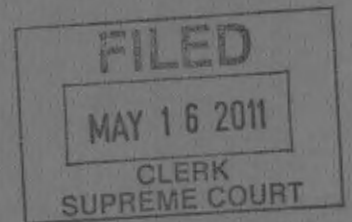


COMMONWEALTH OF KENTUCKY
SUPREME COURT
DISCRETIONARY REVIEW NO. 2010-CI 000029
COURT OF APPEALS
NO.2008-CA-02229
APPEAL FROM THE FRANKLIN CIRCUIT COURT
ACTION NO. 06-CI-00081



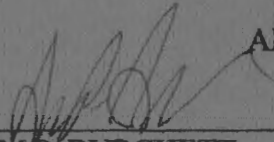
KENTUCKY SOUTHERN COAL
CORPORATION

APPELLANT

APPELLANT BRIEF

COMMONWEALTH OF KENTUCKY,
ENERGY AND ENVIRONMENT CABINET

APPELLEE



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CERTIFICATE OF SERVICE

This is to certify, in accordance with CR 76.12(6), that the record on appeal in this matter has not been removed from the Franklin Circuit Court by counsel for Appellant and that I have served a copy of this document by mailing a copy of same, postage prepaid, on this the 16th day of May, 2011 to:

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INTRODUCTION

This appeal involves questions regarding the standards for demonstration of a surface mining permit holder's *prima facie* right of entry, the adjudication of property rights by the Energy and Environment Cabinet, the failure to recognize loss of standing to contest permit renewal, the legal precedent regarding dominance of the mineral estate, and whether the actions of the Franklin Circuit Court and the Cabinet were arbitrary and capricious or an abuse of discretion.

The matter was appealed from the Opinion and Order of the Franklin Circuit Court upholding the Final Order of the Cabinet that denied the Appellant a renewal of the permit. The lower court found that the Cabinet had correctly applied the law to the facts of the case. The Court of Appeals agreed and a motion for discretionary review was filed with the Supreme Court. That motion was granted on March 15, 2011.

STATEMENT CONCERNING ORAL ARGUMENTS

This is a complicated matter and oral arguments would be helpful for the Supreme Court to better understand the matter before decision.

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STATEMENT OF THE CASE

This matter is before the Supreme Court upon grant of motion for discretionary review filed by the Appellant. The Court of Appeals affirmed (“Affirmed Opinion”) the Franklin Circuit Court’s Opinion and Order entered November 3, 2008 (“Opinion”) which had the matter as an original action/appeal of the Order of the Secretary of the former Environmental and Public Protection Cabinet, now Energy and Environment Cabinet (the “Cabinet”) denying Appellant’s Renewal Application #3 to Permit No. 854-5025 on September 18, 2000. (Final Order dated December 16, 2005). The Franklin Circuit Court, in the Opinion, upheld the Final Order and this further appeal seeks to overturn that decision regarding the denial of permit renewal because of no right of entry. This appeal further addresses the failure of the Cabinet to properly rule on Petitioner’s various motions to dismiss, remand and exceptions.

This particular property’s history dates from the mid 30’s. The remote predecessor in interest, Norton Coal Mining Company, as a result of some insolvency proceedings in 1936, was forced to dispense with certain of its assets. As a result, two deeds were made on September 18, 1936, that had the effect of severing the mineral and surface estate on a number of properties in Hopkins County. Those deeds may be found as part of the records of Hopkins County in Deed Book 140, page 108 and Deed Book 141, page 12. (Copies of both deeds are attached as Exhibit B to the original

Memorandum of Support for summary disposition by the Petitioner). Language in Deed Book 140, page 108 reserved as follows:

But there is nevertheless reserved and excepted from all lands hereby conveyed all the coal and other minerals and the mining and mineral rights and privileges, the right of subjacent support, and the rights of way for manways, air shafts, drainage shafts, drains, pipelines, power lines, railroads and railroad switches as may be convenient or necessary for the working or development of the Norton coal mines.

Thus from 1936 forward, the successors in interest to these mineral properties have had the unfettered right to mine the coal by both the surface and deep mining methods. That is a paramount right of entry. Because a remote successor in interest to a portion of one surface tract, Harold and Georgia Bandy, did not believe that this language applied to its property and to finally adjudge the relative property rights, Norton Coal Corporation brought suit against the Bandys. The result of that litigation was the Judgment. In the Judgment, the Court opined as follows

[T]he reservation contained in the deed from Norton Coal Mining Company, et al., acting by and through Maurice K. Gordon, Special Master in Chancery, to Walter W. Crick dated September 12, 1936, of record in Deed Book 140, page 108, Hopkins County Court Clerk's Office, was effective as to all tracts conveyed in said deed. The Court is further of the opinion that the Plaintiff, as successor to Norton Coal Corporation, acquired such coal and mining rights as were conveyed to said Norton Coal Corporation, and not therefore conveyed away....

