COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
NO. 2008 SC-000735-D

HAZARD COAL CORPORATION; WHITAKER COAL CORPORATION; PERRY COUNTY COAL CORPORATION; LOCUST GROVE, INC.; and TECO COAL CORPORATION — **APPELLANTS**

VS.

LARRY J. KNIGHT and EILEEN KNIGHT, his wife and, LARRY E. KNIGHT and MARY KNIGHT, his wife — **APPELLEES**

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BRIEF FOR APPELLANTS

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CERTIFICATE OF SERVICE

I, the undersigned attorney, do hereby certify that a true and correct copy of the foregoing was this day mailed, postage prepaid, to Ronald G. Polly, P.O. Box 786, Whitesburg, Kentucky 41858, Attorney for Appellees, Hon. William Engle, III, Judge, Perry Circuit Court, 545 Main Street, Hazard, Kentucky 41702, Mr. Samuel Givens, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601, and that ten originals have been mailed by United States Registered Mail to Ms. Susan Stokley Clary, Clerk, Kentucky Supreme Court, 209 Capital Building, 700 Capital Avenue, Frankfort, Kentucky 40601-3488, this the 5th day of January, 2010.

Charles J. Baird

CHARLES J. BAIRD

INTRODUCTION

At the conclusion of a Bench Trial, the Trial Court held that the Appellants herein had a "prescriptive easement" to use a coal haul road located on the Appellees' property. The Court of Appeals reversed the Trial Court and held that the Appellees were denied the right to a Jury Trial on the prescriptive easement issue.

STATEMENT CONCERNING ORAL ARGUMENT

The Appellants desire oral argument in this case because they believe oral argument would be helpful to the Court in deciding the issues presented. Neither the Trial Court nor the Court of Appeals addressed any of the other substantive arguments raised below by the Appellants , including the express easement and exclusive easement granting authority contained in the Severance Deed, which in and of themselves support a ruling in the Appellants' favor, and all of which present questions of law. (See numerical paragraph 8 in Trial Court's Conclusions of Law, Tab 3 hereof, and a similar statement made by the Court of Appeals on page 4 of its Opinion, Tab 1 hereof).

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

I. The Interest of the Parties.

The Appellees, Larry J. Knight, Eileen Knight, his wife, and Larry E. Knight and Nedra Knight, his wife, filed this action on September 2, 2002 alleging that the Appellants, Whitaker Coal Corporation, Hazard Coal Corporation, Perry County Coal Corporation, Locust Grove, Inc., and TECO Coal Corporation, had "wrongfully entered upon and mined coal and hauled other coal across the Plaintiffs' land.... without right, title, claim, interest or authority and without consent or permission from Plaintiffs, and thereby damaged, destroyed and wasted said land". (Record, hereinafter "R" p.1-6). The Appellants (the Defendants in the Trial Court) denied they trespassed on the Appellees' surface property and asserted they had the right to use the road pursuant to the rights and privileges granted to them in the "mineral severance deed" which granted the Appellants an easement to haul coal from other tracts over the Appellees' surface and also granted the Appellants "easement granting authority" with respect to the surface property. The Appellants also pleaded the affirmative defenses of champerty, estoppel, laches, statute of limitations, waiver and easement by prescription, as a complete bar to the claims asserted in the Complaint. (R. p.12-26).

There is no dispute among the parties regarding their title documents. (See the Statement of the Case in the Brief filed in the Court of Appeals by the Appellees herein). The Appellees are the owners of two contiguous tracts of surface property. Larry J. Knight and Eileen Knight obtained title to the first tract by deed dated November 6, 1987, and Larry E. Knight and Larry J. Knight obtained title to the second tract of surface

property by deed dated December 27, 1999. (Complaint numerical paragraph 8 R. p.3, Video Recording ("VR") 2/24/06 9:07:30 and 9:10:08).

The Appellants collectively are the owners of the minerals and all the rights and privileges granted in the severance deed which severed all the coal, minerals and mineral products located on and under a 121.51 acre tract of land (the "Severance Deed"). A copy of the Severance Deed is attached hereto in the Appendix as Tab 2. (VR:2/24/06; 9:32). There is no dispute that the Appellant, Hazard Coal Corporation ("HCC") is the owner of the minerals and the rights described in the Severance Deed and the Appellees' title to the surface property and HCC's title to the minerals described in the Severance Deed trace back to a "common source". (VR:2/24/06; 10:08:30, and see Findings of Fact entered by the Perry Circuit Court (the "Trial Court") on March 6, 2006 in numerical paragraphs 1, 2, 3 and 4 R. 389-390). A copy of the Findings of Fact, Conclusions of Law and Judgment entered by the Trial Court is attached hereto in the Appendix as Tab 3.

