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IN THE
COURT OF APPEALS OF INDIANA

EASTERN LIVESTOCK, INC. and THOMAS P. GIBSON,	)	
Appellants,	)	
vs.	)	No. 88A01-0909-CV-436
BILL DAY,	)	
Appellee.	)	

APPEAL FROM THE WASHINGTON SUPERIOR COURT
The Honorable Larry R. Blanton, Special Judge
Cause No. 88D01-9904-CP-90

July 29, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Eastern Livestock, Inc. ("Eastern") and Thomas P. Gibson ("Gibson") appeal and Bill Day cross-appeals the trial court's judgment entered on Day's third-party complaint alleging breach of contract and on the counterclaims filed by Eastern and Gibson, following a bench trial. Eastern and Gibson present the following issues for review:

1. Whether the evidence supports the trial court's finding regarding "missing cattle" and the damages awarded to Day for such cattle.

2. Whether the evidence is sufficient to support the trial court's findings regarding transfer charges made by Eastern and/or Gibson in Day's account.

3. Whether the evidence supports the trial court's finding regarding overpayments that Eastern and Gibson allegedly made to Day.

And on cross-appeal, Day presents the following issues for review:

1. Whether the trial court erred when it concluded that his pasture contracts with Gibson were not unconscionable.

2. Whether the trial court erred when it refused to award prejudgment interest to Day.

We affirm.

FACTS AND PROCEDURAL HISTORY[1]

In the 1990s, Gibson owned a farm in Lanesville, Indiana, where he raised cattle. At all relevant times he also owned a two-thirds interest in Eastern, one of the larger

[1] We pause to observe that the parties have, for the most part, failed to support the facts asserted in their respective Statements of the Facts with page references to the Record on Appeal or Appendix. Such supporting citations are required by Indiana Appellate Rule 46(A)(6)(a). The failure to provide such supporting citations hinders our review of the issues, requires the court to expend needless time locating that information in the Record on Appeal, and could result in the waiver of issues. We remind counsel to comply with this requirement.

cattle brokerage companies in the United States.[2] In the mid-1990s, Gibson, in his individual capacity, and Day entered into a Pasture Contract, which was a pre-printed form prepared by "In-House Counsel" for Gibson or Eastern.[3] Under the Pasture Contract, Gibson agreed to deliver a specified number of head of cattle to Day's farm, and Day agreed to "feed, water, and care for said cattle, until said cattle are ready to be sold[.]" Plaintiff's Exhibit 33.[4] Such an arrangement is commonly known as backgrounding. The Pasture Contract provided for payment as follows:

> 3. PAYMENT FOR CARE OF CATTLE. [Gibson] shall pay to [Day] the difference between the Cost of the Cattle and the Sale Price as those terms are defined in subparagraphs 3.1 and 3.2 herein, for pasturing, watering, feeding and caring for said cattle, unless the Cost of the Cattle exceeds the Sale Price. In the event the Sale Price shall be insufficient to reimburse [Gibson] for the Cost of Cattle, [Gibson] shall give notice to [Day] of any deficiency. The amount of the deficiency shall immediately become due and payable by [Day] to [Gibson]. [Day] agrees that it will be liable to [Gibson] for the full payment of any deficiency resulting from Cost of Cattle being in excess of Sale Price.
>
> 3.1 COST OF CATTLE. Cost of Cattle as used herein is defined as the sum of $37,441.00 est. (plus).[5]
>
>> A. All of [Gibson's] general and administrative expenses associated with the purchase of the livestock or the sale of the livestock as described in paragraph 1 herein, including but not limited to all interest, fees, bank charges (including late

[2] Gibson's son, John F. Gibson, owns the remaining one-third interest in Eastern.

[3] The Pasture Contract was executed by Gibson and Day "with a copy to Michael Kopp, Esquire[,] In-House Counsel." Appellee's App. at 35.

