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July 6, 2001

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

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Davis, J., dissenting:

This case involves the simple question of whether or not a waiver executed in a deed was valid. The majority concedes that the deed waiver is valid. The opinion should have ended with that determination. Nevertheless, the majority goes on to conclude that parties who have waived their rights to sue for subsidence can, notwithstanding a valid deed waiver, sue for damages resulting from subsidence where there has been a permit violation. On this point I must respectfully disagree.¹

The majority has addressed this as an issue of Dodge Fuel Corp.'s rights, and apparently found that Dodge Fuel could, by virtue of the permit process, waive its right to not be sued. I believe the Majority took the wrong approach. It is not Dodge Fuel's rights that are in question here, it is Antco's. Certainly W. Va. Code § 22-3-25(f) (1994) (Repl. Vol. 1998) grants to Antco the right to sue Dodge Fuel for permit violations causing subsidence damage to Antco. It is Antco, however, who waived that right in the deed. Dodge Fuel was entitled to rely on Antco's waiver and to conduct itself accordingly.

¹I would also disagree that Antco should be permitted to pursue a cause of action for damage to a piece of equipment as a result of a permit violation. The Majority opinion indicates that the permit did not in any way contemplate damage to surface *equipment*. However, a review of Antco's complaint reveals that it did not sue for damage to a piece of equipment. Rather, Antco sought damages for "subsidence on the surface property of the Plaintiffs[']', causing the closing of the 'Quarry' of Antco, Inc. and depriving the surface owners, John Antulov and Steve Antulov, of royalties from the mining and extraction of limestone on the property."

Consequently, Antco should be estopped from pursuing a cause of action against Dodge Fuel to collect for its subsidence damages. *See Ara v. Erie Ins. Co.*, 182 W. Va. 266, 270, 387 S.E.2d 320, 324 (1989) (“Estoppel is properly invoked to prevent a litigant from asserting a claim or a defense against a party who has detrimentally changed his[her] position in reliance upon the litigant’s misrepresentation or failure to disclose a material fact.”); *See also Webb v. Webb*, 16 Va. App. 486, ___, 431 S.E.2d 55, 61 (1993) (“Estoppel is the doctrine by which a ‘party is prevented by his own acts from claiming a right to [the] detriment of [the] other party who was entitled to rely on such conduct and has acted accordingly.’” (quoting Black’s Law Dictionary 551 (6th ed. 1990))); Black’s Law Dictionary 571 (7th ed. 1999) (defining “estoppel by deed” as “[e]stoppel that prevents a party to a deed from denying anything recited in that deed if the party has induced another to accept or act under the deed”). *Cf Id.* (defining “estoppel by contract” as “[a] bar against a person’ denying a term, fact, or performance arising from a contract that the person has entered into.”). The Majority’s rule to the contrary unfairly deprives parties of the benefits of their bargains.

A coal operator should be entitled to rely on a valid deed waiver. This Court has held, and the Majority recognizes, that deed waivers are valid in this state. *See Maj. Op.* at 13-14. It is patently unfair to maintain that deed waivers are permitted under state law, yet render them ineffective after-the-fact due to the very conduct that was the subject of the waiver. Stated another way, under the Majority opinion a landowner may sell the sub-surface mineral rights to his or her property and obtain an optimum sales price by executing a waiver of subsidence damage in the deed. The surface landowner may then obtain a second, windfall, recovery for the previously anticipated subsidence damage by instituting a civil suit based

upon a permit violation.² Thus, the unsuspecting coal operator has paid for a meaningless waiver. Furthermore, due to the operator's reliance on the waiver, it has been deprived of alternatives that it likely would have pursued had it known of the ineffectiveness of the waiver, such as not entering the agreement in the first instance, negotiating a better price in the absence of a waiver, or conducting itself more carefully so as to not cause subsidence damage.³

The Majority maintains that not allowing Antco to pursue this cause of action would effectively "eviscerate the entire permitting process." Maj. Op. at 23. What the majority fails to acknowledge, however, is that the proper remedy for Dodge Fuel's permit violations is found in W. Va. Code § 22-3-17 (1997) (Repl. Vol. 1998). Pursuant to this statute, the director of the Division of Environmental Protection has a mandatory duty to take certain actions in response to permit violations. For example, under some circumstances the director must order "the cessation of the operation or the portion thereof causing the violation." W. Va. Code § 22-3-17(a). There also may be imposed a "mandatory civil penalty of not less than seven hundred fifty dollars per day per violation." *Id.* Where there is a pattern of violations of a permit, the director may cause the coal operator's permit to be revoked

²Rephrased in the context of the facts of the present case, a land owner/coal operator may sell land while reserving the sub-surface mineral rights. The buyer may obtain the surface land at a bargain rate by executing a waiver of subsidence damage in the deed. Having already received the benefit of a reduced price in exchange for relinquishing the right to recover for subsidence damage, the surface landowner may then obtain a windfall recovery for previously anticipated subsidence damage that actually occurs by suing on a theory of a permit violation.

³The Majority opinion appears to have far reaching implications for businesses who have been operating under deed waivers and who, depending upon the language contained in their mining permits, are now exposed to liability for subsidence.

and the entire amount of the operator's bond to be forfeited. W. Va. Code § 22-3-17(b).

For these reasons, I believe that Antco should have been estopped from pursuing its action against Dodge Fuel, and the circuit court's order granting partial summary judgment to Dodge Fuel should have been affirmed. I am authorized to state that Justice Maynard joins me in this dissenting opinion.