II. The Relevant Language in the Severance Deed and the Coal Lease.

The Severance Deed clearly and unambiguously grants to the Appellants the following rights:

> **[T]he exclusive rights-of-way for any and all Railroads and ways** and pipelines that may hereafter be located on said property by the "Grantee", its successors and assigns, under authority of said "Grantee" or assigns in, under, concerning or appurtenant to the hereinafter described tract of land, together with the right to enter upon said lands, use and operate the same, and the surface thereof and to make use of and for this purpose divert water courses thereon in any and every manner that might be deemed necessary or convenient for mining and removing therefrom, or otherwise utilizing the product of said minerals, and for the transportation therefrom of said articles, **and the right to use of such, as well as for the removal of the**

products taken out of any other land owned or hereafter acquired by the "Grantee". (Emphasis added)

During the 1960's, Elmer Whitaker and/or his affiliate companies, leased from HCC the coal underlying the subject property and other lands and commenced operations. In 1981, several properties were consolidated into a new coal lease to the Appellant, Whitaker Coal Corporation (WCC), and the coal lease specifically granted all the mining rights, easements and privileges, together with all the rights of ingress and egress upon, over and across the property described in the coal lease (the "Lease") and all rights necessary and convenient for mining, removing, transporting and shipping the coal mined pursuant to the Lease. (VR: 2/24/06; 10:42:16; also see Plaintiffs' Exhibit No. 19). The subject property was included within the Lease.

III. Testimony Concerning the Coal Haul Road.

1. Location of the Coal Haul Road.

The coal haul road (the "Road") which is the subject of this action is located along the bench of the No. 9 Coal Seam which was surfaced mined in the mid 1940's (VR: 2/24.06:10:52, and also see numerical paragraph 7 of the Trial Court's Findings of Fact R. p.390-391). The Road crosses surface properties owned by individuals and entities other than the Appellants (VR: 2/24/06:2:06). The portion of the Road which is located on the Appellees' surface is about "quarter of a mile" up the mountain and is not accessible from the lower levels of their property "without either climbing a cliff or going up Route 1096 and coming back down the Haul Road" (VR: 2/24/06:10:18:18). In order for the Appellants to access the portion of the Road on their property by using Route 1096, they have to travel across properties owned by others (VR: 2/24/06:2:05-2:07).

Kentucky Highway 1096 runs from the mouth of Fourseam Hollow all the way up the hollow to the top of the ridge which separates Fourseam Hollow on one side and Big Creek on the other side. Kentucky Highway 1096 then goes over the ridge and down Big Creek to Kentucky Highway 80 near the community of Avawam. The Appellees property is located on Fourseam Hollow. The next hollow downstream from Fourseam Hollow is Davidson Branch where there is located the "Davidson Branch Preparation Facility" which was originally constructed and operated by Whitaker Coal Corporation and which is presently owned and operated by the Appellant, Perry County Coal Corporation, and where for several decades there was previously located the "old Black Gold Tipple". (VR: 2/24/06: 10:40:50-10:42:00). The Road in question is approximately three (3) miles in length and begins at the mouth of Big Creek and goes up Big Creek to the top of Fourseam Mountain and then goes past Fourseam Hollow, goes over and past the Appellees' surface property and then goes down Davidson Branch to the Davidson Branch Preparation Facility. (VR: 2/24/06: 11:07-11:09).

All the above is very well stated by the Trial Court in numerical paragraphs 5 through 11 of its Findings of Fact. (R. p. 389-390 and Tab 3).

2. <u>Testimony of Elmer Whitaker Regarding Use and Construction of the Road.</u>

Mr. Elmer Whitaker is a current owner and President of the Appellant, HCC and was the former owner of the Appellant, Whitaker Coal Corporation (WCC), from the 1960s until 1983 when he sold WCC to another company in 1983. (VR: 2/24/06: 10:49:54; 10:51:08-10:51:30). Notwithstanding the sale, Mr. Whitaker continued to be in

charge of WCC until 1987, when he left the company all together. (VR: 2/24/06; 10:51:50).

Mr. Whitaker testified that he was familiar with the Road and that his mines had continuously used the Road from 1967 to 1987. (VR: 2/24/06: 11:07-11:09). Whitaker stated that during this time "We maintained it from the time we started hauling across the hill, we kept a grader, we kept it graded, we kept it drained, we put in drain pipes, we rebuilt the bridge that goes across Big Creek down there, and we always gravelled it at least once a year, and then we kept it watered for dust on the other days". (VR: 2/24/06: 11:10:00-11:10:40). Whitaker stated that the "state never did do anything to it, and we kept it all the way from Route 80 all the up to the top of Fourseam Mountain". (VR: 2/24/06: 11:10:40-11:11:).

Whitaker stated that between 1967 until 1987, when he left WCC, "we spent-we usually, we put about $100,000.00 worth of gravel on it every year - white gravel". (VR: 2/24/06; 11:06).

