SUPREME COURT OF KENTUCKY
NO. 2008-SC-000735-DG

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

v.

BRIEF FOR APPELLEES

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

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POLLY & SMALLWOOD

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Attorney for Appellees

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 Mr. Sam Givens, Clerk, Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601-9229; Mr. Ronald G. Combs, P.O. Box 1039, Hazard, Kentucky 41701, Mr. Charles Baird, P.O. Box 351, Pikeville, Kentucky 41502, Mr. Paul R. Collins, P.O. Drawer 779, Hazard, Kentucky 41702, Attorneys for Appellants; Hon. William Engle, III, Judge, Perry Circuit Court, 545 Main Street, Hazard, Kentucky 41702, and that ten originals have been mailed by United States Registered Mail to Ms. Susan Stokley, Supreme Court Clerk, Room 209, State Capitol, 700 Capital Avenue, Frankfort, Kentucky 40601-3488, and the undersigned attorney does further certify that the record on appeal has not been withdrawn by counsel for the appellees, all this the 8th day of March, 2010.

Attorney for Appellees
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INTRODUCTION

This is an appeal where the trial court erroneously denied appellees a jury trial as to prescriptive easement and adverse possession of a haul road where the evidence of use is totally conflicting and the haul road originated by permissive use of mineral severance deed and hauling of other already removed coal and refuse over the road was not permitted by the mineral severance deed and the Court of Appeals reversed the trial court and ordered a jury trial.

STATEMENT ON ORAL ARGUMENT

The appellants believe that oral argument would be beneficial in this case to identify the difference in origin of coal hauled across the road and the conflict in evidence of the use of the haul road.

STATEMENT OF POINTS AND AUTHORITIES

B. Kentucky Court of Appeals Opinion
Reversing and Remanding rendered
September 5, 2008

COUNTERSTATEMENT OF THE CASE

The appellees' complaint filed on September 30, 2002, seeks recovery from the appellants for damages from appellants' use of a road crossing appellees' surface land in hauling enormous tonnages of already removed coal over said road from distant mine sites to appellants' coal preparation plant, transporting enormous tonnages of coal refuse across said surface land and installing power lines across said surface, during a period of nearly 15 years and up to the present time. (R. Vol. I, pp. 1-6; Vol. II, pp. 247-249). The answers of the appellants plead ownership of such right to haul said other coal, champerty, laches and prescriptive easement by adverse possession. (R. Vol. I, pp. 12-26; Vol. II, pp. 253-259).

The appellees are the owners of the surface land, and the appellants are the owners or assignees of the mineral with their chains of title tracing to the same source. The appellants are the owners or assignees of the mineral by mineral severance deed of 1910 from William Newberry, et al, to Vizard Investment Company covering 122.51 acres of mineral with mineral rights stated therein for mining and removing the appurtenant minerals thereby conveyed and removal of other minerals from other land of such owner. (VR, 2-24-06, 09:04:00 - 09:58:25, 10:40:14 - 10:45:17; appendix, A).

The appellees in their complaint and all appellants, except Hazard Coal Corporation, in their answers demanded a jury trial of all issues triable by a jury. The case was set for jury trial on December 5, 2005, by the court by Order entered April 8, 2005, and continued by the court upon motion of the appellants, and reset for jury trial

on February 24, 2006, by the court by Order entered January 5, 2006. (R. Vol. I, pp. 34-35; Vol. II, pp. 250-252). The trial court overruled appellants' motion for summary judgment as to all issues, including prescriptive easement. (R. Vol. I, pp. 85-107; Vol. II, pp. 250-252). The appellees and appellants filed proposed instructions relating to all issues disputed by the evidence, including prescriptive easement. (R. Vol. I, pp. 141-148; Vol. II, pp. 172-184).

