





determine on remand, that is a 'due diligence' standard, a 'reasonable diligence' standard, or a standard defined by the express or implied terms of the lease agreement. Without definitive answers to these questions, the circuit court cannot determine whether the lease has been forfeited or abandoned. At this point in the litigation, there are no definitive answers to these disputed questions of fact, and the circuit court erred in granting a summary judgment for the plaintiff." *Nye*, 376 Ill. App. 3d at 443, 876 N.E.2d at 671.

¶ 9 Upon remand, the circuit court held a trial and entered a judgment in favor of plaintiff. The trial court stated that the appropriate standard was whether defendants exercised reasonable diligence to continue production and that defendants failed to meet this standard.

¶ 10 Defendants appeal.

¶ 11 ANALYSIS

¶ 12 Offers of Proof

¶ 13 Defendants contend that the trial court improperly denied requests to make offers of proof. The stress of defendants' argument is on an asserted misunderstanding of the law by the trial court. Although defendants characterize the trial court's refusals to accept offers of proof as numerous, they point to two particular rulings. A review of these rulings reveals that defendants were not prejudiced.

¶ 14 The assertion that the trial court misunderstood the law derives from the first example cited by defendants. Plaintiff testified in his case in chief. During cross-examination, plaintiff was asked by defense counsel to assume facts that defendants represented to the court would be proven in their case in chief—namely, plaintiff was asked to presume that the State had held an administrative hearing in February 2001 and that defendants were not notified of the hearing. Plaintiff was then asked the

following:

"Do you think it would be reasonable for [defendants] not to attend this administrative hearing that they never got notice of?"

¶ 15 Plaintiff's counsel objected. The trial court ruled that this question exceeded the scope of direct examination, was irrelevant, and invited speculation on a legal issue. In response to the court's ruling, defendants asked to make an offer of proof. At this point, plaintiff's counsel erroneously stated, "I don't think it's necessary to make offers of proof in our circuit courts."

¶ 16 The assertion by plaintiff's counsel is undoubtedly incorrect. As a general rule, a trial court's refusal to permit an offer of proof is error. *People ex rel. Department of Transportation v. Kotara, L.L.C.*, 379 Ill. App. 3d 276, 285, 884 N.E.2d 1235, 1243 (2008). In most instances, in order to preserve for appeal a ruling of inadmissibility, the overruled party must present an offer of proof. *People v. Thompkins*, 181 Ill. 2d 1, 2, 690 N.E.2d 984, 985 (1998). This requirement promotes informed deliberation at the trial and enables courts of review to evaluate the propriety of the exclusion. *Little v. Tuscola Stone Co.*, 234 Ill. App. 3d 726, 731, 600 N.E.2d 1270, 1274 (1992).

¶ 17 Nonetheless, the assertion that the trial court accepted the erroneous statement of law is dubious. Indeed, the trial court did not deny defendants an opportunity to develop the record. The court ruled that defendants could call plaintiff in their case in chief, and defendants failed to follow this line of inquiry when plaintiff was later called in their case.

¶ 18 In any event, an offer of proof was not necessary for this particular questioning. If an offer of proof is necessary for an informed decision, then the refusal to permit its making is error. *In re Marriage of Marcello*, 247 Ill. App. 3d 304, 313, 617 N.E.2d 289, 295 (1993). An offer of proof is not necessary where the

trial court clearly understood the nature and character of the evidence. *Dillon v. Evanston Hospital*, 199 Ill. 2d 483, 495, 771 N.E.2d 357, 365 (2002). In cases where the purpose and materiality was apparent on its face, the refusal of a trial to allow an offer of proof has been held not to be error. See, e.g., *In re Tasha L.-I.*, 383 Ill. App. 3d 45, 54, 890 N.E.2d 573, 581 (2008); *In re Marriage of Strauss*, 183 Ill. App. 3d 424, 428, 539 N.E.2d 808, 811 (1989); *In re Marriage of Passiales*, 144 Ill. App. 3d 629, 640, 494 N.E.2d 541, 550 (1986). In this instance, the nature and character of the evidence was clear, and the question invited speculation and was irrelevant and beyond the scope of direct examination.