The Judgment goes on to formulate a lease between Norton and the Bandys allowing Norton to "strip mine" the Bandy's 18.1 acres. That lease was for a period of fifteen years. Apparently there may have been plans by Norton to strip mine the property. However, going forward, there were no strip mining revisions to any of the permits and neither Norton nor its successors ever exercised its right to strip mine the

Bandy tract during the lease term. The permit and all renewals have been for the express purpose of deep mining only. Thus, at a minimum the “lease” contained in the Judgment was moot.

In 2000, the Reynolds acquired the property from the Bandys and thereafter sought an exorbitant lease rate from the Petitioner for the continued right to surface mine the property. The Reynolds were refused and in retribution sought and was successful in setting forth a chain of events resulting in the Cabinet not renewing the permit based upon the Reynolds’ assertion that Kentucky Southern needed a surface lease for right of entry. The Appellant filed a petition regarding that denial. The Appellant was seeking a renewal of Surface Mining and Reclamation Operations Permit No. 854-5025 (the “Permit”) in July of 1999. On July 6, 2000, the Cabinet received a protest letter from Jeff and Marian Reynolds (the “Reynolds”) claiming that the Appellant no longer had legal access to a certain part of the permitted property. Following a long and complicated procedural history by the Office of Administrative Hearings, in 2005, the Secretary by Final Order, denied the renewal. The Final Order and subsequently the Opinion is based upon the incorrect assertion /finding that there was a *bona fide* property dispute at the time of the Final Order in 2005. No property dispute existed at the time of the Final Order because the Reynolds had divorced and divested themselves of the entire 18.1 acre tract of land in 2004. From 2002 forward, the Reynolds ignored orders of the hearing officer to continue participating in the hearing process and ceased all participation in the hearing process. As early as September of 2002, the hearing officer should have dismissed their claims for failure to prosecute as is authorized by 400 KAR 1:090, Section 13. In fact, the Hearing Officer noted as early as March of 2003 that the Reynolds did not participate

in the hearing conference and had not filed prehearing memoranda or responses (March 26, 2003 Summary Disposition Conference Report). Having been apprised of these events through exceptions filed to the proposed order, motions to dismiss and various other pleadings, the Cabinet simply ignored the real facts and issued its Final Order not based upon the facts it had before it. This ruling was with the clear knowledge that no further *bona fide* dispute existed regarding right of entry because of clear abandonment of any claim by the Reynolds, the Reynolds failure to abide by hearing officer orders, the failure of the Cabinet to dismiss the Reynolds for failure to abide by the hearing officers orders, the divorce of the Reynolds followed by a property division and subsequent sale of the Reynolds subject surface property to a third party thus losing standing in the matter and finally that the third party did not protest the Appellant's right of entry at any point after her acquisition of the property. By issuing the Final Order, the Cabinet refused to follow its own rules, statutes and regulations as well as case law and as such the decision is arbitrary and capricious.

Subsequently, the Franklin Circuit Court, in its opinion, incorrectly ruled against the Appellant in finding that the loss of standing and failure to prosecute its prior claim was "irrelevant." The current owners failure to contest the Appellant's property rights was also deemed "irrelevant." Despite the clear grant of mineral rights to the Appellant pursuant to deeds and the Hopkins Circuit Court upholding those rights in a Final Judgment in 1990, the Court adjudicates that there is "no evidence" of property rights in the record. The abundant demonstration of legal right of the Appellant was deemed by the Court nonexistent, which therefore created a *bona fide* property dispute. (This is completely inconsistent with the Hearing Officer's report wherein he found that an

easement did exist but that the Final Judgment was “ambiguous”). The lower court states, without any evidence in the record, that the Appellant had failed to give unasserted third parties the opportunity to be heard regarding potential third party property rights. In fact, legal counsel to the Cabinet at the time solicited those third party property owners to intervene. They did but it was later determined that none owned property even contiguous to that of the permitted property. The lower court blames Appellant for not affording the new owners the right to complaint. The new owners, having been notified of their rights, never sought to intervene or assert new property disputes and they had ample opportunity to do so. The lower court demands that Appellant enter into a lease with the Reynolds to resolve this matter. That is a legal impossibility-- to enter into a lease agreement with former owners or assert legal claims against the former owners, as they have no current property interest to negotiate, lease or defend (the Reynolds). Further, the lower court concludes Appellant must enter into a surface lease as the only property right to demonstrate a proper right of entry. That is both legally and factually incorrect. Appellants have had the right to access its deep mining mineral from 1937 forward. The opinions of the Court of Appeals and lower court should be overturned and the Cabinet ordered to issue the Appellant’s renewal.