At the pretrial conference held on February 17, 2006, which had been set by Order of the court entered January 5, 2006, the court ordered that the pretrial conference reconvene on February 20, 2006. At the pretrial conference held on February 20, 2006, the court announced, without request by any of the parties, that he was bifurcating the action by taking evidence on February 24, 2006, without a jury, as to the use of the haul road for construing the mineral severance deed and other issues, and having the jury decide damages on February 27, 2006. (VR, 2-20-06). At the bench trial on February 24, 2006, without jury, evidence was presented by the appellees and appellants on all issues of the case, except damages, with direct and total conflict in the evidence as to prescriptive easement or adverse possession. Upon the conclusion of the bench trial, the trial court announced that he had not reached the question of construing the mineral severance deed or any other issues, but ruled that the appellants had a prescriptive easement by adverse possession for 15 years prior to appellees' ownership of the surface land, and dismissed the appellees' claims. The appellants made no motion for directed verdict. (VR, 2-24-06, 3:54:50).

On behalf of appellees, Larry J. Knight, Eileen Knight and Larry E. Knight, testified that the haul road was not used by the appellants for hauling other already

removed coal, machinery, supplies, refuse or personnel from the time of the haul road's initial use by the appellants or their assignors hauling appurtenant coal from the 122.51 acres of the mineral severance deed until 1988, when a new permit was granted by the State for hauling other coal and refuse across the haul road, and it was thereupon widened and raised, but kept in the same location as was previous and the hauling of other already removed coal and refuse began. (VR, 2-24-06, 09:04:00 - 10:40:14). On behalf of the appellants, the witnesses, Elmer Whitaker and Rex Napier, testified that the haul road had been used for hauling other already removed coal and refuse for the period from 1967 to 1988 and up to the present time, without any records identifying the road used for hauling other coal to the preparation plant. (VR, 2-24-06, 10:40:14 - 3: 12:11).

The preparation plant was built by appellants on adjacent land by use of an access road that did not cross appellees' land and that other access road was used by appellants to haul other already removed coal to the preparation plant at all times. The records did not identify which road was used.

At the bench trial the evidence was undisputed that the other coal and refuse had already been removed from distant locations other than the mineral severance deed, hauled over the public road and then over the haul road to the preparation plant for washing, processing and sales: the mineral severance deed only permits use of appellees' surface land for removal of other coal, and does not permit the use of the haul road for hauling other coal already removed to a public road and then across the haul road to a preparation plant for cleaning, processing and selling.

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).

The mineral severance deed of 1910 from William Newberry, et al, to Vizard Investment Company, Appendix, A, covers 122.51 acres of minerals with mineral rights stated as follows:

> "...all the coal minerals and mineral products, timber, rights and privileges as hereinafter mentioned on and under the hereinafter described boundary of land, all coal minerals and mineral products, all oils and gases, all salt minerals and salt water, fire and potter's clay, all iron ore, all stone and such of the standing timber under fourteen inches in diameter as may or by the "Grantee" herein, be deemed necessary for mining purposes, and 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 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 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". Free access to, upon and over the said land is hereby conferred upon the "Grantee", for the purpose of surveying and prospecting the aforesaid property and interests: but there is reserved in this deed to the "Grantor" coal for his own family use for fuel, also all the timber upon said land, except that necessary for mining and the purposes hereinbefore mentioned, and the free use of the land for agricultural purposes, so far as such use is consistent with the rights hereby sold...". (emphasis added)

The first part of the certain rights granted in the mineral severance deed relating to the subject road are as follows:

> "...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, 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 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,..."

These quoted rights are for "...Railroad and ways and pipelines...in, under, concerning or appurtenant to the hereinafter described tract of land,...". No mention is made of the word road or roads, and the rights are limited as appurtenant to the described tract of land. There is no other language in this regard. Further, these rights are only for use of the surface land in mining and removing minerals appurtenant thereto. No other language is contained therein to extend beyond the use of the surface land for removing the coal appurtenant to the land or release and indemnity from liability.

The second part of the certain rights in the mineral severance deed are as follows:

> "...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..."

The other coal had already been removed from the other land, transported over public roads and brought by the appellants across the appellees' surface land for the

appellants' convenience in hauling to their coal preparation plant only.

The use of appellees' surface land by the appellants for the hauling of other coal to the preparation plant, the transporting of coal refuse of such other coal and the installing and maintaining of power lines across said land for the processing of any other coal from land owned or acquired by the appellants are not permitted by said mineral severance deed.