In 1965 or 1966 Mr. Whitaker started using the Road from the intersection of Route 1096 for the primary purpose of supplying the old Black Gold Mine (or EAS Mine) located in Davidson Branch (VR: 2/24/06;10:56). At that time what is now Kentucky Route 15 was not constructed. The only access to Davidson Branch and the "Black Gold Tipple" and the "Black Gold Mine", was to either ford the river or go across the railroad tracks and go to Fourseam and travel back to Davidson Branch along the railroad tracks and through the Golf Course (VR: 2/24/06:10:54:11), which according to Mr. Whitaker was a very poor way to get supplies to that mine. (VR: 2/24/06:10:56:24). Beginning in 1967 Mr. Whitaker testified that he put in a mine known as the "Perry

County Coal Mine" on Riles Branch of Big Creek (VR: 2/24/06:10:55:21), and at that time Mr. Whitaker started maintaining Route 1096 from the top of Fourseam Mountain, down Big Creek to Route 80 at Avawam. (VR: 2/24/06:10:55:45).

After the installation of the Perry County Coal Mine in 1967, Mr. Whitaker testified that they started using the Road not only to supply his mines but also to haul coal from mines on Big Creek to the Black Gold Tipple located in Davidson Branch "day and night" (VR: 2/24/06; 10:57:24 and 10:58:45). In fact, Mr. Whitaker recalled one of the several trucks used to transport coal from Big Creek to Davidson Branch was a Mack truck he bought new (reason he remembered it) which he called the Number 7 Truck (VR: 2/24/06; 10:58:45). The Number 7 truck hauled coal from the Perry County Coal Mine and the King Block Mine also located on Big Creek, across the Road to the tipple in Davidson Branch (VR: 2/24/06; 10:57:24; 10:59:00). The Perry County Coal Mine was in operation for 30 years and didn't work out until after he left. (VR: 2/24/06; 10:59:25).

From 1967 until he left in 1987, Mr. Whitaker stated that there was coal being transported on the Road nearly all the time. Mr. Whitaker stated that in 1967 "We started using it (the Road) pretty heavy". (VR: 2/24/06; 10:57:30). He stated "We always had 6 or 8 different mines, at least that many, and a lot of times we had 10 or 12 different jobs" on Big Creek. The coal from these mines was trucked from the Big Creek side of Fourseam Mountain across the Road to Davidson Branch and some was trucked in the other direction. (VR: 2/24/06; 11:01:50-11:03:33). Whitaker stated there were 49 mines that were operated by Ray Coal Company which he owned and they were "scattered all up and down Big Creek, Ben's Branch of Big Creek, Riles Branch of Big Creek and the next

branch down below Riles Branch", and much of this the coal was trucked to Davidson Branch. (VR: 2/24/06; 11:01-11:03).

In 1976 Mr. Whitaker constructed the Davidson Branch Coal Preparation Plant in Davidson Branch (VR: 2/24/06; 10:53:17). After the Davidson Branch Preparation Plant was constructed, a much greater volume of coal started going across the Road to the preparation facility. (VR: 2/24/06; 11:04:19).

Mr. Whitaker testified that he used both ten wheel trucks and tractor trailer trucks to haul coal across the Road (VR: 2/24/06; 11:34:23). The coal came from a number of deep, surface and auger mines operated by Whitaker on the Big Creek side of Fourseam Mountain (VR: 2/24/06; 11:06:30), and from Honey Branch (VR: 2/24/06; 11:05:49).

In addition to hauling coal across the Road, Mr. Whitaker testified that it was used for whatever purposes they needed to use it, including to check ventilation fans and an emergency personnel hoist located in Eversole Branch, for employees to access the various mines, to transport supplies and mine timbers and for all purposes incidental to their mining operations. (VR: 2/24/06; 11:21:23). Mr. Whitaker also maintained the Road during the period he was associated with Whitaker, which ended in 1987. Mr. Whitaker recalled they used a rock crusher which was purchased in connection with surface mining to crush sandstone that was placed on the Road (VR: 2/24/06; 11:23:38). Mr. Whitaker also remembered personally running a road grader on the Road in order to maintain the Road (VR: 2/24/06; 11:24:22).

The above described continuous and uninterrupted operations on the Road began in 1965 or 1966 (VR:2/25/06; 10:56:24), and continued until Mr. Whitaker was no longer associated with the Appellant, WCC, in 1987. (VR: 2/24/06:11:06:38).

3. Testimony of Rex Napier.

In addition to the testimony of Mr. Whitaker, Rex Napier, an employee of the Appellant, Perry County Coal Corporation (PCC), testified on behalf of the Appellants (VR: 2/24/06; 10:40:24). Mr. Napier testified he has been associated with Whitaker's property since 1982, and had direct knowledge of the Road since 1982. (VR: 2/24/06; 11:42:54), (VR: 2/24/06; 11:40:56).

a. Napier's Knowledge and Testimony Regarding the Usage of the Road.

