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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REPLY BRIEF FOR APPELLANTS

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CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the Reply Brief for Appellants has been served by first class mail, postage prepaid, to Hon. 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 24th day of March, 2010.

Charles J. Baird

CHARLES J. BAIRD

INTRODUCTION

After reviewing the Appellees' Brief, it is apparent that there were several statements made therein which are not contained in the Record, contained an incorrect interpretation of the language of the Severance Deed and the case of **Pike-Floyd Coal Co. v. Nunnery**, therefore necessitating this Reply.

The statements made by the Appellees in their Brief are in quotes below with citations to the Record, if given, and the Responses of the Appellants to each statement are in bold print. Copies of the cited portions of the Appellees' Brief are attached hereto in the Appendix with the quoted sections highlighted.

STATEMENT OF POINTS AND AUTHORITIES

I. STATEMENTS MADE BY THE APPELLEES REGARDING THE ISSUE OF WAIVER OF THEIR RIGHT TO A JURY TRIAL.

1. "At the conclusion of the evidence at the bench trial, without jury, appellees' attorney told the trial judge, as should have been obvious, that the evidence presented by the appellees and the evidence presented by appellants was in total conflict as to prescriptive easement or adverse possession and those issues were exclusively for submission to and decision by the jury." (VR, 2-24-06, 3:27:51-3:54:50) (Appellees' Brief, p. 3 and 4, which are filed behind Appendix Tab 1, p. 1 and 2)

Appellants' Response.

There was no statement whatsoever made by Appellees' counsel that the issues of prescriptive easement or adverse possession were issues "exclusively for submission to and a decision by the jury". The Record, at the location cited above by the Appellees, states that, "There are differences in the testimony as to the facts of when coal was... hauled across this road", and there was also a statement that, "So that's an issue of fact, at least, on that question". (VR 2-24-06, 3:27) There was no statement made by Appellees' counsel either at the Pretrial held on February 20, 2006, or at the Bench Trial held on February 26, 2006 that the issue of prescriptive easement or adverse possession should be submitted to a jury.

2. "The court made no statement or indication that all factual issues were to be decided by the court at the bench trial on February 24, 2006, or whether upon determining factual issues existed from the evidence that such would not be then subsequently submitted to the jury scheduled for convening on February 27, 2006." (Appellees' Brief, p. 10, which are filed behind Appendix Tab 1, p. 3)

Appellants' Response.

The Trial Court was very clear regarding what evidence it would hear and what issues were to be decided at the Bench Trial. The Trial Court told the parties that it wanted to hear evidence on the construction of the Severance Deed and the usage of the Road. Specifically, the Court 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 decide at the conclusion of the day or the conclusion of the Trial. (Emphasis added; (VR: 2/20/06;3:21:45)**

Furthermore, the Trial Court made it very clear that the only issue to be tried before a jury, if he ruled in the Appellees' favor, would be the issue of "damages". Specifically, the Trial 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)**

In addition to the above, the Appellees in their Brief admitted they presented evidence at the Bench Trial "on all issues of the case, except damages..". (Appellees' Brief, p. 10 and Appendix Tab 1, p. 4)

3. "At the conclusion of the bench trial, the appellees' attorney told the trial judge, as was obvious, that the evidence presented by the appellees and the evidence presented by the appellants was in total conflict and disputed as to the use or non use of the haul road until 1988 as related to prescriptive easement or adverse possession, and that those issues were exclusively for submission and decision by the jury. Of course, the trial court ignored this admonition and objection." (Appellees' Brief, p. 12 and Appendix Tab 1, p. 5)

Appellants' Response.

The appellees did not cite to the Record regarding the above "admonition and objection" and no such statement was made at the Bench Trial or for that matter at anytime.

4. "The trial judge overruled appellees' demand and motion for jury trial, appellees were required to comply and appellees' attorney advised the court after the testimony that the factual issues were required to be submitted to a jury under appellees' demand and motion for jury trial." (Appellees' Brief, p. 15, Appendix Tab 1, p. 6)

Appellants' Response.

There is no citation to the Record where Appellees' attorney advised the Court "that the factual issues were required to be submitted to a jury under Appellees' demand and Motion for Jury Trial", and no such statement was made at the Bench Trial or for that matter at any anytime.

5. "The appellees' demand for a jury trial is continuing and does not require repetition. The trial court was, and is, required to hold a jury trial of factual issues." (Appellees' Brief, p. 13, Appendix Tab 1, p. 7)

AND

"The appellees were not required to object further because they had already demanded a jury trial and had not withdrawn it or consented to a trial without a jury." (Appellees' Brief, p. 13, Appendix Tab 1, p. 7)

Appellants' Response.

The Appellees previously stated that they had told the Trial Court at the conclusion of the Bench Trial that the issue of prescriptive easement was "exclusively for submission to and decision by the jury", and further that the Court

had "ignored this admonition and objection". In the above sections of the Appellees' Brief they seem to imply that they did not object, because they "were not required to object" after they had demanded a jury trial in the Complaint. Either the Appellees objected or they didn't; it is clear from the Record they did not.

The Appellees obviously knew that the prescriptive easement issue was one of the matters that the Trial Court would decide, without a jury. It was clearly one of the issues regarding "usage" of the Road. Substantially all the evidence presented by the Appellees at the Bench Trial concerned the use of the Road and the prescriptive easement issue. There was never an objection made by the Appellees to the fact that they did not receive a jury trial on this issue until there was an adverse ruling.