[4] Appellants' Appendix also includes a copy of Plaintiff's Exhibit 33. However, the pages of Appellants' Appendix are not consecutively numbered as required under Indiana Appellate Rule 51(C). Thus, we do not cite to Appellants' Appendix. We also remind counsel to comply with this requirement.

[5] Some of the underlined terms, including the amount indicated in Paragraph 3.1, indicate blanks filled in differently on each contract. The trial court found that the parties had orally agreed to modify some terms over the course of the business arrangement. But the parties do not dispute that the relevant substantive terms of the contract remained the same during the backgrounding arrangement with Day.

> charges or penalties if incurred as a result of any default by buyer as described herein), reasonable accounting fees, market protection and legal expenses, insurance, taxes, health fees or licenses paid to any state, governmental agency, or ultimate buyer of livestock.
>
> B. Cost of feed, water, veterinarian supplies or bills, immunization costs, insurance, taxes or any other costs associated with cattle which are required to be borne and paid for by [Day] should [Day] fail to pay for the same.
>
> C. A fee of two percent (2%) per annum of the aggregate of the sums listed in paragraph 3.1 herein.
>
> D. An additional charge of $1.25 per head per month will be charged against the cattle, payable at time of delivery off pasture.
>
> E. It is acknowledged by [Day] that these cattle owned by [Gibson] are subject to a lien and security agreement in favor of F.B.S. Ag Credit, Denver, Colorado as indicated on the enclosed EFS.
>
> 3.2 SALE PRICE. The Sale Price shall be such price that [Gibson] in its absolute and sole discretion is able to obtain for the cattle on or about Feb., 1996[.] [Gibson] shall attempt to obtain the best price possible for the cattle, but [Gibson's] decision to sell the cattle shall not be subject to review or questioned by [Day], and such decision shall be binding on [Day]. The Sale Price, for purposes of computing the amount due the Parties hereto, shall include all commissions, fees, transportation and other normal handling charges common to the industry, paid by [Gibson] in connection with the sale of the cattle.

Appellee's App. at 32-33 (emphases original). The underlining in the second half of paragraph 3 is found on the original preprinted form.

Over an almost three-year period, Gibson and Day executed nineteen Pasture Contracts in the 1990s, and Gibson made twenty-two deliveries of cattle to Day. The difference, three deliveries of cattle, was governed by oral contracts. In total, Day backgrounded more than 2,000 head of cattle for Gibson. Day's compensation for

backgrounding was the sales price less the cost of the cattle. The last sale of cattle backgrounded by Day for Gibson was made on August 14, 1998.

In 1999, Capital Feed and Farm Center filed a complaint against Day to recover on an account for feed supplied to his farm. On July 26, 1999, Day filed a third-party complaint against Eastern, Gibson, and John F. Gibson.[6] On August 20, Eastern and the Gibsons timely filed their answer and counterclaim. And on July 19, 2000, the trial court entered summary judgment in favor of Capital Feed and Farm Center, awarding a money judgment against Day.[7]

Discovery proceeded on matters related to the third-party complaint and the counterclaims. A bench trial was held July 14 and 15 and September 16 and 17, 2008. After the trial, the parties submitted proposed findings and conclusions. And on March 25, 2009, the trial court entered its Findings of Fact, Conclusions of Law and Order ("the Order").[8] In the Order, the court made findings regarding the overall backgrounding arrangement:

> Eastern Livestock Co. Inc. and its principal owner/chief executive officer [Gibson] have an incestuous relationship that makes no effort at modesty.
>
> Eastern Livestock Co. Inc. purchases cattle at Bourbon Stockyards in Louisville, Kentucky. They sell cattle they purchase to Thomas P. Gibson personally who ships the cattle to a Providence, Kentucky feed lot where they are sorted, placed in like kind groups according to frame, size and weight. Once they are grouped they are sent to the backgrounders under the Pasture [C]ontract. The backgrounders, like Day[,] take delivery of the

[6] John F. Gibson has not filed an appellant's brief, independently or in conjunction with Gibson and Eastern. Nevertheless, he is a party on appeal pursuant to Appellate Rule 17(A).