Rex Napier testified that he personally travelled the Road from 1982 through the present date (VR: 2/24/06; 11:45:15). Napier stated the Road has been used continuously for all mining purposes since 1982 and is in the same condition and the same location as it was in 1982. (VR: 2/24/06; 11:43:30; VR: 2/24/06; 2:07:40).

Mr. Napier testified that he personally travelled the Road from 1982 to the present date to perform various job related duties (VR: 2/24/06; 11:45:15). Specifically, Mr. Napier testified that he travelled the Road on an average of once or twice a week from 1982 until 1994-1995 and then two or three times a week since 1994-1995 to perform reviews required by various mining laws and to ensure compliance with those laws. (VR: 2/24/06; 11:45:32). At no time was his use of the Road interrupted. (VR: 2/24/06; 11:46:23).

Mr. Napier testified regarding coal tonnage records showing how many tons of coal the Appellant, WCC, transported across the Road from 1974 to 2005 (VR: 2/24/06; 2:03:44). Mr. Napier testified that the tonnage records introduced as PCC Exhibit #15 showed all mining operations on going at the respective times and the leases they were coming from (VR: 2/24/06; 1:55:35). For example, Mr. Napier testified that the tonnage

records showed in excess of 275,000 clean tons of coal was hauled across the Road to the Davidson Branch Preparation Plant during the years 1982, 1983 and 1984 (VR: 2/24/06; 1:57:44). Since the tonnage records only showed clean tons, the actual tons of raw coal hauled across the Road would have been greater (VR: 2/24/06; 2:00:36). The tonnage records introduced by Appellants supported Mr. Whitaker's testimony because they showed tons of coal coming from the mines on Big Creek such as the Perry County Coal Mine (VR: 2/24/06; 1:57:56 and 1:57:17). Based on his review of the tonnage records and his personal knowledge of the mining operations since 1982, Mr. Napier testified that on average, approximately 100,00 tons of coal per year was hauled over the Road for the years included in the tonnage records (VR: 2/24/06; 2:03:44 and 2:04:31), which would have resulted in a lot of truck traffic across the Road (VR: 2/24/06; 2:01:29).

b. Napier's Testimony Regarding Permitting Actions.

Mr. Napier testified the Road is permitted by the applicable State regulatory agencies for transporting coal and hauling refuse to a refuse site. Napier stated the Road has been permitted by the State since around 1978, when the "Interim Permitting Program" began. (VR: 2/24/06; 1:54:13 and 1:26:33). The Interim Permitting Program was the first time permits were required for conducting mining operations and was required after the enactment of the Untied States Surface Mine Reclamation and Control Act of 1977. (VR: 2/24/06; 11:46:45).

In 1984 the Road was included in the Permanent Program Permit, which transitioned the permit from the Interim Permitting Program after the Commonwealth of Kentucky gained primary jurisdiction over the permitting process. (VR: 2/24/06;

11:47:08). The Road and the Appellees' property have been the subject of a permit since 1978 through the present date. (VR: 2/24/06; 11:46:31-1:54:44).

4. Appellees' Testimony Regarding the Road.

a. Larry J. Knight.

The Appellant, Larry J. Knight, stated that he has been familiar with the Road since 1958, since he was eleven years of age. (VR: 2/24/06; 9:16). He stated his initial recollection of the Road was when coal was being removed from the property in the late 1950's, (VR: 2/24/06; 9:16:10 and 9:16:55), and he stated at that time no coal was being mined from other tracts which was hauled over what now is his surface property.

Knight acknowledged the coal was hauled over the Road to the "Fourseam Coal Tipple" in Davidson Branch which he stated burned "more than twenty years ago". (VR: 2/24/06; 9:17:30). The Fourseam Tipple is the same as the Black Gold Tipple described by Mr. Whitaker. Knight stated that after the mining took place in the 1950's coal was not hauled over the Road until about 1988. (VR: 2/24/06; 9:18:00).

Mr. Knight stated he had no personal knowledge of any coal being mined by WCC starting about 1967 that was hauled over the Road. (VR: 2/24/06; 10:19). He conceded that coal was hauled to the Fourseam Tipple over what is now his property which was mined from at least two other properties. (VR: 2/24/06; 10:06:00-10:06-18).

While Mr. Elmer Whitaker, the owner of WCC, testified that he constructed the Davidson Branch Preparation Facility in 1976, the Appellee, Larry J. Knight, was asked by his counsel on two separate occasions when the preparation facility was built and he testified "in the mid 80's". (VR: 2/24/06; 9:18:40). Knight was asked by his counsel,

"Could it have been in the 70's?", and he responded, "I don't think". (VR: 2/24/06: 9:18:50).

Knight stated after the Davidson Branch Preparation Facility was built (according to him in the mid 1980's), coal was hauled for "several years", and until "1988" along Kentucky Highway 15 to the Davidson Branch Preparation Facility rather than using the Road.