The trial court entered its Findings of Fact, Conclusions of Law and Judgment on March 6, 2006, ruling that the appellants had a prescriptive easement by adverse possession presented by evidence at the trial, without a jury, and dismissed appellees' claims.

Upon appeal to the Court of Appeals, the trial court's ruling was reversed because the trial court erroneously failed to grant appellees a jury trial. The Court of Appeals held in its Opinion Reversing and Remanding as follows:

> "However, in Steelvest, Inc. v. Scansteel Service Center, 908 S.W.2d 104 (Ky. 1995), the Kentucky Supreme Court addressed the constitutionality of Subsection (c):
>
> > At issue is whether the right to trial by jury, under the Kentucky Constitution, is contravened by civil rule 39.01(c), which permits a trial court to deny this right in an action at law for damages upon a determination that the case, because of the peculiar questions involved or because the action involves complicated accounts, or a great deal of facts, is impractical for a jury to intelligently try."

The Kentucky Constitution, in actions at law, gives the litigant an unqualified right to trial by jury. Section 7 of the Kentucky Bill of Rights provides: "The ancient mode of trial by jury shall be held sacred, and the right thereof remain inviolate, subject to such modifications as may be authorized by this Constitution." To emphasize the Bill of Rights, Section 26 of the Kentucky Constitution provied that "{t}o guard against transgression of the high powers which we have delegated, We Declare that everything in this Bill of rights is excepted out of the general powers of government, and shall forever remain inviolate; and all laws contrary thereto, or contrary to this Constitution, shall be void." The broad right of preservation is again referenced in CR 38.01; i.e., "the right of trial jury as declared by the constitution of Kentucky or as given by the statute of Kentucky shall be preserved to the parties inviolate."

...

The constitutional term "inviolate" means that the right to trial by jury is unassailable. Henceforth, legislation and civil rules of practice shall be construed strictly and observed vigilantly in favor of the rights and is not to be abrogated arbitrarily by the courts. The constitutional right to a jury trial cannot be annulled, obstructed, impaired or restricted by legislative or judicial action.

...

An argument which authorizes complexity as a basis for constitutionally removing a case from a jury enjoys no support. Complexity was not an equitable basis for a trial without a jury at the time of the adoption of Kentucky's Constitution and to deny a jury trial is to speculate on a jury's capabilities...

CR 39.01(c) violates the right to a trial jury as

> guaranteed in Section 7 of the Kentucky Constitution in at least two respects. It has been used to deny a jury trial where there are raised issues of law and fact and it has broadened the range of application beyond cases of account. Civil Rule 39 shall, therefore, be redrafted as to be in conformity with Section 7 of the Kentucky Constitution.

Steelvest, Inc., supra, at 106-109. (Citations omitted).

Although the trial court herein did not specifically cite to former CR 39.01(c), his rationale behind conducting the bench trial mirrors the language of that rule held to be unconstitutional. As such, we must conclude that the trial court erred in denying Appellants the right to a trial by jury. Moreover, as there is no dispute that Appellants neither withdrew their demand, nor consented to the bench trial by written or oral stipulation, we find that they did not waive their constitutional right to a jury trial on all issues. CR 38.04; CR 29.01.

The Perry Circuit Court's findings of fact, conclusions of law and judgment are reversed, and this matter is remanded for further proceedings consistent with this opinion.

ALL CONCUR."

The appellants' motion for discretionary review was granted and the arguments here are presented.

ARGUMENTS

I. THE COURT OF APPEALS IS CORRECT IN RULING THAT THE TRIAL COURT ERRED IN ORDERING AND DECIDING AT A BENCH TRIAL THE FACTUAL ISSUES OF PRESCRIPTIVE EASEMENT WHERE APPELLEES HAD DEMANDED A JURY TRIAL OF ALL FACTUAL ISSUES AND THE CASE WAS SET FOR JURY TRIAL BUT REPLACED BY THE TRIAL COURT WITH A BENCH TRIAL AS ORDERED 4 DAYS BEFORE THE SCHEDULED JURY TRIAL, ALL OVER AND CONTRARY TO APPELLEES' DEMAND FOR JURY TRIAL OF FACTUAL ISSUES AND THE EVIDENCE AT THE BENCH TRIAL DEMONSTRATED TOTAL DISPUTE AND CONFLICT IN THE USE OF THE ROAD BETWEEN THAT CLAIMED BY THE APPELLANTS AND THAT PROVEN BY THE APPELLEES.