[7] The parties have not included a copy of the Third-Party Complaint, the answer and counterclaim, or the judgment in favor of Capital Farm and Feed Center in the Record on Appeal.

[8] Relevant parts of the Order will be set out as necessary in the Discussion.

> cattle under the terms set out in the pasture contract. When the cattle are finished out as a truck load lot, Eastern Livestock Co. Inc./Gibson provides trucks to deliver cattle to feed lots they either own or partially own. Eastern Livestock Co. Inc. in most cases purchase[s] the cattle from Gibson and finish[es] getting them ready for slaughter market. This is a brief synopsis of the process.[:]
>
> Farmer brings cattle to Louisville Market—Eastern Cattle Company [sic] purchases the farmer[']s cattle—taking commission from farmer for purchase—Eastern sells cattle to Gibson, taking commission on the sale—Gibson puts weight on cattle sells them to Eastern who takes commission which is charged to the backgrounder under the terms of paragraph 3.1 of the [P]asture [C]ontract.
>
> The cattle are seldom if ever exposed to market prices and are often if not always used to provide market protection for Eastern Livestock or Gibson's future trading position.

Appellee's App. at 22-23.

The trial court entered a net judgment in favor of Day for $196,010.82, without interest, and denied the claims by Eastern, Gibson, and John F. Gibson. The parties filed motions to correct error, which the trial court denied. Eastern and Gibson now appeal, and Day cross-appeals.

DISCUSSION AND DECISION

Standard of Review

The trial court entered findings of fact and conclusions thereon pursuant to Indiana Trial Rule 52(A). We may not set aside the findings or judgment unless they are clearly erroneous. Menard, Inc. v. Dage-MTI, Inc., 726 N.E.2d 1206, 1210 (Ind. 2000). First, we consider whether the evidence supports the factual findings. Id. Second, we consider whether the findings support the judgment. Id. "Findings are clearly erroneous only when the record contains no facts to support them either directly or by inference."

Quillen v. Quillen, 671 N.E.2d 98, 102 (Ind. 1996). A judgment will be clearly erroneous either when there is "no evidence supporting the findings or the findings fail to support the judgment." Chidester v. City of Hobart, 631 N.E.2d 908, 910 (Ind. 1994). A judgment is also clearly erroneous when the trial court applies the wrong legal standard to properly found facts. Yanoff v. Muncy, 688 N.E.2d 1259, 1262 (Ind. 1997). While findings of fact are reviewed under the clearly erroneous standard, appellate courts do not defer to conclusions of law, which are reviewed de novo. Fobar v. Vonderahe, 771 N.E.2d 57, 59 (Ind. 2002). We neither reweigh the evidence nor assess the credibility of witnesses but consider only the evidence most favorable to the judgment. Bowyer v. Ind. Dep't of Natural Res., 882 N.E.2d 754, 761 (Ind. Ct. App. 2008).

Issue One: Missing Cattle

Eastern and Gibson contend that the trial court erred when it held Eastern "liable for any cattle Day could not account for." Appellants' Brief at 16. They further contend that the amount of damages awarded to Day is speculative. Id. We address each of these contentions in turn.

With regard to "missing cattle" the trial court found:

> 27. Gibson and Day presented testimony that there were 201 head of cattle that could not [be], nor have not been[,] accounted for. Those mystical animals either disappeared, were stolen, abducted by aliens or never existed. They are just gone.
>
> * * *
>
> 41. The missing cattle are [a] puzzlement. Whether they ever existed is a question. Perhaps there was an error in count, perhaps they were stolen, or as one of the witnesses said[,] "[]They were picked[ ]up by Martians[."] For whatever reason they are unaccounted for[;] however[,] Day was charged the full amount of the costs of the cattle.

> The loss was estimated to be $68,049.45 for 201 head of cattle. Day is not responsible for the entire loss.
>
> Day had a vested financial interest in the cattle and should be compensated.
>
> Day to receive $35,000.00.