He stated that "from the time the wash plant was built up until 1988" there was no coal being hauled across his property by the Appellants. (VR: 2/24/06; 9:19:30). He stated that in 1988 "they began filling the road in with crushed stone and widening it and building it up higher" and thereafter a coal refuse line was also installed. (VR: 2/24/06; 9:20:30). He stated that the Road was used to haul coal mined from other properties across his property and to the Davidson Branch Preparation Facility and that has occurred continuously since 1988. (VR: 2/24/06; 9:33).

b. Larry E. Knight.

The Appellant, Larry E. Knight, the son of Larry J. Knight, stated that he first objected to the state regulatory authorities regarding the use of the Road in 1988. (VR: 2/24/06; 10:35). He admitted that prior to him purchasing the property in 1999 he had knowledge that the Road was being used by the Appellants. (VR: 2/24/06; 10:39).

IV. Proceedings in the Trial Court.

The Appellants and Appellees each filed Motions for Summary Judgment in the Trial Court which were denied. The Appellants argued the Severance Deed granted to HCC the exclusive right to grant easements across the property. The Appellants also argued that the Severance Deed granted to HCC, its successors and assigns, an express

easement to transport coal when it granted the Grantee therein "the right to use of such, as well as for the removal of products taken out of any other land owned or hereafter acquired by the grantee".

At a Pretrial Conference on February 20, 2006, the Trial Court advised the parties and their counsel that it would conduct a Bench Trial on February 24, 2006, on the construction of the Severance Deed and the "usage" of the Road. The specifics of what was ordered by the Trial Court at the Pretrial Conference regarding the Trial will be discussed later herein. The Appellees made no objection to the Court's order.

At the conclusion of the Bench Trial, which included **all** evidence available to the parties, except evidence relating to damages, the Trial Court determined that the evidence showed continuous and uninterrupted use by the Appellants for the required statutory period of time, which use had occurred even *prior* to the Appellees obtaining title to their surface property. The Trial Court then found that the Appellants had a "prescriptive easement to transport coal, personnel, machinery, supplies, refuse and all other things normally associated with the mining of coal along that portion of the Disputed Haul Road that is located within the Knight Surface Property".

The Trial Court did not decide whether the Severance Deed granted the Appellants "exclusive rights of way" or an express easement to haul coal from other properties. The Trial Court also did not address the equitable defenses of champerty, estoppel or laches. All of the above arguments were clearly issues for the Court to decide, without a jury. The Trial Court stated as follows regarding why it did not consider the above arguments made by the Appellants: (See Conclusions of Law No. 8, R. p. 393, Tab 3, p. 5).

> **In addition to their prescriptive easement argument, the Defendants asserted a number of other defenses including the express grant of the easement granting power, express grant of an easement, laches and champerty but, since the Court has ruled in favor of the Defendants on their prescriptive easement, there is no reason for the Court to reach, and the Court does not decide, whether any or all of said defenses were viable or correct.** (Emphasis added)

The Knights, the Appellants below and the Appellees herein, appealed the Trial Court's Findings of Fact, Conclusions of Law and Judgment.

V. Opinion by the Kentucky Court of Appeals Reversing and Remanding.

In the Court of Appeals, the Appellees argued they had been denied the right to trial by jury by the Trial Court conducting a Bench Trial. Appellants argued multiple grounds to justify affirming the Trial Court's decision including (i) Appellees waived trial by jury by acquiescence to and participation in the Bench Trial without objection; and (ii) There were substantial other reasons, not relied upon by the Trial Court, which supported its decision. The Court of Appeals reversed the decision of the Trial Court and concluded that the Trial Court had "erred in denying Appellants (the Knights/Appellees herein) the right to a trial by jury". (Parenthetical added). The Court of Appeals' Opinion Reversing and Remanding is attached hereto in Tab 1. The Court of Appeals further stated that the Appellees had demanded a jury trial and there was "no dispute that the Appellants (Appellees herein) neither withdrew their demand, nor consented to the bench trial by written or oral stipulation, we find they did not waive their constitutional right to a jury trial on all issues. CR 38.04; CR 39.01" (Parenthetical added; See Tab 1, p. 7).

Even though the issues raised by the Appellants which they contend supported the Trial Court's decision, were legal issues for the Court and not a jury (express easement, easement granting authority, etc.), the Court of Appeals did not consider them **"because we conclude that the Trial Court improperly denied Appellants (Appellees herein) a trial by jury, we necessarily do not reach the merits of the easement issue"**. (Parenthetical and emphasis added; see Court of Appeals' Opinion, Appendix Tab 1, p. 4).

ARGUMENTS

I. The Court of Appeals erred in ruling that the Appellees did not waive their right to a jury trial.

At the Pretrial Conference the Trial Court announced that a Bench Trial would be conducted on the construction of the Severance Deed and **the usage of the Road**. The Court made it very clear that it wanted to hear **"all"** evidence on the use of the Road, and specifically stated as follows:

> **Put on every bit of proof you've got regarding the usage** and regarding the proof of construction of the Deed and I will do my best to decide at the conclusion of the day or the conclusion of the Trial. (Emphasis added; (VR: 2/20/06; 3:21:45).

