STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Belmont Resources, LLC; Magnum Land Services, LLC; Scott's Run Settlement House, Inc.; Neil F. Gibson, Jr.; Virginia Hodges Greenbert; Susan Hodges Gurley; Thomas Hartshorn Hodges; James W. McIntire; John G. McIntire; Anthony Sartori; Holly N. Sartori; and The Unknown Heirs of A.F. Gibson, if any, Defendants Below, Petitioners

FILED
November 28, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

vs.) No.11-0159 (Preston Co. 10-C-30)

Tunnelton Cooperative Coal Co., Inc. and CNX Gas Company, LLC State of West Virginia, Plaintiffs Below, Respondents

MEMORANDUM DECISION

Petitioners, defendants below, appeal a circuit court order granting summary judgment to respondents, plaintiffs below, in their declaratory judgment action to quiet title to a mineral estate underlying two tracts of land in the Marcellus Shale fairway in Preston County. Respondents claim they own 100% of the mineral rights. Petitioners claim they have a two-thirds interest in the mineral rights. The outcome hinges on the interpretation of language in a 1901 mineral severance deed. Respondents have filed their response. Petitioners have filed a reply.

This Court has considered the petition and the record on appeal. The facts and legal arguments are adequately presented in the petition and the record on appeal, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the petition, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules.

In the 1901 deed at issue in this appeal, A.F. Gibson and his wife (the Gibsons) conveyed coal and mineral rights underlying three tracts of land to the Merchants Coal Company ("Merchants"). Prior to the conveyance, the Gibsons owned all the coal and all other mineral rights underlying tract one; one-third of the coal and all other minerals

underlying tract two; and one-third of the coal and all other mineral rights underlying tract three. Tract one is not at issue in this appeal. In regard to tracts two and three, the primary issue is whether the Gibsons conveyed one-third of the coal and *all* other minerals as respondents' claim, or one-third of the coal and *one-third* of the other minerals thereby giving petitioners the remaining two-thirds, as petitioners claim.

The general warranty clause in the 1901 deed states as follows:

> [T]he said Grantors do grant with covenants of General Warranty, all the coal and other minerals being and underlying the three certain parcels or tracts of land as hereinafter described situate in Reno District, County of Preston and State of West Virginia.

The problematic clauses in the 1901 deed follow the general warranty clause.

Regarding tract two's forty-eight acres and twenty-one perches, the clause at issue contains a metes and bounds description immediately followed by the statement below which petitioners consider to be a "granting clause" while respondents consider it to be a "recital."

> It is herein especially understood by and between the said Grantee and Grantors that said Grantors only intend to convey and do convey, one third of all the coal and other minerals being and underlying the said second tracts [sic] of land herein described or sixteen acres and seven perch of said coal and other minerals, underlying the said herein named and described second tract. . . .

Petitioners note that the sixteen acres and seven perches conveyed is exactly one-third of the total acreage (forty-eight acres and twenty-one perches**)** of tract two.

Similarly, regarding tract three's one and 56/160 acres, the clause at issue contains a metes and bounds description immediately followed by the statement below which again, petitioners consider to be a "granting clause" while respondents consider it to be a "recital."

> It also being understood and agreed between the said Grantors and Grantee that said Grantors only intend to convey and do herein convey to said Grantee, one third of all the coal and other minerals, underlying the said third lot or tract of land herein described . . . and being 72/160 part of an acre, of said coal and minerals, conveyed in this tract . . .

Petitioners note that 72/160 parts of an acre is exactly one-third of the total acreage (one and 56/160 acres) of tract three.

Petitioners include: the "Gibson heirs" who are successors in interest to the Gibsons and include the eight individuals named above, any unknown heirs, and the Scott's Run Settlement House; Magnum Land Services, LLC (Magnum), which obtained oil and gas leases on tracts two and three from the Gibson heirs in the summer of 2009; and Belmont Resources LLC (Belmont), which obtained Magnum's leases on tracts two and three in October 2009.

Respondents are the successors-in-interest to the Merchants Coal Company (Merchants): Tunnelton Cooperative Coal Co., Inc. (Tunnelton) and CNX Gas Company, LLC (CNX). Tunnelton obtained title to the oil and natural gas underlying the subject property on December 1, 1944. Tunnelton's chain of title includes the 1901 deed. On March 31, 2008, Tunnelton granted to CNX its entire interest in the oil, natural gas, coalbed methane gas, and related products in the tracts two and three.

The West Virginia Department of Environmental Protection issued a permit on December 22, 2008, authorizing CNX to commence oil and gas operations on the subject property. Thereafter, CNX drilled a gas well into the Marcellus Shale fairway on the subject property. About a year later, on December 3, 2009, CNX received a letter from Belmont's counsel asserting that Belmont had a two-ninths interest in the oil and gas, as opposed to the two-thirds interest now claimed, underlying tracts two and three, and demanded that CNX cease and desist drilling operations.