Appellee's App. at 24, 29. In sum, the court found that Eastern and/or Gibson had charged Day with the entire loss for missing cattle, which was determined to be $68,049.45. But the court further determined that that loss should be allocated between Day on the one hand and Eastern and the Gibsons on the other.

Eastern and Gibson first contend that the evidence does not support a finding that they should be held accountable for any of the cattle unaccounted for when the backgrounding arrangement with Day concluded. But not all of the Pasture Contracts between Gibson and Day specified the number of head of cattle delivered in a particular shipment. And the parties do not dispute that the aggregate number of head of cattle Gibson delivered to Day exceeded the total number Gibson subsequently sold. The difference between the number delivered and sold constitutes what the court called "missing cattle."[9]

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[9] The parties also mention that a number of head of cattle had died, and the trial court found that Gibson "stood the loss for dead animals." Appellee's App. at 23. Eastern and Gibson point out that the Order is "unclear whether or not Day's death loss entered into the Court's award or calculation of damages." Appellants' Brief at 17 n.1. Eastern and Gibson do not clearly raise this as part of their claim that the trial court erred in determining the number or the amount of damages for missing cattle. In any event, such an argument would merely be a request for us to reweigh the evidence. We may not do so. See Bowyer, 882 N.E.2d at 761.

Eastern and Gibson concede that there were "201 [head of] cattle unaccounted for" after Gibson sold the cattle backgrounded by Day.[10] Appellants' Brief at 14. Still, Eastern and Gibson argue that "there was no direct evidence that these Defendants [Eastern and the Gibsons] removed them from Day's farm and failed to give him proper credit. Neither Day nor any other witness testified as to having seen any cattle removed by Gibson or Eastern under suspicious circumstances." Id. at 13. But Day testified that Gibson transported two semi-trailer loads of cattle from Day's farm for which Gibson did not pay him. Thus, Eastern and Gibson's argument is merely a request for this court to reweigh the evidence, which we cannot do. See Bowyer, 882 N.E.2d at 761. Eastern and Gibson have not shown that they should not be held accountable for any of the missing cattle.[11]

Eastern and Gibson also dispute the court's allocation of liability for the missing head of cattle between Eastern and the Gibsons on the one hand and Day on the other. To that end, they point to the Pasture Contracts, under which "Day agreed, among other things, to receive the cattle [Gibson had] purchased, furnish pasture for the cattle, and, [']to use best efforts to maintain, water and care for and return said cattle upon demand of

[10] Because Eastern and Gibson concede the number of the head of missing cattle, we need not address their arguments that Day "presented no evidence that the number of head that Day was credited as having received and then later sold was inaccurate" or that the missing cattle never existed. Appellants' Brief at 17.

[11] Eastern and Gibson also argue that there are "logical explanations of [sic] what happened or may have happened to the cattle." Id. at 14. Specifically, they argue that Day admitted that he had sold some cattle directly, that Day acknowledged that he had purchased some cattle himself, that Eastern had paid for the cattle Day had purchased. But Eastern and Gibson provide no citations showing where we might find such evidence in the record before us. Thus, any argument based on that evidence is waived. See Ind. Appellate Rule 46(A)(8)(a). And, in any event, the contention advanced by Eastern and Gibson again amounts to a request that we reweight he evidence. We will not do so. See Bowyer, 882 N.E.2d at 761.

[Gibson.']" Appellants' Brief at 16 (quoting Pasture Contract) (emphasis added by Appellants). But the trial court found that there was no clear explanation for why cattle were missing. And Day could not have returned cattle he did not have. It was within the trial court's discretion, on these facts, to allocate the responsibility nearly evenly between the parties. The court did so and, as we have already stated, we cannot reweigh evidence regarding whether Eastern or Gibson actually took delivery of cattle from Day without having paid for the same. See Bowyer, 882 N.E.2d at 761. Thus, again, Eastern and Gibson's argument must fail.