The Trial Court also made it very clear at the Pretrial Conference that depending on how it ruled at the conclusion of the Bench Trial, that a Jury Trial on the issue of "damages", may or may not be necessary. Specifically the Court stated as follows:

> If I decide one way then we will have a Jury Trial on damages. If I decide the other way then we won't. (VR: 2/20/06; 3:20:10)

The Trial Court, on more than one occasion during the Pretrial Conference stated that it intended to decide at the conclusion of the Bench Trial all issues regarding the usage of the Road and the construction of the Severance Deed. The Trial Court made the following additional statements, which are not subject to interpretation:

> Do you all understand what I've done here today and what we are going to do? **Put on every bit of proof**, like I say Mr. Polly. I may decide against you, I may decide against them, but **I'm going to hear every bit of the evidence.** (Emphasis added; VR: 2/20/06; 3:22:20).
>
> We will resume at 9:00 o'clock Friday morning to have all your proof in. **It will be a Bench Trial regarding the construction of the Deed and the usage**. (Emphasis added; VR: 2/20/06; 3:22:45).

There is no doubt that each party and their counsel knew that the Court was going to have a Bench Trial on every single issue, except damages. One of the issues was whether the Appellants had a right to use the Road pursuant to a prescriptive easement resulting from decades of hauling coal, refuse, supplies, employees, etc. over the Road.

Both parties presented evidence at the Bench Trial relating to the prescriptive easement issue and the uses of the Road. The Appellees obviously knew the prescriptive easement issue was going to be tried by the Trial Court, since the entire focus by their counsel's questioning was related to the usage of the Road. Why did the Appellants focus substantially all their testimony at trial on the "usage" issue if they didn't believe the Trial Court was trying that issue? The Appellants obviously knew that the most significant issue to be tried by the Trial Court at the Bench Trial was the prescriptive easement issue since substantially all of their testimony concerned the usage of the Road.

The Appellees did not object to the Trial Court's ruling at the Pretrial Conference scheduling a Bench Trial on all issues, except damages. At the commencement of the

Bench Trial, the Respondents' counsel announced ready for Trial when questioned by the Trial Court, called witnesses and participated in the Bench Trial, all without objection.

The Appellees, in their Motion to Reconsider filed with the Trial Court, very candidly admitted that they were provided with the opportunity to present and did in fact present evidence on all issues in the case, except damages. (R. p. 396-400).

If the Trial Court had determined there was not a prescriptive easement and therefore ruled in favor of the Appellees, the Trial Court made it very clear that the only remaining task would be to have a "Jury Trial on damages". (VR: 2/20/06; 3:20:10).

The Appellants state that the above actions and/or inactions by the Appellees in the Trial Court constituted a waiver of their right to a Jury Trial.

The case of **Equitable Life Assurance Society of the United States v. Taylor**, 637 S.W.2d 663 (Ky. 1982), (overruled on other grounds) concerned the "constitutionally mandated jury determination of damages". The Kentucky Court of Appeals in **Equitable** determined that a Plaintiff may waive its right to a Jury Trial where (i) the Plaintiff did not object or challenge the Order setting the matter for Bench Trial and (ii) the Plaintiff participated, without objection, in the Bench Trial. The Court held as follows:

> Allegiance must be given to the time-worn but still vital axiom that a Court speaks through its records. There is not an iota of evidence in the record before this Court to indicate that such should not apply in this instance. The conclusion must be reached that Plaintiff below affirmatively waived its right to jury determination of damages. Id. 665.

In discussing the "constitutional right to a jury trial" the Court in **Equitable** stated as follows:

> Constitutional rights are assurances given to each citizen of this Commonwealth that his interests will not be affected

> without specifically delineated safeguards. These rights are personal to each of us and cannot be circumvented or cast aside through the whims or caprices or others. However, this is not to say that should one wish not to avail himself of the protection which they offer, that he may not of his own volition choose affirmatively to deny their application. To state otherwise would be to reject the essence of freedom of choice upon which this nation was founded. Id.

Clearly the Appellees affirmatively waived their right to a Jury Trial regarding the prescriptive easement issue and the Court of Appeals erred in its Opinion to the contrary.

The Appellees obviously knew that the prescriptive easement issue would be one of the matters decided by the Trial Court, without a jury. They did not object to the same and therefore placed their bet with the Trial Court. It was only when things did not go the Appellees' way, that they objected. What the Court of Appeals did in its Opinion was to allow the Appellees to keep silent before the Trial Court on the issue of a Bench Trial, which allowed them to determine the outcome. When the outcome was adverse to the Appellees, they then objected to the fact that they did not receive a Jury Trial regarding the issue of whether the Appellants had a right to use the Road as a result of a prescriptive easement. The Court of Appeals has allowed the Appellees, by remaining silent, to have a "second bite at the apple".