Respondents filed a declaratory judgment action on February 9, 2010, to quiet title to the oil and gas estate underlying tracts two and three. On March 12, 2010, petitioners served an answer and counterclaim for declaratory judgment and made claims against CNX for slander of title and tortious interference with contract. On June 14, 2010, respondents filed a motion for summary judgment on Count I of the complaint seeking a declaratory judgment regarding respondents' ownership of the oil and gas pursuant to the 1901 deed. In addition, CNX moved for summary judgment on petitioners' counterclaim. Petitioners filed a response to CNX's motion for summary judgment, a cross-motion for partial summary judgment, and a motion for declaratory relief.

Following a hearing, the circuit court entered an order on September 14, 2010, granting respondents' motion for summary judgment with respect to the claim for declaratory judgment. On September 24, 2010, petitioners filed a motion to reconsider or, in the alternative, a motion for stay. On December 22, 2010, petitioners' motion to reconsider was

denied but their motion for stay was granted subject to the requirement that petitioners post a $100,000 bond.

Petitioners appeal the circuit court's September 14, 2010, order granting summary judgment to respondents and raise two assignments of error. First, petitioners argue that the circuit erred as a matter of law in concluding that the 1901 deed did not contain an exception or reservation, i.e., words of limitation, in certain and definite language pursuant to West Virginia Code § 36-1-11, and that the Gibsons intended to convey one hundred percent of their interest in the mineral estate at issue. Petitioners' second assignment of error is that in rendering its decision, the circuit court erred in considering the alleged lack of a post-conveyance tax assessment for two-thirds of the mineral estate within and underlying the subject tracts.

We have carefully considered the petitioners' arguments and the record on appeal. Finding no error, we attach and incorporate by reference the circuit court's well-reasoned, September 14, 2010, order granting respondents' motion for summary judgment.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: November 28, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Menis E. Ketchum
Justice Thomas E. McHugh

Appendix to Memorandum Decision
Supreme Court Case No. 11-0159

IN THE CIRCUIT COURT OF PRESTON COUNTY, WEST VIRGINIA

TUNNELTON COOPERATIVE COAL COMPANY, INC.,
a West Virginia corporation, and
CNX GAS COMPANY, LLC,
a Virginia limited liability company,

Plaintiffs,

v. **Civil Action No. 10-C-30**

BELMONT RESOURCES, LLC,
a Michigan limited liability company,
MAGNUM LAND SERVICES, LLC,
a Michigan limited liability company,
SCOTT'S RUN SETTLEMENT HOUSE, INC.,
a West Virginia corporation,
NEIL F. GIBSON, JR.,
VIRGINIA HODGES GREENBERT,
SUSAN HODGES GURLEY,
THOMAS HARTSHORN HODGES,
JAMES W. McINTIRE,
JOHN G. McINTIRE,
ANTHONY J. SARTORI and HOLLY N. SARTORI,
husband and wife, and
THE UNKNOWN HEIRS OF A.F. GIBSON, if any,

Defendants.

ORDER

On the 24th day of August 2010, the Parties appeared before the Court on the Motions of Plaintiffs for Summary Judgment on Count One of the Complaint seeking a Declaratory Judgment, CNX Gas Company, LLC Mathews for Summary Judgment on the counter-claims for slander of title and tortious interference and the Defendants' cross-motion for Summary Judgment for Declaratory Judgment.

Whereupon having reviewed the memoranda and exhibits submitted by the Parties and having heard the arguments of Counsel, the Court hereby grants Plaintiffs' Motion for Summary Judgment with respect to the claim for declaratory judgment and finds as follows.

Appendix to Memorandum Decision
Supreme Court Case No. 11-0159

The primary issue in this case concerns the interpretation of the language pertaining to the second and third tracts described in that certain deed dated January 31, 1901, of record in the Preston County Clerk's Office in Deed Book Number 90 at Page 332 between A. F. Gibson and wife as Grantors to Merchants Coal Company of Baltimore City, Maryland as Grantee.

The Parties agree that the interpretation of the language in dispute relating to tracts two and three is a matter of law for the Court. Further, the Parties agree that at the time of the conveyance in 1901 Mr. Gibson and his wife owned one-third of the coal and all of the other minerals underlying tracts two and three. The issue in this case as it pertains to the deed is whether A. F. Gibson and wife conveyed one-third of the coal and all the other minerals underlying tracts two and three or did they convey one-third of the coal and one-third of the other minerals underlying tracts two and three.

West Virginia Code § 36-1-11 provides:

> When any real property is conveyed or devised to any person, and no words of limitation are used in the conveyance or devise, such conveyance or devise shall be construed to pass the fee simple, or the whole estate or interest, legal or equitable, which the testator or grantor had the power to dispose of, in such real property, unless a contrary intention shall appear in the conveyance or the will.

However, the deed in question contains two purported granting clauses. The first clause says:

> [T]he said grantors do grant with covenants of General Warranty, all of the coal and other minerals being and underlying the three certain parcels or tracts of land as hereinafter described situate in Reno District, County of Preston and State of West Virginia.