Finally, Eastern and Gibson contend that the evidence does not support the amount of loss the trial court attributed for missing cattle and awarded to Day. In this regard they argue that the amount is speculative and unsupported by or inconsistent with the evidence.[12] In particular, they contend that the award is based on the amount estimated to be the sale cost of the missing cattle without subtracting the cost of the cattle. In other words, they argue that the figure on which the amount of the award is based exceeds the amount that Day was due under the Pasture Contracts and that he would have been paid had the missing cattle been accounted for and sold.

Again, Day's compensation for backgrounding was the sales price for the cattle less the cost as those terms were defined in the Pasture Contracts. The trial court found

[12] Eastern and Gibson also contend that there was no foundation for the admission of testimony by Day's expert, Peter Tucker, on the amount of the loss attributable to missing cattle. But Eastern and Gibson have not shown that they objected to the admission of Tucker's testimony at trial for lack of foundation. As such, to the extent they are arguing that the court should not have admitted that testimony, the argument is waived. See Raess v. Doescher, 883 N.E.2d 790, 796 (Ind. 2008) ("[f]ailure to object at trial to the admission of the evidence results in waiver of the error").

that Gibson charged Day in full for the cost of the missing cattle.[13] For the missing cattle, Day's compensation would have been the sales price, as estimated by Day's expert, less the cost. The court determined that "Day is not responsible for the entire loss" attributable to the missing cattle. Appellee's App. at 29. But, before the judgment, that is actually what happened—the entire cost of the cattle was charged to Day. And although the court did not specify why it determined to allocate $35,000 of the $68,049.45 loss to Eastern and Gibson (via an award of that amount to Day), that amount is slightly over half of the total loss. Eastern and Gibson have not shown that the trial court's determination to divide the loss in this fashion is clearly erroneous. Eastern and Gibson's arguments regarding damages for missing cattle must fail.

Issue Two: Transfer Charges

Eastern and Gibson also contend that the trial court erred when it found that certain charges against Day's account, or "transfers," were neither justified nor satisfactorily explained. The trial court found:

> 43. There were accounting discrepancies and transfers on the settlement sheets that were not explained or justified. The sum of $127,834.19 was deducted from money due[] Day, arrived at by moving figures, contract amounts, numbers and cattle counts around, all to the detriment of Day, with no accounting justification nor corresponding satisfactory explanation.
>
> Day to receive $127,834.19.

Appellee's App. at 29. Eastern and Gibson maintain that the finding is "contrary to the undisputed evidence presented at trial" because there was "no evidence presented that Day was damaged in this amount." Appellants' Brief at 18. We cannot agree.

[13] Eastern and Gibson dispute that finding, but, again, we cannot reweigh the evidence. See Bowyer, 882 N.E.2d at 761.

Upon the sale of each lot of cattle, Day was provided a closeout statement showing the settlement of Day's account for that lot. Tucker, Day's accounting expert, testified that he found three questionable transfers on those statements

> where there was a shortage of sell on one closeout, effectively a sale was added to that closeout statement and then further down the road, where there was an excess of sales then that was deducted at a later stage. . . . There were three items that were deducted from the closeout statements but were never added back in and that was probably the biggest anomaly I found with regard to that.
>
> * * *
>
> They were charged against Mr. Day which were [sic], and they were regarded, they were marked as transfers but they were never actually put on another closeout statement.

Transcript at 259-60. Tucker further testified that the total amount of the three transfers was $127,834.19. Thus, there is evidence in the record to support both the fact of the unexplained transfers charged against Day as well as the amount of those transfers and, in turn, the resulting amount awarded to Day.

Still, Eastern and Gibson argue that "Tucker never testified that Day suffered a loss in this amount. He simply described these transfers as an anomaly." Appellants' Brief at 19. They further contend that James Tate, a CPA and the accounting expert hired by Eastern and Gibson, found the accounting entries that corresponded to the three anomalous entries Tucker had identified. Again, Eastern and Gibson ask us to reweigh the evidence, which we will not do. See Bowyer, 882 N.E.2d at 761. Eastern and Gibson's argument regarding the award for erroneous transfer charges against Day must fail.