The Court in the case of **Jones v. Gardner**, 262 Ky. 812, 91 S.W. 2d 520, 523 (Ky. 1936), established the following principle which is applicable to the Appellees' conduct in this case:

> It has often been held by this court that a party taken by surprise during the trial must act promptly and will not be allowed to take a chance of getting a verdict, and then if he loses demand a new trial.

The Appellants state that that is exactly what the Court of Appeals has allowed the Appellees to do. They never made one objection to the Bench Trial on all issues, except damages. Not at the Pretrial Conference, not at the Trial. It was only after the Trial Court ruled in favor of the Appellants that the Appellees stated that they were wronged as a result of not having a Jury Trial on the issue pertaining to the prescriptive easement.

II. The Court of Appeals erred by disregarding other valid reasons raised by the Appellants, which were not relied on by the Trial Court, but which supported its decision.

Neither the Trial Court or the Court of Appeals chose to discuss the other reasons set forth by the Appellants in support of their position that they had the right to use the Road. The Trial Court ruled solely on the issue of prescriptive easement and therefore did not find it necessary to decide "whether any or all" of the additional issues raised by the Appellants "were viable or correct". The Trial Court specifically referred to the Appellants' position that they possessed the "express grant of an easement" and also possessed the "express grant of easement granting power". The Appellants raised these legal issues once again in the Court of Appeals which refused to consider them "because we conclude that the Trial Court improperly denied the Appellants a trial by jury, we necessarily do not reach the merits of the easement issue".

The Court of Appeals disregarded controlling authority which requires a reviewing Court to affirm a Trial Court's decision on other grounds, even if the Trial Court's decision was based on an incorrect ground or reason. The Supreme Court in

Haddad v. Louisville Gas & Electric Company, 449 S.W. 2d, 916 (Ky. 1969), held as follows:

> It is familiar law, however, that a correct decision will not be disturbed on appeal merely because it was based on an incorrect ground or reason, and this is especially so where the correct grounds were presented to the trial court but not acted upon by it.

There are numerous other Kentucky cases which state exactly the same. The Court in **Sloan v. Jewel Ridge Coal Corporation**, 347 S.W. 2d 504, 506 (Ky. 1961), held that "It is a rule of appellant practice of general recognition that if a judgment is sustainable on any ground, other grounds are immaterial".

The Trial Court reached the correct decision that the Appellants had the right to use the Road. The Appellants agree with the Trial Court's reasoning, but state that the Trial Court and the Court of Appeals could have reached the same conclusion for two correct and significant reasons which are as follows:

> **1. The Severance Deed granted to the Appellants an easement over the Appellees' surface property to haul coal from other tracts.**

The Court is requested to closely review the language in the Severance Deed which is quoted in the Statement of the Case on pages 2-3 herein and which can also be found on Page 1 of the Severance Deed which is attached in Appendix Tab 2. The following language grants the Appellants an easement over the Appellees' surface property to haul coal from other tracts:

> [A]nd for the transportation thereof of said articles, **and the right to use of such, as well as for the removal of the products taken out of any other land owned or hereafter acquired by the "Grantee"**. (Emphasis added).

In **Pike-Floyd Coal Co. v. Nunnery**, 24 S.W.2d 614 (Ky. 1929), the Court of Appeals construed a severance deed which contained the following language:

> **[A]nd the right to use of such as well as for the removal of the products taken out of any other lands, owned or hereafter acquired by the Grantee, his heirs or representatives, its successors or assigns...**

The Court will note that the language contained in the deed interpreted by the Court in **Pike-Floyd Coal** is the **exact language as contained in the Severance Deed in this case**.

The Court in **Pike-Floyd Coal** interpreted the above language as granting to the grantee in the severance deed **an easement to permit the transportation of coal removed from other properties and hauled over the property described in the severance deed**. The Court in **Pike-Floyd Coal** stated as follows:

> As we construe the contract, it confers the right on Appellant to use the lands of Appellees to transport its minerals taken from other lands, that is, **it has an easement over the lands of Appellees which may be used in connection with the transportation of mineral products from other lands.** (Emphasis added; *Id. at 615.*)

The language in the Severance Deed grants to the Appellants the right to haul coal over the Appellees' surface which was mined from other properties. For some reason, the Trial Court decided to decide the case on the prescriptive easement issue and chose not to consider or discuss the express easement granted in the Severance Deed. The Court of Appeals totally ignored this issue only because the Trial Court did not grant the Appellees a jury trial on the prescriptive easement issue. The Appellants have always maintained, and they believe it is crystal clear, that they are entitled to use the Road over the Appellees' surface property pursuant to the unambiguous easement granted to them in the Severance Deed.

