiffs, concluding that the plaintiffs were entitled to a judgment declaring that the Murphy-George/Betty lease and Ranch Oil's interest therein were no longer in effect and that the new Hummon-George/Betty lease was valid and in effect. The court explained that there was no material issue of fact as to the activities conducted on well No. 34-31. Even assuming that April 14, 2005, was the relevant date from which the 60-day period began, under the plain meaning of the contract, the reworking operations conducted in this case did not qualify as "'operations for the drilling of a well.'" Because "'operations for the drilling of a well'" did not occur within 60 days from April 14, Ranch Oil failed to hold the Ranch Oil-George/Betty interest through the savings clause of paragraph 12, and the Murphy-George/Betty lease had expired.

The court denied Ranch Oil's motions for summary judgment based on waiver and estoppel and denied the plaintiffs'

motion for summary judgment as to their trespass and conversion claims. Various subsequent motions by Ranch Oil relating to the order for summary judgment were overruled, and the matter was set for a bench trial on the plaintiffs' claims for trespass and conversion. The record fails to demonstrate that, at any time, the plaintiffs sought to bifurcate their damages and attorney fees claims.

(b) Trial on Trespass and Conversion Claims

At the trial on the plaintiffs' action for trespass and conversion, the plaintiffs presented expert and lay witness testimony as to surface damage surrounding well No. 34-31 and the estimated cost of remedying that damage. They also testified as to the cost of ripping up a roadway to the well and lost revenue over the course of 3 years of $195 from 5 acres of land not able to be grazed as a result of the damage surrounding the well.

(i) Restoration of Land

On cross-examination, the plaintiffs' witnesses admitted that they were unable to identify when the alleged surface damage occurred. Ranch Oil presented testimony disputing the estimated price of restoring the land. Ranch Oil also presented testimony from the director of the NOGCC, who explained that the NOGCC had the authority and mandate to compel the bonded operator of the well, Ranch Oil, to conduct cleanup operations upon closure of the well. The director testified that the end result of these operations, supervised by the NOGCC, would be to restore the land to be capable of being used in the manner it was used prior to drilling the well.

(ii) Lost Interest Income

Hummon presented evidence, over Ranch Oil's objection, of interest income that it would have made had it been able to drill a well on the land occupied by Ranch Oil. The calculations were made by Tyler Sanders, a petroleum geologist who works for Hummon. Sanders admitted there would have been no profits because any well drilled on the land would have operated at a loss. Sanders also admitted that the oil from the undrilled well is still in place, producible, and not lost.

Nevertheless, Sanders sought to demonstrate damages using monthly posted oil prices from May 2005 to the time of trial, adding a 5-percent annual percentage rate, deducting estimated expenses, and assuming production of 11 barrels a day with no decline. Sanders' calculations resulted in an asserted loss of $18,179.77. In essence, this amount represented the estimated interest value of the estimated sales of oil from a well Hummon would have drilled on the land occupied by Ranch Oil.

The estimate of 11 barrels a day was based on what Sanders asserted were similar wells to the south, which share production from a common reservoir—although Sanders admitted on cross-examination that those wells had a higher cumulative production than wells located on land under the Murphy-George/Betty lease. The president of Bellaire Oil Company testified that the wells to the south are structurally different due to thicker sands and more water. They produce oil more efficiently than wells on George and Betty's land. He also noted that it would be impossible to estimate the production output without knowing the exact location of the well. It was undisputed that Hummon had not yet applied for a permit to drill on George and Betty's land.

The 5-percent annual percentage rate was described by Sanders as a simple annual interest. During cross-examination, Sanders conceded he did not know the average interest rate for deposits in Hayes County, either presently or during the time which Hummon would have operated a well. And the president of Bellaire Oil Company contested the methodology Hummon presented on lost interest income, asserting that the calculations omitted royalties and taxes and that they were based on noncomparable lease expenses.

(iii) Costs of Plugging Wells

Hummon also presented evidence of how much it would cost to plug Ranch Oil's wells, while Ranch Oil presented evidence that the figures presented by Hummon were inflated. Hummon had not been ordered to plug the wells that had been operated by Ranch Oil, nor was any evidence presented that Hummon would need to plug the wells to effectively operate on the Hummon-George/Betty lease. But Hummon was concerned

about future liability for this cost. Ranch Oil presented the testimony of the director of the NOGCC who explained that, in accordance with law and policy, the NOGCC would hold the current bonded operator of the wells in question, Ranch Oil, responsible for any cleanup and plugging costs to the NOGCC's satisfaction. Hummon conceded that it would not have a claim for damages relating to the cost of plugging the wells if the NOGCC determined that plugging the wells was Ranch Oil's responsibility.