Issue Three: Overpayments

Finally, Eastern and Gibson contend that the trial court erred when it denied their claim for overpayments allegedly made to Day over the course of their business relationship with him. On this issue Eastern and Gibson are appealing from a negative judgment. As such, we will reverse only if the evidence is without conflict and all reasonable inferences to be drawn from the evidence lead to a conclusion other than that reached by the trial court. Aamco Dealers Adver. Pool v. Anderson, 746 N.E.2d 383, 386 (Ind. Ct. App. 2001).

In support of their claim for overpayments, Eastern and Gibson point to the testimony of Michael Kopp, Eastern's general counsel, and Tate, their accounting witness. Both witnesses testified that, based on their reviews of Eastern's accounting documentation, Day had been overpaid $78,945.21 during the backgrounding arrangement.[14] The trial court found that "Eastern Livestock and Thomas Gibson present claims for overpayment of the contracts. Those claims are not supported by the testimony nor the facts." Appellee's App. at 30. Eastern and Gibson argue that Day presented no testimony contradicting the testimony of Kopp and Tate on this point. Regardless of whether Day presented evidence on this issue, the court was free to find

[14] In their brief, Eastern and Gibson refer to Exhibit B, which was a summary spreadsheet prepared by Kopp of all costs and income from the backgrounding program. They also cite Exhibits C and D as the supporting documentation that Kopp used to create the spreadsheet. In an attempt to review these exhibits, we found that they are not included in the Appellants Appendix, as required by Appellate Rule 49(A)(2)(h). We also note that the court reporter did not index the Exhibit Binder as required by Appellate Rule 29(A). As a result, we could not always locate or review the exhibits referred to by Appellants. We remind counsel and the court reporter to comply with the cited rules, which are necessary to facilitate our review of issues on appeal.

Kopp's and Tate's testimony not credible. Yet again, Eastern and Gibson ask us to reweigh the evidence. We will not do so. See Bowyer, 882 N.E.2d at 761.

Issue Four: Unconscionability

On cross-appeal, Day contends that the trial court erred when it concluded that the Pasture Contracts were not unconscionable. We note initially that the Pasture Contracts contain the following choice-of-law provision: "THIS AGREEMENT SHALL BE GOVERNED BY THE LAWS OF THE COMMONWEALTH OF KENTUCKY." Appellee's App. at 36 (emphasis original). It is well-settled that contractual choice of law provisions govern only the substantive law of any claims arising out of the contract; the law of the forum state where the suit is filed still governs procedure. Smither v. Asset Acceptance, LLC, 919 N.E.2d 1153, 1157-58 (Ind. Ct. App. 2010). Thus, the substantive law of Kentucky applies in this case. See id. We also observe that Day is appealing from a negative judgment on this issue. As such, again, we will reverse only if the evidence is without conflict and all reasonable inferences to be drawn from the evidence lead to a conclusion other than that reached by the trial court. Aamco Dealers Adv. Pool, 746 N.E.2d at 386.

The Kentucky Court of Appeals has described the law on unconscionability in contracts as follows:

> A fundamental rule of contract law holds that, absent fraud in the inducement, a written agreement duly executed by the party to be held, who had an opportunity to read it, will be enforced according to its terms. The doctrine of unconscionability has developed as a narrow exception to this fundamental rule. The doctrine is used by the courts to police the excesses of certain parties who abuse their right to contract freely. It is directed against one-sided, oppressive and unfairly surprising contracts, and not

> against the consequences per se of uneven bargaining power or even a simple old-fashioned bad bargain.
>
> An unconscionable contract has been characterized as "one which no man in his senses, not under delusion, would make, on one hand, and which no fair and honest man would accept, on the other." Unconscionability determinations being inherently fact-sensitive, courts must address such claims on a case-by-case basis.