The appellees in their complaint demanded a jury trial of all issues triable by a jury, pursuant to CR 38.01, 38.02 and 39.01. It is elementary and fundamental under the law that in the trial court the appellees were entitled to a trial before and by a jury of all factual issues in this case.

The case was set for jury trial for December 5, 2005, and then on February 24, 2006, and instructions were proposed by the appellees and appellants on all factual issues, including prescriptive easement and adverse possession. As a matter of fact, in their answers the appellants, Whitaker Coal Corporation, Perry Coal Corporation, Teco Coal Corporation and Locust Grove Inc. requested a jury trial.

On February 20, 2006, four days before the jury trial set for February 24, 2006, the trial court announced, without request by any of the parties, that he was bifurcating the action by taking evidence on February 24, 2006, without a jury, as to the use of the

haul road and for construing the mineral severance deed and other issues, and having the jury decide damages on February 27, 2006. 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.

At the bench trial on February 24, 2006, without a jury, evidence was presented by the appellees and appellants on all issues of the case, except damages, with direct and total conflict in the evidence as to prescriptive easement or adverse possession. On behalf of appellees, Larry J. Knight, Eileen Knight and Larry E. Knight testified that the haul road was not used by the appellants for hauling other already removed coal, machinery, supplies or personnel from the time of the haul road's initial use by the appellants hauling appurtenant coal from the 122.51 acres of the mineral severance deed until 1988, when a new permit was granted by the State for hauling other coal and refuse across the road and it was thereupon widened and raised but kept in the same location as previous and the hauling of other already removed coal and refuse began over the road to and from the preparation plant constructed by appellants on adjacent property. These witnesses demonstrated that they were intimately familiar with the road and its use at the time at issue in the case, and their familiarity was not challenged.

At the bench trial, the appellants presented the testimony of Elmer Whitaker and Rex Napier that for many years prior to 1988 the appellants had used the haul road for hauling other already removed coal, machinery, supplies and personnel, although in all

answers to interrogatories the appellants denied they had records or other evidence to show the other already removed coal hauled across the haul road after 1988. There were no records that designated which access road was used. There was a total and direct conflict in the testimony at the trial as to the use of the haul road for hauling other already removed coal prior to 1988. The jury was required to decide the credibility and weight of such evidence in view of the evidence presented by appellees. Certainly, the jury could reasonably find that Elmer Whitaker and Rex Napier were wrong in their testimony that other already removed coal, machinery supplies, refuse and personnel were hauled across the haul road prior to 1988 when such other already removed coal, machinery, supplies and personnel had in fact been hauled across the other access road to the preparation plant, by which the tipple, preparation and wash plants had been built in the first place.

Upon the conclusion of the bench trial on February 24, 2006, the trial court announced that he had not reached the question of construing the mineral severance deed or any other issues, but ruled that the appellants had a prescriptive easement by adverse possession for 15 years as established by the testimony of the witness, Elmer Whitaker, and dismissed the appellees' claims.

At the bench trial, on behalf of the appellants, Elmer Whitaker and Rex Napier, testified that the haul road had been used for hauling other already removed coal and refuse from the period of 1967 and up to the present time without any records identifying the road used for hauling other coal or refuse to or from the preparation plant. The trial court simply chose to believe the testimony of Elmer Whitaker without any records identifying the road used, as opposed to the clear and conflicting testimony

of the witnesses on behalf of the appellees, Larry J. Knight, Eileen Knight and Larry E. Knight, that the road had not been used from 1967 to 1988.

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.

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 to and decision by the jury. Of course, the trial court ignored this admonition and objection.

The trial court entered its Findings of Fact, Conclusion of Law and Judgment on March 6, 2006, granting the appellants a prescriptive easement by adverse possession by the evidence presented at the bench trial, without a jury, based upon the testimony of Elmer Whitaker, without any records and in the face of and contrary to appellees' request for jury trial, and without any reference to probative value or claim of waiver or any basis for trying the case without a jury.