(c) Order of Nominal Damages for the Plaintiffs

The court, as the trier of fact, ruled that the plaintiffs had failed to show that any damage to the property was caused during the time of Ranch Oil's trespass and conversion. The court explained that the plaintiffs failed to show when the damage occurred and who caused the damage. The court also concluded that pursuant to Neb. Rev. Stat. § 57-905 (Reissue 2010), the NOGCC had exclusive authority to compel any cleanup of the well site. Thus, while Ranch Oil is legally required to restore the premises, the plaintiffs failed to prove their claim for damages for restoration of the premises. The court similarly found that the NOGCC had the exclusive authority to require Ranch Oil to plug the wells and that this was not a matter for which the plaintiffs were entitled to damages.

The court found that the plaintiffs failed to prove their claim for lost profits. The court noted that Sanders assumed production and interest rates that were not based in fact and concluded that Sanders' methodology for determining lost profits was not valid. In addition, the court noted that Neb. Rev. Stat. § 57-205 (Reissue 2010) allows only the owner of the leased premises to recover damages and that there was no evidence of lost profits suffered by the landowners.

The court found that the plaintiffs failed to meet their burden of proof on the issue of attorney fees, because no evidence was submitted to the court on attorney fees. Because of the failure to prove any damages, the court issued an order dismissing the plaintiffs' claims for trespass and conversion and Ranch Oil's counterclaim. The court awarded George and Betty

costs and nominal damages in the amount of $100, pursuant to § 57-205.

The plaintiffs filed a motion to alter or amend the judgment, or, in the alternative, for new trial. The plaintiffs principally took issue with the district court's failure to award the amount of damages to which their witnesses attested. The plaintiffs also asserted that the issue of attorney fees was whether they were recoverable, not their amount, since the fees were ongoing. The court overruled the motion for new trial, and the parties filed the present appeal and cross-appeal.

III. ASSIGNMENTS OF ERROR

Ranch Oil assigns that the district court erred in failing to find that (1) the plaintiffs were required to give notice to Ranch Oil of any alleged breach of the Murphy-George/Betty lease with a demand that the terms of the implied covenant of production be complied with within a reasonable time as a condition precedent to the filing of the subject lawsuit demanding forfeiture of the Murphy-George/Betty lease; (2) all that was required under the Murphy-George/Betty lease was commencement of drilling operations and that Ranch Oil's activities had, in fact, been a commencement of drilling operations within 60 days of April 14, 2005; and (3) the plaintiffs' acceptance of royalty payments from the production of the well waived any alleged breach of the Murphy-George/Betty lease and estopped the plaintiffs from asserting such claims and bringing this lawsuit.

On cross-appeal, the plaintiffs assign that the district court erred in failing to (1) find liability for trespass and conversion, (2) award sufficient damages, (3) award Hummon damages for the cost of plugging abandoned wells, and (4) award costs and attorney fees.

IV. STANDARD OF REVIEW

[1] An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from the facts

and that the moving party is entitled to judgment as a matter of law.[2]

[2] The meaning of a contract is a question of law, in connection with which an appellate court has an obligation to reach its conclusions independently of the determinations made by the court below.[3]

[3] With respect to damages, an appellate court reviews the trial court's factual findings under a clearly erroneous standard of review.[4]

[4] The standard of review for an award of costs is whether an abuse of discretion occurred.[5]

V. ANALYSIS

Generally, an oil and gas lease consists of a definite term and an indefinite term beyond which the definite term of the lease may be extended.[6] The definite term is a specified exploratory period within which the lessee invests in discovering oil and establishing production.[7] Thereafter, the lease may be continued into an indefinite term, so long as production continues, through a continuous production clause.[8]

When such continuous production ceases, the lease automatically terminates unless there is some other provision which would prevent termination.[9] A cessation of production clause, also referred to as a "resumption of operations" or "savings clause," may make it possible for the lessee to preserve the

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[2] *Mandolfo v. Mandolfo*, 281 Neb. 443, 796 N.W.2d 603 (2011).

[3] *Davenport Ltd. Partnership v. 75th & Dodge I, L.P.*, 279 Neb. 615, 780 N.W.2d 416 (2010).

[4] *ADT Security Servs. v. A/C Security Systems*, 15 Neb. App. 666, 736 N.W.2d 737 (2007).

[5] See *Malicky v. Heyen*, 251 Neb. 891, 560 N.W.2d 773 (1997).

[6] 38 Am. Jur. 2d *Gas and Oil* § 211 (2010).

[7] See, e.g., *Fremont Lbr. Co. v. Starrell Pet. Co.*, 228 Or. 180, 364 P.2d 773 (1961).