Conseco Fin. Servicing Corp. v. Wilder, 47 S.W.3d 335, 341-42 (Ky. Ct. App. 2001) (internal citations omitted). The court further distinguished between two types of unconscionability, procedural and substantive:

> Procedural, or "unfair surprise," unconscionability "pertains to the process by which an agreement is reached and the form of an agreement, including the use therein of fine print and convoluted or unclear language. . . . [It] involves, for example, 'material, risk-shifting' contractual terms which are not typically expected by the party who is being asked to 'assent' to them and often appear [] in the boilerplate of a printed form." The notion of procedural unconscionability thus includes many of the concerns raised by contracts of adhesion. Substantive unconscionability "refers to contractual terms that are unreasonably or grossly favorable to one side and to which the disfavored party does not assent."

Id. at 343 n.22 (internal quotation marks and citations omitted).

In his third-party complaint, Day alleged that the Pasture Contracts are unconscionable. In the Order, the trial court found in relevant part as follows:

> 28. Without doubt the contractual agreement under which Eastern Livestock/Gibson and Day operated was, and is, a contract decidedly crafted, created and formed to be of maximum benefit to Eastern Livestock/Gibson. It is a stringent agreement[,] one that leaves little bargaining power to Day or any other farmer who enters into such a bargain.
>
> Improvident, unconscionable, unreasonable and oppressive are terms that best describe the agreement. However, this court is not authorized to declare an agreement void merely because it may be unwise, or even foolish, in the absence of any mistake, fraud or oppression. Courts are not capable of weighing the wisdom of contracts nor balancing the benefits of

contractual agreements voluntarily entered into between competent parties. Absent strong law or transgression of serious public policy issues, parties are basically free to make whatever agreements they wish no matter how unwise those agreements appear to third parties.

A contract is not unenforceable on the grounds that the return is disproportionate to expenditures in time, money or effort.

29. The laws of the Commonwealth of Kentucky are specific and clear. The Commonwealth has long treated contracts as being almost sacrosanct. In Conseco Finance Serving Corp. v. Wilder [47 S.W.3d 335 (Ky. Ct. App. 2001), t]he Kentucky Court of Appeals re-stated their long standing rule:

> A fundamental rule of contract holds that, absent fraud in the inducement, a written agreement duly executed by the party to be held, who had an opportunity to read it, will be enforced according to its terms. [p.34] (Emphasis added)[.]

Day signed not ONE contract but NINETEEN contracts that are essentially duplicates. One would assume that he would have read at least one of the documents he signed.

30. Day pleads unconscionability. The case law of the Commonwealth establishes the legally accepted definition of unconscionable transactions as being a situation where a party is denied his right to "contract freely". The law forbids only one-sided oppressive and unfairly surprising contracts, not bad business deals. Louisville Bear Safety Service, Inc.[v. S. Cent. Bell Tel. Co., [571 S.W.2d 438 (Ky. Ct. App. 1978)]. Blacks Law Dictionary at page 1540[,] 8th Edition 2004[,] defines unconscionability as a contract "which no man in his senses, not under delusion, would make, on the one hand, and which no fair and honest man would accept on the other. The principal that a Court may refuse to enforce a contract that is unfair or oppressive because of over reaching [sic] contractual terms, terms that are unreasonably favorable to one party while precluding meaningful choice for the other party. Because unconscionability depends on circumstances at the time the contract is formed. . . . . ."

In Conseco, previously cited the Court addressed unconscionability:

> "Unconscionability has developed as a narrow exception to this narrow rule. The doctrine is used by the Courts to police the excesses of certain parties who abuse their right to contract freely. It is directed against one-sided, oppressive and unfairly surprising contracts, and not against the

> consequences per se of uneven bargaining power or even a simple old fashion[ed] bad bargain"

> Day sought out Eastern Livestock/Gibson and inquired about doing contractual work as a backgrounder. He was conversant with the nature of the relationship he was entering. He voluntarily signed NINETEEN identical contracts. He was not coerced, he was no[t] fraudulently induced and he can hardly say he was unfairly surprised by the terms and conditions in those nineteen separate agreements.
>
> 31. These contractual agreements are not palatable. However, under the case law of the Commonwealth of Kentucky they are legally enforceable and not deemed to be per-se unconscionable.