Tract Two contains a metes and bounds description purporting to describe 48 acres and 21 perches, but this description is followed by a clause that reads:

> It is herein especially understood by and between the said grantee and grantors that said grantors only intend to convey and do convey, one-third of all the coal and other minerals being and underlying the said second tract of land herein described or sixteen acres and seven perch of said coal and other minerals, underlying the said herein named and described second tract.

The third tract contains a metes and bounds description for what purports to be one acre and 56/160th of an acre. This description is also followed by a similar clause as the deed for the 48 acres and 21 perches tract:

> It also being understood and agreed between the said Grantors and Grantee that said Grantors only intend to convey and do herein convey to said Grantee, one-third of all the coal and other minerals, underlying the said third lot or tract of land herein described, namely, the tract of land conveyed by Allen Sharp and Nancy Sharp to said Grantors, and being 72/160th part of an acre, of said coal and minerals, conveyed in this tract.

The Parties disagree as to the meaning and intent of the clauses contained in the second and third tracts in the deed. This Court agrees with the property law principles that both sides have cited to the Court with respect to deed construction.

The Court finds and concludes that the clauses at issue with respect to tracts two and three do not clearly show an exception or reservation because in order to create an exception or reservation in a deed which would reduce a grant in the conveyance clause which is clear, correct and conventional, the reservation must be expressed in certain and definite language. *Hall v. Hartley*, 146 W.Va. 328, 119 S.E.2d 759 (1961). Reading all of the clauses together, the Court finds that with respect to the second and third tracts it was the intent of A. F. Gibson and his wife to convey to the Merchants Coal Company of Baltimore one-third of the coal and all of the minerals under the second and third tracts. That is to say Mr. Gibson and his wife conveyed by this deed all the coal that they owned and all of the other minerals that they owned. Such a conveyance comports with West Virginia Code Section 36-1-11. They did not express any exception or reservation in certain and definite language.

In *Winnings v. Wilpen Coal Company*, 134 W.Va. 387, 59 S.E.2d 655 (1950), the Supreme Court of Appeals of West Virginia held that by virtue of West Virginia Code § 36-1-11, the use of the word "all" in a grant of coal is unnecessary because all of the coal passed by the

statute. Additionally, the Court finds *Hall v. Hartley* persuasive. By applying the principles of these cases and the Code, the Court is able to give effect to all parts of the deed by this interpretation and finds that the first granting clause undoubtedly grants with covenants of general warranty, all of the coal and other minerals that A. F. Gibson and his wife owned. The Court believes that the purpose of the second clauses relating to the second and third tracts was to clarify that A. F. Gibson and his wife owned one-third of the coal and all of the other minerals, that they were conveying only what they owned, (and all of what they owned), and were clearly limiting the general warranty so as to protect themselves by making it clear as to what they owned by virtue of the second clauses in tracts two and three.

With respect to the language "hereinafter described," the words immediately preceding that language say, "underlying the three certain pieces or tracts of land as hereinafter described situate in Reno District." The Court interprets the language "as hereinafter described" as referring to the three tracts in Reno District which are subsequently described by metes and bounds in the body of the deed. The language in the second clauses, that in the second tract refers to 16 acres and 7 perches of coal and in the third tract refers to 72/160th of an acre of coal, is a common attempt to divide by three which lay people use when a one-third undivided interest is being conveyed. In reality, an undivided fractional interest in the coal within and underlying the subject premises (i.e., an undivided one-third interest in coal) was being conveyed by the subject deed. The Court believes this was merely an attempt to clarify on the part of A. F. Gibson that he intended to convey an undivided one-third interest in the coal.

Finally, the Court also considers as instructive the conduct of A. F. Gibson after the 1901 conveyance in that there is no record of assessment of him owning any coal or other minerals in Preston County. Subsequent deeds in the chain of title of Merchants Coal Company simply mirror the language of the 1901 deed.

Based upon the foregoing, the Court finds that the remaining motions are moot and as such are hereby denied. The Court saves the defendants an exception to all of the rulings of the Court. The court specifically noted its rulings relates solely to the deed in question — The A.F. Gibson Deed dated January 31, 1901 (45)

Based upon the forgoing it is hereby ORDERED that Plaintiffs' Motion for Summary Judgment on the declaratory judgment count of the Complaint is hereby GRANTED and that judgment be entered in accordance with this Order.

The Clerk is directed to send a certified copy of this Order to all counsel of record.

2 copies S/D 9/14/10 SPM RCL

ENTER: September 14, 2010

Lawrance S. Miller, Jr.
Chief Judge

entered: September 14, 2010
Betsy Castle, Clerk
by: Shantel Lambka, Deputy

Prepared & submitted by:

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A TRUE COPY:
ATTEST: S/BETSY CASTLE
CLERK OF THE CIRCUIT COURT
By Shantel Lambka Deputy