[8] See *id.*

[9] 2 Eugene Kuntz, A Treatise on the Law of Oil and Gas § 26.8 (1989 & Cum. Supp. 2009). See, also, *Kirby v. Holland*, 210 Neb. 711, 316 N.W.2d 746 (1982).

lease beyond the primary term by resumption of operations if production should cease.[10] The various clauses of an oil and gas lease are designed to complement one another and to be mutually exclusive in operation.[11]

[5] The Murphy-George/Betty lease contained a primary definite term of 10 years, with a provision for extension by continuous production.[12] The parties agree that, at the latest, production ceased by April 14, 2005. In their pleadings and at the hearings on the motions for summary judgment, Ranch Oil asserted that the Murphy-George/Betty lease was still valid, because it had met the requirements of paragraph 12. Now, on appeal, it also argues that its operations satisfied paragraph 11. Appellate courts do not generally consider arguments and theories raised for the first time on appeal.[13] Nevertheless, we find the language of the Murphy-George/Betty lease to be clear. Because production ceased after expiration of the primary term, the relevant provision is the savings clause found in paragraph 12:

> If after the expiration of the primary term of [the Murphy-George/Betty] lease, production on the leased premises shall cease from any cause, [the Murphy-George/Betty] lease shall not terminate provided lessee commences operations for drilling a well within sixty (60) days from such cessation, and [the Murphy-George/Betty] lease shall remain in force during the prosecution of such operations, and if production of any of the minerals covered by [the Murphy-George/Betty] lease results therefrom, then as long as such production continues.

[6] Where the parties have bargained for and agreed on a time period for a temporary cessation clause, the agreed-on time period will control over the common-law doctrine of temporary cessation allowing a "reasonable time" for resumption of

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[10] See 4 Eugene Kuntz, A Treatise on the Law of Oil and Gas § 47.3 at 98 (1990 & Cum. Supp. 2009).

[11] See *id.*, § 47.4(f)(3).

[12] See 2 Kuntz, *supra* note 9, § 26.4.

[13] See *Tolbert v. Jamison*, 281 Neb. 206, 794 N.W.2d 877 (2011).

drilling operations.[14] Thus, Ranch Oil needed to "commence[] operations for drilling a well" no more than 60 days from the date of cessation of production. Because we find the issue of what acts qualify as "commenc[ing] operations for drilling a well" is decisive, we, like the district court, will assume, without deciding, that production on Murphy-George/Betty lease ceased on April 14, 2005.

1. Commencement of Operation for Drilling Well

[7] In interpreting a contract, a court must first determine, as a matter of law, whether the contract is ambiguous.[15] A contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings.[16] As for clauses of special limitation, or so-called unless clauses, controlling the duration of a lessee's interest in an oil and gas lease, we have held that such clauses give rise to a strict construction in favor of the lessor and against the lessee.[17] This conforms to the general rule that oil and gas leases are to be strictly construed against the lessee and in favor of the lessor.[18]

[8] When the terms of the contract are clear, a court may not resort to rules of construction, and the terms are to be accorded their plain and ordinary meaning as the ordinary or reasonable person would understand them.[19] The fact that the parties have suggested opposing meanings of a disputed instrument does not necessarily compel the conclusion that the instrument is ambiguous.[20]

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[14] *Hoyt v. Continental Oil Co.*, 606 P.2d 560, 564 (Okla. 1980). Accord, *Wilson v. Talbert*, 259 Ark. 535, 535 S.W.2d 807 (1976); *Greer v. Salmon*, 82 N.M. 245, 479 P.2d 294 (1970).

[15] *Katherine R. Napleton Trust v. Vatterott Ed. Ctrs.*, 275 Neb. 182, 745 N.W.2d 325 (2008).

[16] *Davenport Ltd. Partnership v. 75th & Dodge I, L.P., supra* note 3.

[17] See *Valentine Oil Co. v. Powers*, 157 Neb. 71, 59 N.W.2d 150 (1953).

[18] See *id.*

[19] *Thrower v. Anson*, 276 Neb. 102, 752 N.W.2d 555 (2008).

[20] See *Sack Bros. v. Tri-Valley Co-op*, 260 Neb. 312, 616 N.W.2d 786 (2000).

Ranch Oil argues that any operations preparatory to restoring an old well to production would constitute "commenc[ing] operations for drilling a well." The plaintiffs read the phrase more narrowly and argue that the end result of the operations must be the making of a new hole in the ground. The meaning of "commence[] operations for drilling a well" is a question of first impression for our court.