The Appellants can't state for certain why the Appellees did not object to the Trial Court at the Pretrial Conference, prior to or at the conclusion of the Bench Trial, or prior to the Trial Court's decision, that the issue of prescriptive easement should be tried by a jury, but the fact of the matter is the Appellees never did. Until the Trial Court's decision, everything appeared to be going the Appellees' way; the Court overruled the Appellants' Motion for Summary Judgment and the Appellants believe that the Appellees expected to be successful at the Bench Trial. They never objected, they never "admonished" the Court. The Appellees took a gamble, and made no objection until the Trial Court rendered a decision unfavorable to them. The Appellants state that the Appellees should not be entitled to remain silent regarding this issue and to have a "second bite at the apple".

II. **THE APPELLEES' ARGUMENTS REGARDING THE EASEMENT CONTAINED IN THE SEVERANCE DEED GRANTING THE APPELLANTS THE RIGHT TO HAUL COAL FROM OTHER TRACTS OVER THE APPELLEES' SURFACE PROPERTY.**

1. "The mineral severance deed permitted only mining and removal of appurtenant coal from the 122.51 acres and removal of other coal. It does not permit the mining of coal from other tracts of land and already removed to public roads and then hauled to and across the haul road, crossing appellees' land to appellants' preparation plant or hauling refuse from the preparation plant." (Appellees' Brief, p. 12, Tab 2, p. 1)

2. "In **Pike-Floyd Coal Co. v. Nunnery**, 24 S.W.2d 615 (Ky. 1929), the mineral severance deed language was the same as the present case, and the court there held only that the deed granted the right of removal of other coal. There was no issue in that case as in the present case of transporting other already removed coal across the subject land to a preparation plant for processing and sale only. There is no dispute in this record that the coal had already been removed." (Appellees' Brief, p. 17-18, Tab 2, p. 2-3)

Appellants' Response.

It is obvious that the above argument represents the main thrust of the Appellees' Brief. The term "other already removed coal" appears over twenty (20) times in the Appellees' Brief. The Appellants have had great difficulty in understanding the Appellees' reasoning regarding this issue.

In the first place, in Item 1 above the Appellees concede that the Severance Deed permits "removal of other coal". Secondly, the language used by the Appellees, such as, "already removed coal" and "already removed to public roads"

is not contained anywhere in the Severance Deed. The Appellees have cited the above language, which is not even in the Severance Deed, over twenty (20) times in support of their position in this case. The Appellees want to rewrite the Severance Deed and for the Court to insert words not contained in the Severance Deed and give them a new meaning. The above obviously violates the long established principles of the "four corners doctrine". (Hoheimer v. Hoheimer, 30 S.W.3rd 176-178 (Ky. 2000).

Furthermore, the Appellees misquote and misinterpret the Court's decision in Pike-Floyd Coal Company v. Nunnery. A copy of Pike-Floyd Coal Company v. Nunnery is attached in the Appendix in Tab 3, p. 1 and 2, and the language interpreted by the Court is the exact language as contained in the Severance Deed in this case. The Court, in Pike-Floyd Coal Company 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; *supra at 615.*)

III. MISCELLANEOUS STATEMENTS MADE BY THE APPELLEES IN THEIR BRIEF AND RESPONSES THERETO.

1. The Appellees allege that the "appellants cannot obtain prescriptive easement or adverse possession for non permissive uses after the use has been done permissively". (Appellees' Brief, p. 16, Tab 4, p. 1)

Appellants' Response.

The alleged "permissive" use referred to by the Appellees is when the Appellants' predecessors exercised the right granted to them in the Severance Deed

to mine coal from beneath the Appellees' surface property. The Appellants state that the Appellees, nor their predecessors in title, gave permission to mine the coal and haul it out over their surface property, and those rights were specifically granted in the Severance Deed. There was no permission required and there is nothing in the Record which supports the Appellees' position regarding this issue.

2. The Appellees state that the Severance Deed uses the word "ways" and further stated that "no mention is made of the word road or roads, and the rights are limited as appurtenant to the described tract of land". (Appellees' Brief, p. 5, Tab 4, p. 2)

Appellants' Response.

The Severance Deed granted the mineral owner "the exclusive rights of way for any and all railroads and "ways" and pipelines that may hereafter be located on said property by 'grantee', its successors or assigns...". (The Severance Deed is attached in the Appendix filed with the Appellants' Brief, Tab 2; Quotation around the word "ways" was added for emphasis.)

The term "way" is defined as a "passage, street or road" in Bouvier's Law Dictionary (1856 Edition). Such is the plain meaning of the term "way" when used in the Severance Deed. Appellees offered no contrary interpretation of the term. Courts enforce the fair, reasonable and plain meaning of the words used by the parties and to construe the deed most strongly in favor of the grant and against the grantors under well known principles of Kentucky common law. Franklin Fluorspar Co. v. Hosick, 39 S.W.2d 665 (Ky. 1931). In addition, the construction of written instruments is for the Court and not for the jury. Regal Block Coal Co. v. Bentley, 263 S.W. 683 (Ky. 1924), and that construction will not defeat the obvious

purpose for which the written instrument was executed. Trivette v. Consolidation Coal Co., 15 S.W.3rd 727 (Ky. 2000).

In addition to the above, the word "ways" was also in the severance deed interpreted in Pike-Floyd Coal Co., Id. p. 805, wherein the Court granted the right to haul coal over the surface owner's property from "other lands". Clearly the words "ways" and "roads" are synonymous.

CONCLUSION

For the above stated reasons and for the reasons set forth in the Appellants' Brief filed herein on January 6, 2010, the Appellants, Whitaker Coal Corporation, Perry County Coal Corporation, TECO Coal Corporation, Hazard Coal Company and Locust Grove, Inc., request that the Court reverse the Opinion of the Court of Appeals and affirm the Findings of Fact, Conclusions of Law and Judgment entered by the Perry Circuit Court.

Respectfully Submitted,

SIGNED ON BEHALF OF ALL
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