Under the Kentucky Rules of Civil Procedure, the constitution and the law, the trial court was unauthorized to decide the factual issue of prescriptive easement or adverse possession upon the conflicting evidence of use or non use of the haul road prior to 1988 for hauling other already removed coal and simply ignored appellees'

demand for jury trial. The Court of Appeals correctly ruled that the trial court erred and reversed and remanded the case for jury trial.

II. APPELLEES DID NOT WAIVE THEIR DEMAND FOR JURY TRIAL BY NOT FURTHER OBJECTING TO THE TRIAL COURT'S ORDER OF A BENCH TRIAL TO REPLACE THE SCHEDULED JURY TRIAL WHERE APPELLEES' DEMAND FOR JURY TRIAL HAD NOT BEEN WITHDRAWN, THE CASE WAS SET FOR JURY TRIAL AND REPLACED AND AT THE TRIAL THE FACTUAL EVIDENCE AS TO PRESCRIPTIVE EASEMENT TOTALLY CONFLICTED, AND APPELLEES' ATTORNEY ADVISED THE EVIDENCE THEREON AS TOTALING CONFLICTING FACTUAL ISSUE FOR THE JURY.

The appellees' request for a jury trial of all issues triable by a jury is enforceable inviolate under CR 38.01 and 39.01 unless consent is filed by the appellees for trial by the court sitting without a jury. 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.

In the present case, the trial court in its hearings before the bench trial on February 24, 2006, during hearing on February 17, 2006, and on February 20, 2006, and at the bench trial or in the court's Findings of Fact, Conclusion of Law and Judgment did not give any basis for trial without a jury or any indication of or reliance upon waiver of a jury trial by appellees. 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.

There is no basis for a claim of waiver on the part of the appellees to the

decision of the court on February 24, 2006. As a matter of fact, in his closing statement on February 24, 2006, appellees' attorney admonished and objected to the court that the issues of prescriptive easement and adverse possession were disputed factual issues by conflicting evidence presented at the trial that were to be submitted to and decided by the jury.

Until the court announced his decision on February 24, 2006, after hearing the conflicting evidence on prescriptive easement, for the appellants on such issue the appellees had no reason to believe that the court would decide such jury issues of prescriptive easement or adverse possession under the total and conflicting evidence of the use and non use of the haul road for hauling other already removed coal presented at the bench trial. Under such conflicting evidence, it was the duty of the court to submit such issues to the jury for decision. The court could only construe the mineral severance deed and nothing more.

The appellants fail to acknowledge or dispute that the appellees were required to participate in the bench trial by reason of the ruling of the trial court and that there is nothing in the record or otherwise to indicate that the trial court relied upon any waiver by the appellees. There was no waiver with respect to the bench trial and appellees' attorney advised the court after the testimony was taken that the testimony of the appellees and the testimony of the appellants totally conflicted with regard to hauling already removed coal across the subject haul road prior to 1988, presenting issues of fact required for the jury by reason of appellees' demand for jury trial. The appellants fail to acknowledge or dispute that the trial court made no statement or ruling that the testimony presented by the appellees was without probative value. Credibility of the

witnesses and weight of the evidence are issues for the jury where the evidence is disputed and conflicting.

The cases cited by appellants do not support their argument for waiver. In the case of Equitable Life Assur. Soc., etc. v. Taylor, 637 S.W.2d 663 (Ky. App. 1982), the plaintiff had signed an Order reciting that he moved for trial before the court. In Jones v. Gardner, 91 S.W.2d 520 (Ky. 1936), the plaintiff sought a new trial on grounds of surprise during the trial for alleged improper statement by defendant's counsel to the jury, without objection or bill of exceptions. These cases bear no resemblance to the present case. 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. There is no basis shown, and none exist, for the assertion by appellants that they were entitled to a directed verdict. The appellants fail to acknowledge or dispute that if a claim of adverse possession fails, so do claims of champerty, laches and estoppel. The originating permissive use of the haul road for removing appurtenant coal precludes such claims, as appellants have conceded.

There is no dispute that appellees neither withdrew their demand for jury trial or consented to the bench trial by written nor oral stipulation and did not waive their constitutional right to a jury trial on all issues. CR 38.04; CR 39.01.