(a) Commencement

In its reading of the Murphy-George/Betty lease, Ranch Oil first relies on the fact that the term "commencement" has been held to encompass preparatory activity, such as making and clearing a location and delivering equipment to the well site. We agree that it is the general rule that activities preparatory to the specified operation are sufficient to satisfy commencement clauses.[21] However, the literal provisions of the clause in question will govern what type of operation must be commenced or resumed.[22]

Thus, if the clause specifically provides for the resumption or commencement of drilling, no other operation will satisfy the clause.[23] If the clause is to commence drilling operations, then the preparatory acts must be "'preliminary to the beginning of the actual work of drilling'" and performed with "'the bona fide intention to proceed thereafter with diligence toward the completion of the well, constitute a commencement or beginning of a well or drilling operations within the meaning of th[e] clause of the lease.'"[24] In the case of a provision requiring that the lessee commence to drill a well, it is not necessary that the lessee actually be penetrating the surface with drilling equipment within the period of time specified by the clause,[25] but it has been said that "the preparatory activity must

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[21] See 3 Eugene Kuntz, A Treatise on the Law of Oil and Gas § 32.1 (1989 & Cum. Supp. 2009).

[22] 4 Kuntz, *supra* note 10, § 47.5.

[23] *Id.*

[24] *Walton v. Zatkoff*, 372 Mich. 491, 498, 127 N.W.2d 365, 369 (1964), quoting 2 W.L. Summers, The Law of Oil and Gas § 349 (perm. ed. 1959).

[25] 3 Kuntz, *supra* note 21, § 32.3(b). See, also, 2 Summers, *supra* note 24.

be in good faith and must be of the type which is associated with or can be expected to precede immediately the process of making [a] hole."[26]

(b) Operations

Ranch Oil also relies on general definitions of "operations."[27] We agree with the plaintiffs that the cases relied on by Ranch Oil are inapposite to the issue of what "commence[] operations for drilling a well" means. In *Bargsley v. Pryor Petroleum Corp.*,[28] the oil and gas lessee made similar arguments. The lessee noted that he had "long-strok[ed]" the existing well to increase its pumping capabilities; laid pipeline to the well; performed electrical work; maintained electricity; and installed, checked, and repaired flow lines.[29] He argued that the lease remained in force under the language in the contract allowing for extensions if "'drilling operations'" were being prosecuted.[30] But the court disagreed, explaining that "[w]hile these activities under certain circumstances might be considered to be 'operations,' that is a question we do not address as these 'operations' are not 'drilling operations' as a matter of law."[31] The operations undertaken, the court concluded, were not preliminary to the actual work of drilling.[32]

(c) Drilling of Well

The terms "commence" and "operations," as used in the Murphy-George/Betty lease, plainly refer to the act of "drilling a well." The phrase "drilling a well" is not defined in the Murphy-George/Betty lease itself. The Oil and Gas Lien Act[33]

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[26] 4 Kuntz, *supra* note 10, § 47.4(3) at 125.

[27] See, e.g., *Walton v. Zatkoff, supra* note 24; *Breaux v. Apache Oil Corporation*, 240 So. 2d 589 (La. App. 1970).

[28] *Bargsley v. Pryor Petroleum Corp.*, 196 S.W.3d 823 (Tex. App. 2006).

[29] *Id.* at 826.

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] See Neb. Rev. Stat. § 57-801 et seq. (Reissue 2010).

defines "drilling" as "drilling, digging, torpedoing, acidizing, cementing, completing, or repairing,"[34] but it does not define "drilling a well." Neither do the NOGCC's rules and regulations define "drilling a well."

The Concise Oxford American Dictionary defines the verb "drill" as to "produce (a hole) in something by or as if by boring with a drill," to "make a hole in (something) by boring with a drill," and to "make a hole in or through something by using a drill."[35] As Ranch Oil points out, other courts have held that the use of the simple phrase "drilling operations" in an oil and gas lease can encompass the activity of drilling through a cement plug of an old well—since the lessee is making a hole, with a drill, through something.[36] But here, the relevant phrase defining the operations which must be commenced is "drilling a well."

The word "well" is defined as "a shaft sunk into the ground to obtain water, oil, or gas."[37] Thus, under these definitions, "drilling a well" would be to produce, by using a drill, a long, narrow hole sunk into the ground to obtain water, oil, or gas. We conclude that this definition generally conforms to the plain meaning of the phrase as used in the Murphy-George/Betty lease. And we conclude that using a drill to simply remove cast iron and sand plugs from an old well is not "operations for drilling a well" as contemplated by the Murphy-George/Betty lease.

The weight of authority agrees that general reworking operations, which do not involve making a new hole, are not "operations for drilling a well." One commentator states that "reworking operations will not satisfy a clause that requires the resumption of 'operations for drilling a well.'"[38] While cases on this issue are rare, in *Petroleum Engineers Producing*

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[34] § 57-801(8).

[35] Concise Oxford American Dictionary 275 (2006).