To let stand these decisions would overturn a century of legal precedent and statutes regarding the ownership of mineral property. Additionally, the Cabinet needs direction on this matter for absent Supreme Court rulings, nothing prevents the Cabinet and the Franklin Circuit Court from deeming “irrelevant” legal precedent, statutes and when politically expedient granting to prominent coal companies, right of entry, even when no

right of entry exists. There is now, no standard, from which the Cabinet rules on these matters.

LEGAL ARGUMENT

INTRODUCTION

Denying Appellant had a *prima facie* right of entry based solely on a lack of surface lease when it demonstrated mineral ownership is “adjudicating” property rights adverse to Appellant. By demanding that only a surface lease is sufficient for purposes of demonstrating right of entry, despite the mineral estate ownership, the lower court overturns a century of case law, common law and statutory precedent. To allow other politically prominent coal companies to be granted a permit or permit transfer with no demonstration of any right of entry creates, within Kentucky, an unjust system in allocating permits. By doing so, this constitutes an arbitrary and capricious action and an abuse of discretion.

In Kentucky, when a mineral estate and surface estate are severed, two separate estates in land then coexist. Because of the nature of the mineral estate and the fact that at common law, there was no ability by the mineral owner to eject the surface squatter, certain statute and case law protections were afforded the mineral owner. Paramount is the fully developed legal principal that the surface owner holds the surface “in trust” for the mineral owner, whose estate is dominant. By deed and legal adjudication in Hopkins Circuit Court, the Appellant has both the mineral estate and the right to access that mineral estate for purposes of underground mining. The Cabinet and the lower courts ignore these legal principals, and further denies that these legal rights exists with

Appellant, while disingenuously claiming it is not “adjudicating” property rights. Denying Appellant had a *prima facia* right of entry based upon its ownership is “adjudicating” property rights adverse to Appellant.

I. **APPELLANT DEMONSTRATED PRIMA FACIA RIGHT OF ENTRY**

Both the Cabinet, in its Final Order, and the lower courts in their respective opinions refuse to recognize the Appellant’s *prima facia* right of entry based on various deeds and court judgments. The Court of Appeals states specifically that the lack of surface lease with the new owner, Cathy Gunn, is fatal. The Court of Appeals goes further than the Cabinet in demanding relitigation of Appellant’s property rights in Hopkins County, thus ignoring the finality of the original Judgment and ignoring the Cabinet’s finding that the Final Judgment of the Hopkins Circuit Court is ambiguous and resolves this ambiguity outside the four corners of the document, by insinuating that somehow the mineral rights were abandoned (the Final Judgment clearly says otherwise). Inconsistent with this finding, the lower courts conclude that there was no evidence of right of entry because the only right of entry is a surface lease, again ignoring the Cabinet ambiguity argument and the finding that Appellant had an easement.

Appellant’s predecessor sought, litigated and was successful in asserting its mineral rights and the Final Judgment quieted title in Norton as to those mineral rights. The Court of Appeals Appellant is prohibited from relitigating that issue because of *res judicata*. The legal fact that it chose to enter into a surface lease, for purposes of strip mining but not deep mining, is “irrelevant” to its mineral rights and a permit for deep mining. Thereafter, Norton and its successor in interest had a *prima facia* right of entry to mine its mineral estate via the surface lease for surface mining and via its mineral rights

accorded it for deep mining, pursuant to the deeds. The Court of Appeals assumes that this permit renewal is for the purposes of surface mining and not deep mining. That assumption is incorrect. The permit in question is for deep mining and not surface mining. At no time did the Appellant apply for or obtain a permit for the purposes of surface mining its mineral estate. The surface disturbance permit was for the surface disturbance associated with deep mining. The Cabinet, in its Final Order, does acknowledge that Petitioner has an “easement to underground works.” Having an “easement” and no protest from current owners that should be sufficient to demonstrate right of entry. The lower court and Court of Appeals simply ignored this finding in ruling that that there was no evidence of right of entry for purposes of surface mining.