The Court of Appeals correctly held that the appellees did not withdraw or waive their demand for jury trial and the trial judge erred in failing to hold a jury trial.

III. THE COURT OF APPEALS RULING THAT THE TRIAL COURT ERRED IS OTHERWISE SUPPORTED IN THAT THE TRIAL COURT ERRED IN FINDING PRESCRIPTIVE EASEMENT UNDER THE CONFLICTING EVIDENCE THEREON WHERE THE ORIGINATING USE OF THE ROAD BY APPELLANTS BEGAN AS AUTHORIZED BY THEIR MINERAL SEVERANCE DEED IN HAULING APPURTENANT COAL FROM THE MINERAL TRACT FOR REMOVAL THEREOF, AND THE MINERAL SEVERANCE DEED DID NOT AUTHORIZE THE USE OF SAID ROAD FOR HAULING OTHER, DISTANT ALREADY REMOVED COAL ACROSS SAID ROAD AND LAND TO APPELLANTS' PREPARATION PLANT.

Use of the haul road began and originated to remove only appurtenant coal of the 122.51 acres as permitted by the mineral severance deed, and the appellants cannot obtain prescriptive easement or adverse possession for non permissive use for hauling other coal already removed across the haul road to the preparation plant or refuse from the preparation plant after their use of the haul road was begun permissively. The fact that the use of the haul road by the appellants began or originated previously under the mineral severance deed for transporting appurtenant coal as permitted by the mineral severance deed was never challenged or disputed in the evidence because it cannot be disputed.

The evidence at the bench trial was not disputed that the use of the haul road by the appellants began or originated previously under the mineral severance deed for transporting appurtenant coal as permitted by the mineral severance deed, and the appellants cannot obtain prescriptive easement or adverse possession for non permissive uses after the use has begun permissively. See, Shephard v. Blue Diamond

Coal Co., 706 S.W.2d 1 (Ky. App.,1985); Cole v. Gilvin, 59 S.W. 3d 468 (Ky. App., 2001) and Piney Oil & Gas Co. v. Scott, 79 S.W.2d 394 (Ky., 1924).

At the bench trial, the trial court was required to hold that the appellants could not, under the law, obtain prescriptive easement or adverse possession for hauling other coal already removed and refuse as appellants' use originated from permission by the mineral severance deed to haul only appurtenant coal and remove other coal. The point is that the appellants hauled enormous tonnages of other already removed coal across the haul road to their preparation plant on adjacent property and refuse from such already removed coal from the preparation plant, all of which they were not permitted to do by the mineral severance deed.

The trial court erred in not finding that prescriptive easement or adverse possession was precluded by the originating permissive use of the road for mining and removing appurtenant and other, not already removed coal, and the Court of Appeals Opinion reversing and Remanding is otherwise supported by originating permissive use precludes non permissive prescriptive easement.

IV. THE COURT OF APPEALS DID NOT DISREGARD AND THERE ARE NO REASONS, INCLUDING EXPRESS EASEMENT, EXCLUSIVE RIGHTS OF WAY OR LACK OF PROBATIVE VALUE OF APPELLEES' TESTIMONY TO SUPPORT THE DISMISSAL BY THE TRIAL COURT.

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.

The language of the appellants' mineral severance deed does not come within the language of the Northern form of mineral severance deed relating to the issue of easement granting power or exclusive rights of way. The case cited by the appellees of Columbia Gas Transmission v. Consol of Ky., 15 S.W. 3d 727 (Ky. 2000) sets out the Northern form language creating the easement granting power as follows:

> "{T}he exclusive rights-of-way for any and all railroads tram roads, haul roads and other ways, pipe lines telephone and telegraph lines that may hereafter be located on said land by the parties of the first part, their heirs, representatives or assigns, or by the party of the second part, its successors or assigns, or by any person or corporation with or without the authority of either of said parties, their, or its, heirs, representatives, successors or assigns...". (emphasis added)

This language is different from the present mineral severance deed by containing:

> "tram roads, haul roads and other ways,...telephone and telegraph lines that may hereafter be located on said land by the parties of the first part, their heirs, representatives or assigns, or by the parties of the second party, its successors or assigns, or any other person or corporation with or without the authority of either of said parties, their, or its, heirs, representatives, successors or assigns...".