[36] See, *Huhn v. Marshall Exploration, Inc.*, 337 So. 2d 561 (La. App. 1976); *Browning v. Cavanaugh*, 300 S.W.2d 580 (Ky. 1957).

[37] Concise Oxford American Dictionary, *supra* note 35 at 1029.

[38] 4 Kuntz, *supra* note 10, § 47.5 at 137.

Corp. v. White,[39] the Supreme Court of Oklahoma held that the drilling of input wells and other repressuring operations designed to produce additional oil from an old well were not "'"commenc[ing] to drill a well"'" within the terms of the lease. Similarly, in *French v. Tenneco Oil Co.*,[40] the court held that reworking operations, which included "swabbing the well, blowing the well to the atmosphere, acidizing, injecting [a chelating agent], and pulling tubing, reperforating and sand fracturing," did not satisfy a clause providing that the lease will not terminate if "'operations for drilling a well'" are resumed within 60 days of cessation of operations.

[9] Ranch Oil points out that one court has considered "reworking or redrilling" an old well to be "drilling" a well, as that term was used in an oil and gas lease,[41] but we note that one of the wells in that case was "redrill[ed]" to a significantly greater depth than it had been before.[42] Although counsel for Ranch Oil has asserted in oral arguments that Ranch Oil drilled well No. 34-31 deeper than it had been prior to being closed, we find no evidence of that fact from the record. This court cannot consider as evidence statements made by the parties at oral argument or in briefs, as these are matters outside the record.[43] A bill of exceptions is the only vehicle for bringing evidence before an appellate court; evidence which is not made a part of the bill of exceptions may not be considered.[44] All the evidence in the record, viewed in a light most favorable to Ranch Oil, indicates that drilling equipment was used to remove the fill and bridge that had been placed in the well and that the depth of well No. 34-31 was approximately the same after these reworking operations as before—4,335 feet deep.

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[39] *Petroleum Engineers Producing Corp. v. White*, 350 P.2d 601, 603 (Okla. 1960).

[40] *French v. Tenneco Oil Co.*, 725 P.2d 275, 276-77 (Okla. 1986).

[41] Brief for appellants at 16, quoting *Kothmann v. Boley*, 158 Tex. 56, 308 S.W.2d 1 (1957).

[42] See *Kothmann v. Boley, supra* note 41, 158 Tex. at 59, 308 S.W.2d at 7.

[43] See *Wolgamott v. Abramson*, 253 Neb. 350, 570 N.W.2d 818 (1997).

[44] *Coates v. First Mid-American Fin. Co.*, 263 Neb. 619, 641 N.W.2d 398 (2002).

[10] While the parties to the Murphy-George/Betty lease could have written the savings provision of paragraph 12 to include both the "commenc[ing] of operations for drilling a well" and reworking—or even general "drilling operations"—they did not. A court is not free to rewrite a contract or to speculate as to terms of the contract which the parties have not seen fit to include.[45] On the face of the instrument, the parties did not intend that restoring an old well to production, through use of drilling equipment to remove fill and a bridge plug, would be sufficient to save the Murphy-George/Betty lease once there had been a cessation of production. This is presumably because the parties anticipated that an old well, reopened, would not produce sufficient quantities of oil for the lessors to have an interest in prolonging the Murphy-George/Betty lease. We find that the phrase "commence[] operations for drilling a well" is unambiguous and that, viewing the evidence in a light most favorable to Ranch Oil, Ranch Oil did not "commence[] operations for drilling a well" within 60 days of cessation of production.

2. Waiver and Estoppel

[11] Even if its actions did not satisfy the terms of the savings clause, Ranch Oil argues that we should reverse the district court's grant of declaratory judgment for the plaintiffs, because George and Betty accepted royalty payments and have thereby waived the breach. Ranch Oil relies on landlord-tenant case law addressing the acceptance of rent after a lessee's default. But, in oil and gas leases, it is well established that the acceptance of royalties by a lessor after the expiration of the primary term does not waive expiration of the lease or estop the landowner from claiming the lease is no longer valid.[46] It has been explained that it would be improper to estop the lessor from denying that the lease has terminated based merely on the acceptance of a royalty, because the royalty is but a

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[45] *Gary's Implement v. Bridgeport Tractor Parts*, 270 Neb. 286, 702 N.W.2d 355 (2005).

[46] See, e.g., 2 Summers, *supra* note 24, § 305. See, also, 3 Kuntz, *supra* note 21, § 43.2.

fraction of the total production to which the lessor would be entitled to receive if the lessee were not occupying the land.[47] The district court did not err in denying Ranch Oil's estoppel claim.