2. The Severance Deed granted "exclusive rights-of-way" for all railroads and ways across the subject property.

The Severance Deed granted the mineral grantee **"the exclusive rights of way for any and all railroads and ways and pipe lines that may hereafter be located on said property by the 'Grantee' its successors or assigns...".** On numerous occasions Kentucky Courts have interpreted the meaning of the grant of "exclusive rights of way" as conveying to the grantee of the mineral estate (the Appellant HCC herein) the easement granting power with respect to the surface overlying the mineral estate. The most recent case to uphold the principle was **Columbia Gas Transmission Corporation v. Consol of Kentucky, Inc.**, 15 S.W.3rd 727 (Ky. 2000).

The **Columbia Gas** case cites three cases previously decided by this Court, **Cornett v. Louisville & Nashville Co.**, 182 S.W.2d 230 (Ky. 1944), **Louisville & N.R.P. Co., v. Quillen,** 242 S.W.2d 95 (Ky. 1951) and **Elk Horn Coal Corp. v. Kentucky-West Virginia Gas Co.**, 317 S.W.2d 472 (Ky. 1957) and clearly demonstrates the continued vitality and viability of those cases. In each of the cases, the Court determined that the clause granting the mineral grantee the "exclusive rights of way" actually granted the exclusive easement granting power with respect to the surface estate overlying the mineral. The Court in **Columbia Gas** summarized the holdings in **Columbia Gas**, **Cornett**, **Quillen** and **Elk Horn Coal** when it stated as follows:

> The Cornett and Quillen cases clearly uphold the claim of the coal corporation here that the mineral deeds gave it complete control over rights of way, and negative the contention of the gas company that the mineral deeds conveyed only appurtenant easements.
>
> The simple answer to this argument is, that the deed did not purport to convey an easement, but rather

> ownership of the surface as concerned future grants of easements. The grantee did not receive a mere easement, but the easement-granting power.
>
> As hereinabove indicated in this opinion, we think the coal corporation had complete ownership of the surface as concerns right of way uses, and was not limited to appurtenant easements... (**Columbia Gas, supra**, 15 S.W.3rd 727, 729-730).

Clearly the Severance Deed grants "the exclusive rights-of-way for any and all Railroads and ways and pipelines that may hereafter be located on said property by the "Grantee", its successors or assigns under authority of said "Grantee", in, under, concerning or appurtenant to the hereinafter described tract of land...". The language is nearly identical to the language set forth in the cases cited herein and grants to HCC, the owner of the mineral estate, the right to grant easements over the Appellees' surface property. In the Lease from HCC to WCC, WCC was clearly granted an easement to use the Road for the exact purposes for which it has been used for several decades.

III. The Court of Appeals erred by not concluding that the Appellees presented insufficient evidence of probative value to rebut the existence of a prescriptive easement.

The Trial Court, the parties and their counsel were directed to submit "all" of their evidence at the Bench Trial concerning the usage of the Road. The Trial Court, after conducting the Bench Trial and hearing all of such evidence, determined by that Appellants met the requirements for obtaining a prescriptive easement **"prior to the time that the Plaintiffs purchased any of their property"**. (Emphasis added). The record contains no evidence from the Appellees of a probative nature to rebut the finding that a prescriptive easement existed prior to the Appellees obtaining title to their property.

The finding by the Trial Court was as if the Court had granted a Directed Verdict after hearing "all" of the evidence and decided that there was insufficient evidence of probative value to rebut the Appellants' testimony regarding the prescriptive easement. In reality, the Trial Court, after listening to all the evidence presented by the parties, merely exercised one of its judicial functions and determined that the evidence submitted by the Appellees on the use of the Road **prior to the Appellees' purchasing of its property, lacked sufficient probative value and determined that the Appellants, based on the evidence presented and as a matter of law, had acquired a prescriptive easement.**

The Trial Court has a duty to weigh the evidence, and when there is no evidence of probative value to support the opposite result, the Trial Court could not have allowed a jury to consider evidence of insufficient probative value as to permit a verdict in favor of the Appellees. **Gibbs v. Wickersham**, 133 S.W.3rd 494 (Ky. App. 2004).

Even if the Trial Court allowed the case to be heard by a jury, based on all the evidence presented, the Appellants would have been entitled to a Directed Verdict at the close of the evidence, making any error in failing to grant a Jury Trial harmless. **Spellman v. Fiscal Court**, 574 S.W.2d 342 (Ky. App.1978).

CONCLUSION

The Appellants, Hazard Coal Corporation, Whitaker Coal Corporation, Perry County Coal Corporation, Locust Grove, Inc. and TECO Coal Corporation request that the Court affirm the Findings of Fact, Conclusions of Law and Judgment entered by the Perry Circuit Court, either for the reasons set forth therein or for the foregoing reasons set forth herein.

Respectfully Submitted,

SIGNED ON BEHALF OF ALL
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