This language makes it clear that the mineral owner has the easement granting power by being the exclusive authority to permit all roads over the surface. The language in the appellants' mineral severance deed does not contain such authority.

The Columbia Gas case, Supra, discusses the other cases cited by the

appellants of Cornett v. Louisville & Nashville, R. Co., 182 S.W.2d 230 (Ky. 1944), Louisville and H.R. Co. v. Quillen, 242 S.W.2d 95 (Ky. 1951) and Elk Horn Coal Corp. v. Ky.-West Virginia, 317 S.W.2d 472 (Ky. 1957), which held that the Northern form of mineral severance deed created the easement granting power. However, in the Elk Horn case, Supra, the court held that some of the mineral deeds at issue did not contain an easement granting clause.

The present mineral severance deed permits the use of the surface for the hauling of appurtenant coal or removal of other coal owned by the appellants. This language does not permit the use of appellees' surface for the hauling across it to a preparation plant for purposes of cleaning, preparation, processing and selling of other coal owned by the appellants after its removal has been achieved. The other coal owned by the appellants, is not required to be transported over the appellees' surface land for such other coal removal. On the contrary, the other coal owned by the appellants at issue in this case had already been removed, brought over public roads and hauled across appellees' surface land by the appellants to a coal tipple and preparation plant for cleaning, preparation, processing and sale. Such use of appellees' surface land is not permitted. See, Hi Hat Elkhorn Coal Co., v. Kelly, D.C. Ky., 1962, 205 F. Supp. 764; Newman v. Hi Hat Elkhorn Coal Co., 6th Cir., 298 F. 2d 119 (1962); Hi Hat Elkhorn Mining Co. v. Newman, 352 S.W.2d 71 (Ky. 1961); Wiser Oil Company v. Conley, 346 S.W.2d 718 (Ky. 1960); Rose v. Martin, 220 S.W.2d 385 (Ky. 1949); Marlowe v. Marcum, 171 S.W.2d 997 (Ky. 1943); and Flannery v. Utilities Elkhorn Coal Co., 138 S.W.2d 988 (Ky. 1940).

The appellants did not have the right to haul other already removed coal mined

from distant mine sites over the appellees' surface land to appellants' tipple and preparation plant for processing and selling. Their mineral severance deed did not, and does not, permit the use of appellees' surface land by the appellants for such purposes.

The appellants' possession of the road was authorized under the mineral severance deed for purposes necessary for the mining and removal of coal from beneath the surface of the 122.51 acres of which appellees' land is a part or the removal of other coal. Such possession of the road by the appellants was not, and is not, of the type of unambiguous possession sufficient to ripen into title by adverse possession. See, Shepherd v. Blue Diamond Coal Co., 706 S.W.2d 1 (Ky. App. 1985).

The appellees agree, in view of the appellants raising the issue, that this court should construe the Vizard mineral severance deed as to whether it does or does not create the easement granting power evidenced by the "broad form" mineral severance deed and whether or not the appellants exceeded the deed's authority of their rights by hauling across appellees' land other already removed coal and refuse therefrom.

The trial court did not state, indicate or infer that the appellees' testimony was lacking in probative value and there is no basis shown by appellants that appellees' testimony lacked probative value in any way. The trial court simply wanted to believe, and chose to believe, appellants' testimony in the face of totally conflicting and disputing evidence by appellees. The trial court erred in failing to submit the factual issue to a jury as demanded by appellees.

There are no reasons to support the trial court in its rulings and failure to hold a jury trial. The mineral severance deed does not grant exclusive rights of way or the easement granting power, and this court should so hold.

CONCLUSION

For the foregoing reasons, the appellees request that the Opinion Reversing and Remanding of the Court of Appeals be affirmed with directions that prescriptive easement or adverse possession are precluded by the original permissive use of the haul road under the mineral severance deed, that exclusive rights of way are not granted by the mineral severance deed, or the jury trial be held on all issues of fact as to prescriptive easement or adverse possession.

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