Ranch Oil's assignment of error regarding the district court's failure to find that George and Betty were required to give notice of any alleged breach of the Murphy-George/Betty lease does not appear to have been argued in its brief. In order to be considered by an appellate court, the alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error.[48] Nevertheless, we note that it is also well established that if the lessee fails to act under a clause of special limitation in an oil and gas lease to keep the lease in force, then "the lease terminates without any action being required by the lessor or the lessee."[49] In other words, termination of the lease is "automatic and self-operating."[50] Accordingly, the lessor is under no obligation to give notice of termination to the lessee.[51]

We conclude that the district court properly denied Ranch Oil's affirmative defenses. Because Ranch Oil failed to satisfy the savings clause of the Murphy-George/Betty lease as a matter of law and failed to raise any issue of material fact as to its affirmative defenses of waiver and estoppel, we affirm the partial summary judgment of the district court declaring the Murphy-George/Betty lease to no longer be in force and effect. We turn now to the plaintiffs' counterclaims.

3. Plaintiffs' Cross-Appeal

[12] We next address the plaintiffs' cross-appeal, asserting that the district court erred in failing to award Hummon the cost of plugging Ranch Oil's wells, and in failing to award

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[47] See 3 Kuntz, *supra* note 21, § 43.2.

[48] *In re Interest of Hope L. et al.*, 278 Neb. 869, 775 N.W.2d 384 (2009).

[49] *Valentine Oil Co. v. Powers, supra* note 17, 157 Neb. at 85, 59 N.W.2d at 159.

[50] *Id.*

[51] See *id.*

the plaintiffs damages resulting from trespass and conversion, costs and attorney fees, and deposition expenses. With respect to damages, an appellate court reviews the trial court's factual findings under a clearly erroneous standard of review.[52] The fact finder's determination is given great deference[53] and will not be disturbed on appeal if it is supported by evidence and bears a reasonable relationship to the elements of damages proved.[54] An award of damages may be set aside as excessive or inadequate when, and not unless, it is so excessive or inadequate as to be the result of passion, prejudice, mistake, or some other means not apparent in the record.[55] We affirm the district court's judgment on all matters except deposition expenses.

(a) Surface Damage and Estimated Cost of Plugging

[13] Damages, like any other element of a plaintiff's cause of action, must be pled and proved, and the burden is on the plaintiff to offer evidence sufficient to prove the plaintiff's alleged damages.[56] The trier of fact may award only those damages which are the probable, direct, and proximate consequences of the wrong complained of.[57] As the district court noted, none of the witnesses were able to testify that the alleged surface damage occurred during the time of Ranch Oil's unlawful occupancy. Thus, they were unable to prove surface damages caused as a result of the trespass and conversion theories under which the plaintiffs sought relief.

Moreover, claims for restoration of surface damage sustained through reasonable use of the surface estate do not sound in tort, but are instead recoverable in an action in

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[52] *ADT Security Servs. v. A/C Security Systems, supra* note 4.

[53] *Fickle v. State*, 273 Neb. 990, 735 N.W.2d 754 (2007).

[54] See *Norman v. Ogallala Pub. Sch. Dist.*, 259 Neb. 184, 609 N.W.2d 338 (2000).

[55] *Roth v. Wiese*, 271 Neb. 750, 716 N.W.2d 419 (2006).

[56] *J.D. Warehouse v. Lutz & Co.*, 263 Neb. 189, 639 N.W.2d 88 (2002).

[57] See *Steele v. Sedlacek*, 267 Neb. 1, 673 N.W.2d 1 (2003).

contract for breach of express covenants in the lease—and sometimes, under implied covenants of the lease.[58] In this case, the plaintiffs made no argument for damages based on breach of contract.

The duty to plug abandoned or disused oil and gas wells is most often found to be a creature of statutory or regulatory enactment.[59] Indeed, as the director of the NOGCC testified, the NOGCC has been given the authority to regulate and compel the plugging of wells and to order surface restoration.[60] NOGCC regulations state that the person who drilled or caused to be drilled any well for oil or gas shall be liable and responsible for the plugging thereof in accordance with the rules and regulations of the NOGCC.[61] The director of the NOGCC testified that Ranch Oil, as assignee, would be responsible under NOGCC rules and regulations for plugging the wells in question and performing any necessary surface remediation. Regulations provide that all pits shall be backfilled within 1 year after completion of drilling operations and that biodegradable mulch may be required if establishment of vegetation is determined to be a problem by the director,[62] that all soil containing over 1-percent petroleum hydrocarbons must be remediated or disposed of,[63] and that the NOGCC shall have final authority to determine if the affected land has been restored to its prior beneficial use.[64]

We need not determine whether the NOGCC's jurisdiction over these matters is exclusive to conclude that the district court did not err in denying damages to the plaintiffs. "[U]nder any theory of action the plaintiff will have the burden of

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[58] See, 38 Am. Jur. 2d, *supra* note 6, § 302; Annot., 62 A.L.R.4th 1153 (1988); Annot., 50 A.L.R.3d 240 (1973). See, also, e.g., *Exxon Corp. v. Tyra*, 127 S.W.3d 12 (Tex. App. 2003).