¶ 19 Defendants claim that they also were denied an opportunity to make an offer of proof during the testimony of Robert Mool, legal counsel for the Illinois Department of Natural Resources. At the trial, Mool was represented by an assistant Illinois Attorney General, James Rammelkamp. Mool was called by defendants and was questioned about whether defendants received proper notice of administrative proceedings brought by the Department of Natural Resources. Mool was asked to explain the difference between the rules of evidence in civil court and those at administrative hearings. Mool was then asked whether he ever spoke to Tom Davis of the Illinois Attorney General's office about this case. Mool responded that he thought that any communication with Davis would be privileged. Defense counsel clarified that he was not asking about the contents of any conversation but, rather, when they occurred. Mool responded that he had spoken with Davis earlier in the day when he received a subpoena. Defendants' counsel then asked, "Why did you speak to Mr. Davis about this case?" Mool's counsel objected that this was privileged. Defendants' counsel responded as follows:

"[Attorney for Defendants:] I'm trying to find out whether it is privileged. The

answer of why he spoke will allow us to determine whether or not it is, in fact, privileged."

[The Court:] Sustained.

[Attorney for Defendants:] May I make an offer of proof on the subject?

[The Court:] No.

[Attorney for Defendants:] Thank you, Your Honor.

Your Honor, I move for a mistrial at this time. Your Honor has no discretion or authority to deny me an offer of proof. Denial of an offer of proof as has been previously argued to this court previously constitutes grounds of reversible error. At this point there is really no point in proceeding with this case in light of the numerous offers of proof that have been allowed. For that reason I would—disallowed. And for that reason I would move for a mistrial at this time.

[The Court:] The court believes that this information is privileged and I cannot allow that, and the motion for mistrial is denied.

[Attorney for Defendants:] Okay. And my motion for mistrial included the previous offers of proof that you denied me, not just this one.

[The Court:] Your motion for mistrial is denied."

¶ 20

Again, the context of the question revealed that any relevant answer was inadmissible. The trial court ruled that defendants were seeking privileged information. Defendants' arguments do not call this ruling into question. The question of why Mool talked to his attorney inherently asked for privileged information. Defense counsel did not respond in a manner that indicated how any relevant communication between Mool and his attorney could not be privileged. Instead, he called for a formal offer of proof to inquire about possible evidence. See *People v. Pelo*, 404 Ill. App. 3d 839, 875, 942 N.E.2d 463, 494 (2010) (discussing a

formal offer of proof and an informal report to the court). Notably, defense counsel did not explain how any such communication was not privileged, nor did he posit to the trial court any reason why an *in camera* review would be appropriate.

¶ 21 The privilege is necessary to allow clients to seek legal advice and engage in full discourse with counsel. *Illinois Emcasco Insurance Co. v. Nationwide Mutual Insurance Co.*, 393 Ill. App. 3d 782, 786, 913 N.E.2d 1102, 1105 (2009). Defense counsel's response that his inquiry was an attempt to find out whether the communications were privileged is insufficient to warrant further inquiry. See *O'Keefe v. Greenwald*, 214 Ill. App. 3d 926, 937, 574 N.E.2d 136, 143 (1991) (it is not permissible to use an offer of proof as a discovery tool for a case). Thus, this court need not address plaintiff's assertion that the context of the question reveals that defendants were seeking information that would also be barred by collateral estoppel. *Blair v. Bartelmay*, 151 Ill. App. 3d 17, 20, 502 N.E.2d 859, 861 (1986).

¶ 22 Jury Demand

¶ 23 Defendants also contend that they were denied a jury trial. The plain language of the Code of Civil Procedure (Code) controls the disposition of this issue. The Code provides as follows:

"§ 2–1105. Jury demand. (a) \*\*\* A defendant desirous of a trial by jury must file a demand therefor not later than the filing of his or her answer. Otherwise, the party waives a jury. If an action is filed seeking equitable relief and the court thereafter determines that one or more of the parties is or are entitled to a trial by jury, the plaintiff, within 3 days from the entry of such order by the court, or the defendant, within 6 days from the entry of such order by the court, may file his or her demand for trial by jury with the clerk of the court." 735 ILCS 5/2–1105(a) (West 2004).

¶ 24 Initially, defendants failed to meet the requirements for a jury trial in an action

seeking equitable relief. This action, filed in chancery, sought equitable relief. The plain language of the Code leaves to the discretion of the court the determination of whether to grant jury trial in actions seeking equitable relief. 735 ILCS 5/2–1105 (West 2004). Nothing suggests the trial court abused its discretion. Furthermore, the amendment of the complaint did not transfer the action, nor would it have removed discretion from the court.

¶ 25 Even if the action had not sought equitable relief, the demand would have been untimely. Defendants did not file a demand at the time of the filing of their answer. Plaintiff filed his complaint on February 28, 2005. On March 31, 2005, defendants filed a motion to dismiss. 735 ILCS 5/2–615 (West 2004). On May 31, 2005, defendants filed their answer, without a jury demand. By failing to make a jury demand in their answer, defendants waived their right to a jury trial.