Appellee's App. at 24-26 (emphases original).

Day argument regarding unconscionability on appeal, in its entirety, is as follows:

> An unconscionable contract has been characterized as []one which no man in his senses, not under delusion, would make, on one hand, and which no fair and honest man would accept, on the other.

> Mortage Electronic Registration Systems, Inc. v. Abner, 260 S.W.3d 351, 354 (Ky. App. 2008).

> The Pasture Contracts entered between Day and Tom Gibson, given the critically important information withheld from Day, was such a contract. Whereas the language of paragraph 3.2 of the Pasture Contract would require Eastern Livestock/Thomas Gibson to exercise its best efforts to find the best prices, the undisclosed fact was that there was a complete disincentive for Gibson to do so. The better price Gibson "found", the more likely he was to reduce his profit. (See testimony of Michael Kopp, Transcript, pp. 211-215).

> It is respectfully requested that this Court find such an arrangement unconscionable as a matter of law.

Appellee's Brief at 14.

Day's argument does not pertain to the process by which the Pasture Contracts were reached or to the form of those contracts. See Conseco, 47 S.W.2d at 343 n.22.

Nor does the allegation refer to a term that is unreasonably or grossly favorable to one side and to which he did not assent. See id. Instead, Day alleges that Gibson did not, in fact, use his best efforts to obtain the best prices when selling the cattle in Day's backgrounding operation. Day's claim was borne out by the trial court's finding that "[t]he cattle are seldom if ever exposed to market prices and are often if not always used to provide market protection for Eastern Livestock or Gibson's future trading position." Appellee's App. at 23. But that claim is one for breach of contract, not unconscionability. As such, Day has not shown that the trial court erred when it denied his claim that the Pasture Contracts are unconscionable.

Issue Five: Prejudgment Interest

Finally, Day contends that the trial court erred when it denied his request for prejudgment interest. The longstanding rule in Kentucky is that prejudgment interest is awarded as a matter of right on a liquidated demand and is a matter within the discretion of the trial court or jury on unliquidated demands. 3D Enters. Contr. Corp. v Louisville & Jefferson County Metro. Sewer Dist., 174 S.W.2d 440, 450 (Ky. 2005) (citing Nucor Corp. v. General Electric Co., 812 S.W.2d 136, 141 (Ky. 1991)). Liquidated damages are defined as "an amount contractually stipulated as a reasonable estimation of actual damages to be recovered by one party if the other party breaches." BLACK'S LAW DICTIONARY 395 (7th Ed. 1999). Similarly, unliquidated damages are defined as damages "that have been established by a verdict or award but cannot be determined by a fixed formula, so they are left to the discretion of the judge or jury." Id.

Day argues that he is entitled to prejudgment interest as a matter of law because damages for the claims on which he prevailed, with the exception of the missing cattle claim, are liquidated. While Day is correct that prejudgment interest is awarded as a matter of law where damages are liquidated, we cannot agree that the damages awarded in this case are liquidated. Day prevailed in his claims to recover beef promotion assessment, Hartley feed bill, trucking charges, Hedge Fund payments, and commissions charged to him in the backgrounding operation. To compute the damages for those claims, the trial court was required to review the exhibits, extract the line items from the exhibits, and total them. While the process was not a difficult one, the process required proof of the damages sustained and exercise of the trial court's discretion in weighing that evidence. The damages were not contractually stipulated or fixed by a formula. Thus, the damages for those items were unliquidated.

Day's sole argument is that the damages in this case are liquidated. Day has not argued that the trial court abused its discretion by refusing to award interest, only that he was entitled to interest as a matter of law. But, again, we have determined that the damages are unliquidated. And, again, in Kentucky the trial court has discretion whether to award prejudgment interest on unliquidated damages. 3D Enters., 174 S.W.2d at 450. Day has not shown or even argued that the denial of interest was an abuse of discretion. As such, Day's contention regarding prejudgment interest must fail.

Affirmed.

VAIDIK, J., and BROWN, J., concur.