[59] 50 A.L.R.3d, *supra* note 58.

[60] § 57-905.

[61] 267 Neb. Admin. Code, ch. 3, § 029 (1994).

[62] *Id.*, §§ 012.14 and 012.15.

[63] *Id.*, § 022.03.

[64] *Id.*, § 022.10.

proving that the alleged damage was, in fact, caused by the failure of the defendant to plug."[65] The allegation of damages which might arise in the future is premature and fails to sustain this burden.[66] The plaintiffs did not present any evidence that Ranch Oil's failure to plug has caused them direct harm. Indeed, it appears to be Ranch Oil's intention to plug the wells and restore the property to the NOGCC's satisfaction once it is finally determined that the Ranch Oil-George/Betty interest in the Murphy-George/Betty lease has expired and that it is required to abandon the wells. The plaintiffs seem concerned only that they *might*, in the future, be required to pay for plugging the wells if Ranch Oil fails to do so. Since those events have not and possibly may not ever come to be, any claim based thereon is premature.

(b) Lost Income

The district court likewise did not clearly err in concluding that the evidence of lost interest income was speculative. Hummon admitted that the oil itself was still there to be extracted. Hummon's representative explained that any well Hummon would have operated on the land would have operated at a loss once expenses were considered. The plaintiffs sought only the interest on the investment of gross production from a well Hummon would have allegedly drilled, based on hypothetical production rates and on an assumed interest rate that admittedly had no correspondence to any known interest rate. The plaintiffs sought to demonstrate these lost "profits" through the testimony of Sanders, the petroleum geologist who worked for Hummon.

[14,15] A plaintiff's burden to prove the nature and amount of its damages cannot be sustained by evidence which is speculative and conjectural.[67] A claim for lost profits must be supported by some financial data which permit an estimate of the actual loss to be made with reasonable certitude and

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[65] 50 A.L.R.3d, *supra* note 58, § 2[b] at 252.

[66] See *Fulk v. McLellan*, 243 Neb. 143, 498 N.W.2d 90 (1993).

[67] *Liberty Dev. Corp. v. Metropolitan Util. Dist.*, 276 Neb. 23, 751 N.W.2d 608 (2008).

exactness.[68] We have explained that, in many instances, lost profits from a new business are too speculative and conjectural to permit recovery of damages.[69] Such was the case here. Without having drilled a well or even knowing the exact location of the well Hummon would have allegedly drilled if Ranch Oil had not been occupying the land, the production estimates presented by Sanders were too tenuous. Even if production rates could be established, Hummon failed to adequately demonstrate how it would have invested the proceeds from the sales and what interest rate would have been applicable to the investments.

(c) Lease Extension Payment

Hummon further argues on appeal that the district court erred in granting Ranch Oil's pretrial motion to exclude lease extension costs as an element of damages in their trespass and conversion claim. Hummon allegedly paid $5,260 for the Hummon-George/Betty lease for another 5 years. According to Hummon, this payment should be recoverable as a necessary expenditure to protect Hummon's rights as lessee, given Ranch Oil's occupation of the land and the protracted nature of the litigation. The district court concluded that Hummon, as lessee, did not have any right to recover damages under § 57-205.

For reasons different from those articulated by the district court, we affirm its ruling.[70] While a lessee is not listed as a party who may sue under § 57-205, that statute does not indicate that common-law remedies are no longer available to lessees. And it is generally recognized that the lessee acquires an interest in the land under an oil and gas lease and that the lessee will be protected in the enjoyment of such interest.[71] Nevertheless, we can find no support for Hummon's contention that a lessee may recover as damages the cost of his or her

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[68] *Home Pride Foods v. Johnson*, 262 Neb. 701, 634 N.W.2d 774 (2001).

[69] See *Nebraska Nutrients v. Shepherd*, 261 Neb. 723, 626 N.W.2d 472 (2001).

[70] See, e.g., *Boettcher v. Balka*, 252 Neb. 547, 567 N.W.2d 95 (1997).

[71] 2 Kuntz, *supra* note 9, § 25.1.

election to renew a lease in order to make up for time lost on the land due to a prior lessee's occupation and protracted litigation over the validity of the occupation. Hummon's attempt to introduce evidence of the amount that Hummon negotiated with George and Betty for the 5-year Hummon-George/Betty lease was, in essence, an attempt to circumvent its burden to show the nature and amount of damages that are the probable, direct, and proximate consequences of the first lessee's occupation of the land. As already discussed, the record indicates that if Hummon had been able to occupy the land, it would have lost money. The cost of a lease extension is not reflective of Hummon's actual loss directly resulting from Ranch Oil's alleged trespass and conversion, and the district court did not err in granting Ranch Oil's motion to exclude that evidence.