Having fully demonstrated to the Cabinet, a *prima facie* right of entry, the lower court finds, based upon the claimed “irrelevance” of the Reynolds abandoned protest, transfer of the property, loss of standing and the failure of the new owners to protest, that there remains a dispute but ignores that the Cabinet reached that conclusion by way of the claimed ambiguity and that the Cabinet could step into the shoes of those unasserted owners and continue to assert on their behalf without standing. (There is no legal precedence for this position. The Cabinet does not have that statutory authority and the lower courts pass over this central issue to the matter of arbitrary and capricious standard is affirming the Cabinet’s Final Order.)

A. **Cabinet May Not Maintain An Abandoned Protest.**

1. The Property Is No Longer Owned By The Reynolds.

Neither Jeff nor Marion Reynolds had an interest in the subject 18.1 acre tract from May of 2004 forward. The deeds are on record in the Hopkins County Records (Official Records for purposes of evidence) wherein the property was conveyed to the new owner, Cathy Gunn and as trustee for her children. Ms. Gunn did not seek to intervene and has not raised an issue of property dispute with the Appellant regarding its rights of entry and has not notified the Cabinet that there is such dispute. She is the only person, regarding this 18.1 acre tract, who had standing to continue to raise such dispute after May of 2004. Having obtained the property well before the issuance of the Final Order, the facts set forth in the Final Order do not comport with KAR 405.8 Section 4 and therefore must fail as a matter of law.

Thus, from the time the Reynolds' abandoned their protest in September of 2002 forward, there did not exist a *bona fide* property dispute with the Petitioner regarding right of entry. The Reynolds then lost any standing in May of 2004, after their divorce, by transferring the 18.1 acre tract to Ms. Gunn. The lower court continue to insist that Appellant return to Hopkins Circuit Court and relitigate ownership of the mineral estate with either the Reynolds, who no longer own the property or Ms. Gunn who has never contested that ownership. Alternatively, the lower courts insist that a new surface lease for surface mining must be negotiated with Ms. Gunn as the only possible method for demonstrating right of entry. As this is not a surface mining permit but rather a deep mining permit, both lower courts are insisting on compliance with non-existent rules and

regulations. Both courts cite to authority requiring surface rights for surface mining.

Clearly, if the Reynolds no longer own the property and no one else has contested the mineral rights, access or right of entry, as of September of 2002, there was no *bona fide* "dispute" as it was extinguished, becomes moot and has not been reasserted by the new owner.

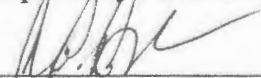
2. No Standing To Assert Bona Fide Dispute.

The Reynolds ceased to participate in the proceedings before the Cabinet in September of 2002 because of their impending divorce and plans to sell the 18.1 acre tract. Their failure to attend hearings, file motions etc., and abide by the Hearing Officer's orders to participate should have been sufficient for the Hearing Officer to take notice of their apparent withdrawal and abandonment of the claim of a dispute and he should have dismissed their protest. He did not and instead maintained that the Cabinet could maintain an abandoned protest. There is no legal precedent for that in American jurisprudence and that position constitutes an arbitrary and capricious action. Appellant, having determined that the Reynolds no longer had standing and had abandoned their protest, raised these issues in a motion to dismiss which was properly served upon both Reynolds. Neither Reynolds responded to the motion to dismiss. The Hearing Officer should have granted this motion as well as the motion to remand on this issue. The failure to grant these motions were beyond the discretion of the Cabinet, as the Reynolds no longer had standing to protest the renewal and recognized that lack of standing by not answering the motion to dismiss. Both the Hearing Officer and the Cabinet simply ignored these motions because it would have resolved the matter in favor of the Appellant. That was an also an abuse of discretion and should be overturned.

CONCLUSION

The Court of Appeals refused to legally or factually recognize the Appellant's right, by deed, res judicata, case law, Kentucky Constitution and statutory law, to access its mineral. The prior surface lease for purposes of strip mining has no relevance as the Permit and Renewal was for deep mining purposes only. The Reynolds, having sold the property and the new owners having not objected to the right of entry, there no longer existed any dispute. The Cabinet refused to dismiss the Reynolds protest despite three years of inactivity from the Reynolds. The Reynolds abandoned their protest years before they sold the property and lost standing. Having demonstrated right of entry, this matter should be resolved by reversing and remanding with orders to dismiss the Reynolds protest, to find that the Appellant has demonstrated right of entry and that the permit be renewed.

Respectfully submitted,



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