¶ 26 Defendants attempt to equate their filing of a jury demand in response to the amendment of the complaint with the filing of a late forum *non conveniens* motion. This ignores the plain language of the Code. Moreover, defendants failed to present to the trial court, or on appeal, any good cause for the late demand or a lack of prejudice from granting a late motion. See *Baldassari v. Chelsa Development Group, Inc.*, 195 Ill. App. 3d 1073, 1077, 553 N.E.2d 98, 101 (1990).

¶ 27 Judgment as a Matter of Law

¶ 28 Defendants also contend that they were entitled to a judgment as a matter of law. They contend that plaintiff lacked standing because he never proved that he owned any interest in the property. First, defendants assert that plaintiff never proved that he ever owned the property. Plaintiff, however, testified that he inherited the property and supported this assertion with a transcript from probate proceedings and an affidavit regarding the heirship of Charles Stantz. Furthermore, plaintiff points out

that while stipulating to the affidavit of heirship, defense counsel stated, "I don't think the [d]efendants are disputing that [plaintiff] inherited the claimed interest from Mr. Stantz." Defendants next assert that any property interest plaintiff had was transferred to Kevin Maus. This did not deprive plaintiff of standing. Maus testified that the "top lease" was not to be effective until the prior lease was cancelled. Furthermore, an allegation of possession is irrelevant to the issue of nonproduction and the benefits to which plaintiff was entitled. *Belden v. Tri-Star Producing Co.*, 106 Ill. App. 3d 192, 200, 435 N.E.2d 927, 933 (1982).

¶ 29 Oil Production

¶ 30 Finally, defendants contend that the trial court erred by finding that the lease had terminated for a lack of production. Defendants assert that plaintiff never proved that the production of oil ceased as alleged in the complaint and that the trial court applied the wrong standard in determining whether the lease was terminated.

¶ 31 Defendants contend that the trial court improperly relied on *Gillespie v. Wagoner*, 28 Ill. 2d 217, 220, 190 N.E.2d 765, 767 (1963). *Gillespie* has long been recognized as the guiding precedent on the termination of an oil and gas lease under a habendum clause. *Belden*, 106 Ill. App. 3d at 205, 435 N.E.2d at 933; see *Dart v. Leavell*, 341 Ill. App. 3d 1091, 1096, 795 N.E.2d 310, 314 (2003); *Smith v. Duncan*, 230 Ill. App. 3d 164, 167, 595 N.E.2d 645, 647 (1992). *Gillespie* established the following:

" 'An oil-and-gas-lease may be abandoned by cessation of operations for an unreasonable length of time. \*\*\* There was abandonment in fact as well as in law. \*\*\* Cessation of operations for a considerable period of time, if unexplained, may be sufficient to warrant a declaration as a matter of law that an oil lease has been abandoned.'

We believe the proper rule to be that temporary cessation of production after the expiration of the primary term is not a cessation of production within the contemplation and meaning of the 'thereafter' clause if, in the light of all surrounding circumstances, reasonable diligence is being exercised by the lessee to continue production of oil or gas under the lease." *Gillespie v. Wagoner*, 28 Ill. 2d 217, 220, 190 N.E.2d 765, 767 (1963) (quoting *Spies v. De Mayo*, 396 Ill. 255, 274-75, 72 N.E.2d 316, 325 (1947)).

¶ 32 Defendants argue that contractual terms distinguish *Gillispie*. Similar to *Gillispie*, the lease contained a habendum clause. The lease provided that the agreement would remain in force "as long thereafter" as oil or gas was produced. *Gillespie*, 28 Ill. 2d at 220, 190 N.E.2d at 767. Defendants contend that *Gillispie* is distinct because it did not contain a provision similar to paragraph 9 of their lease, which excuses delay or interruption "as a result of any cause whatsoever beyond the control of the lessee." *Gillispie* is silent on whether the lease in that case contained such a provision, but defendants' reliance on this asserted distinction is misplaced. Paragraph 9 was irrelevant to the finding of the trial court. The court found that defendants "failed to show reasonable diligence to produce oil under the lease for a substantial period of time prior to their receiving a notice" from the Department of Natural Resources.

¶ 33 This finding was supported by the record. The trial court pointed to several pieces of evidence in its order. The plaintiff and other eyewitnesses testified that they did not observe any production activity and saw rods and tubing out and lying on the ground for a substantial period of time. In contrast, the trial court found that Stanley Leavell's description of production lacked credibility. Furthermore, the trial court pointed to the payment history for the electric bills showing that the power had been

disconnected on several occasions and field inspection reports from the Department of Natural Resources dated February 7, 2001, indicating that the wells had not been producing for more than two years.

¶ 34           Accordingly, the judgment of the circuit court is hereby affirmed.

¶ 35           Affirmed.