(d) Attorney Fees

[16] The standard of review for an award of costs is whether an abuse of discretion occurred.[72] The district court did not abuse its discretion in failing to award attorney fees and costs to the plaintiffs. We have explained that "if an attorney seeks a fee for his or her client, that attorney should introduce at least an affidavit showing a list of the services rendered, the time spent, and the charges made."[73] The plaintiffs here presented no evidence to the district court regarding attorney fees. In *Lomack v. Kohl-Watts*,[74] the Nebraska Court of Appeals affirmed the trial court's denial of attorney fees when the party seeking them had similarly failed to present any evidence upon which the trial court could make a meaningful award of fees. We likewise affirm the district court's denial of attorney fees in this case.

Although the plaintiffs suggest they did not present evidence of attorney fees because they believed they would have an opportunity to provide proof of attorney fees at some later date,

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[72] See *Malicky v. Heyen, supra* note 5.

[73] *Boamah-Wiafe v. Rashleigh*, 9 Neb. App. 503, 514, 614 N.W.2d 778, 787 (2000).

[74] *Lomack v. Kohl-Watts*, 13 Neb. App. 14, 688 N.W.2d 365 (2004). See, also, *Hein v. M & N Feed Yards, Inc.*, 205 Neb. 691, 289 N.W.2d 756 (1980).

the trial was for the plaintiffs' remaining claims relating to trespass and conversion and there was no reasonable basis for the plaintiffs' silent assumption. The plaintiffs did not request, nor did the district court suggest, that the trial would be bifurcated so as to consider attorney fees at a later time. Thus, the plaintiffs' failure of proof is decisive of this issue.

(e) Deposition Costs and Fees

Finally, the plaintiffs assert that the district court erred in failing to order that Ranch Oil pay for the costs and fees of depositions called by Ranch Oil. The plaintiffs had filed a motion to compel payment of witness fees and expenses, to which they attached an invoice reflecting those costs. The district court never expressly ruled on the motion; it was implicitly denied by the final judgment which failed to award these costs.[75]

The plaintiffs' motion sought payment of witness fees and expenses under Neb. Ct. R. Disc. § 6-326(b)(4)(C)(i) and under Neb. Rev. Stat. § 25-1228 (Reissue 2008). Section 25-1228 is inapplicable. It provides that

> a witness may demand his traveling fees, and fee for one day's attendance, when the subpoena is served upon him, and if the same be not paid the witness shall not be obliged to obey the subpoena. The fact of such demand and nonpayment shall be stated in the return.

The plaintiffs' deposition witnesses appeared despite Ranch Oil's failure to pay for traveling fees, and there is no provision in § 25-1228 for a court to compel a postdeposition reimbursement of fees.

[17] Section 6-326(b)(4)(C)(i) states that unless manifest injustice would result, the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery. However, payment of discovery fees under § 6-326 is limited to discovery obtained under subdivisions (b)(4)(A)(ii) and (b)(4)(B). Subdivision (b)(4)(A)(ii) states: "Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such

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[75] See *Olson v. Palagi*, 266 Neb. 377, 665 N.W.2d 582 (2003).

provisions, pursuant to subdivisions (b)(4)(C) of this rule, concerning fees and expenses as the court may deem appropriate." Subdivision (b)(4)(B) states:

> A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in [Neb. Ct. R. Disc. § 6-3]35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

A ruling under § 6-326(b)(4)(C)(i) is reviewed for an abuse of discretion.[76] The plaintiffs' motion to compel payment of witness fees and expenses failed to establish that the depositions were sought or obtained pursuant to either subdivision (b)(4)(C) or subdivision (b)(4)(B). Accordingly, the district court did not abuse its discretion in denying the fees and expenses requested by the motion.

VI. CONCLUSION

We affirm the district court's determination, as a matter of law, that Ranch Oil's activities on George and Betty's land did not operate so as to extend the Ranch Oil-George/Betty interest in the Murphy-George/Betty lease. We also affirm the district court's determination that the plaintiffs had failed to prove they were entitled to damages under common-law trespass and conversion claims and that George and Betty were entitled only to the nominal amount of $100, as specified in § 57-205. Finally, we affirm the denial of the plaintiffs' motions for attorney fees and expert witness fees and expenses.

AFFIRMED.

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[76] See *Future Motels, Inc. v. Custer Cty. Bd. of Equal.*, 252 Neb. 565, 563 N.W.2d 785 (1997).