

Commonwealth of Kentucky
Court of Appeals

NO. 2002-CA-000085-MR

NEW RIDGE MINING COMPANY

APPELLANT

v. APPEAL FROM PIKE CIRCUIT COURT
HONORABLE DANNY P. CAUDILL, JUDGE
ACTION NO. 97-CI-01240

REGALD B. SMITH, Individually
and as Attorney-in-Fact for
MARY ANN SMITH; NEAL SMITH; GAIL SMITH;
ROBERT L. SMITH; ELISSA SMITH;
LINTON SMITH; GAIL SMITH; GEORGE SCOTT
SMITH; AND CINDY SMITH

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: BUCKINGHAM, McANULTY, AND PAISLEY, JUDGES.

McANULTY, JUDGE. New Ridge Mining Company (hereinafter
appellant) appeals the order of the Pike Circuit Court which
determined that parol evidence could be used to correct an
ambiguity in the Surface Lease Agreement between New Ridge and
owners of the surface tract, the Smith Family. We affirm.

The trial court found that the Lease Agreement
incorporated an attached map, which was "made a part of the

parties' written understanding." The trial court concluded that the lease's map exhibit became a part of the lease by the doctrine of incorporation by reference, citing Childers & Venters Inc. v. Sowards, Ky., 460 S.W.2d 343 (1970) and Hertz Commercial Leasing Corp. v. Joseph, Ky. App., 641 S.W.2d 753 (1982). The Lease Agreement provided in paragraph 2.03 that the Smith Family would be paid a "wheelage royalty" for use of their property, as follows:

As Wheelage for all coal not mined from Kentucky Berwind Land Company's mineral tract no. 432 ("Foreign Coal") and which is transported on, over and across the surface of the Leased Premises during the continuance of this Agreement, Lessee covenants and agrees to pay Lessor the sum of Twenty Cents (\$.20) per ton of two thousand (2,000) pounds for each and every ton of clean Foreign Coal so transported hereunder.

Thus, Tract No. 432 was the area from which the Smith family would not receive royalties.

The court found that an ambiguity existed in the Lease Agreement as to the location of Kentucky Berwind Tract No. 432 due to the fact that on the surface map attachment "Tr. 432" was delineated both inside an enclosed tract on the map, and on a point to the west side of the enclosed tract. The court noted that the Smith Family's contention was that Tract No. 432 was that enclosed area delineated on the exhibit map, but New Ridge claimed that the area was much larger than that shown on the

map. The court concluded in its judgment that Tract No. 432 was the smaller, enclosed area on the exhibit map.

The court further stated that it arrived at this conclusion after hearing evidence from the Smith Family's expert witness, Edward Brown, an engineer, as to principles of draftsmanship. The court also found that his testimony was consistent with the first draft of the lease, submitted as an exhibit, both of which comported with the Smith Family's understanding of what the lease terms were. The court found that appellant's predecessor in title, and the drafter of the lease, "unilaterally changed" the reference to appellee's surface in the Lease. The court concluded that, with an ambiguity, the contract must be construed more strongly against the party who prepared it, citing Boyd v. Phillips Petroleum Co., Ky., 418 S.W.2d 736 (1966).

On appeal, appellant argues that parol evidence was used improperly in this case, not to explain the meaning of an ambiguous term, but to determine in the first place whether an ambiguity existed. Appellant contends that the trial court did not find an ambiguity except with reference to the testimony of appellee's expert, who testified that there was one. Appellant argues, in sum, that "the ambiguity was found **after** parol evidence was introduced." Appellant submits that there was no

ambiguity in the surface lease, and notes that there was no finding of mistake by the court.

The construction and interpretation of a contract, including questions regarding ambiguity, are questions of law to be decided by the court. First Commonwealth Bank of Prestonsburg v. West, Ky. App., 55 S.W.3d 829 (2000).

Therefore, this court's standard of review is de novo. Id. at 835-36. Under the parol evidence rule, when parties put their agreement in writing, all prior negotiations and oral agreements are merged in the instrument, and a contract as written cannot be modified or changed by parol evidence, except in certain circumstances such as fraud or mistake. Childers and Venters, Inc. v. Sowards, Ky., 460 S.W.2d 343, 345 (1970).

While nothing can be added to or taken from a written contract by parol evidence, ambiguities may be explained by parol. Stubblefield v. Farmer, 291 Ky. 795, 165 S.W.2d 556 (1942). Under Kentucky case law, while parol evidence is not competent to vary a writing, it is competent to identify the subject-matter of the contract, and to show what objects were, at the time, known by the terms used. Sturtevant v. Hart, 327 F.2d 695 (6th Cir. 1964). Agreements and negotiations prior to or contemporaneous with the adoption of a writing are admissible in evidence to establish the meaning of the writing, whether or not the writing is an integrated agreement. Restatement, Second, Contracts § 214.

In concluding that an ambiguity exists, the court must first determine that the contract provision is susceptible to

inconsistent interpretations. Transport Ins. Co. v. Ford, Ky. App., 886 S.W.2d 901 (1994).

The criterion in determining the intention of the parties is not what did the parties mean to say, but rather the criterion is what did the parties mean by what they said. An ambiguous contract is one capable of more than one different, reasonable interpretation.

Central Bank & Trust Co. v. Kincaid, Ky., 617 S.W.2d 32, 33 (1981). If terms are ambiguous, then extrinsic evidence may be resorted to in an effort to determine the intention of the parties; if not, then extrinsic evidence may not be resorted to. Id. at 34.

We are not persuaded that the trial court erred. Although the court did not specifically so find, we believe that there was a latent ambiguity in the map attachment as to what property was designated. Although appellant produced a map at trial which showed Tract No. 432 as a larger area surrounding the appellee's leased surface, this map was not made a part of the agreement. Therefore, the court could correctly conclude that what the parties *meant* by Tract No. 432 in the agreement was ambiguous. It was capable of two interpretations. Therefore, we do not agree that the trial court only found an ambiguity after hearing the parol testimony in the case.

Once the court has determined that there is an ambiguity requiring parol evidence to explain the meaning of the terms, earlier negotiations and agreements of the parties which were not finalized may be examined to determine what the parties meant. Thus, it was proper for the trial court to examine the

earlier lease agreement of the parties and draw conclusions as to the intended meaning of the final lease agreement. There was also no error in relying upon the testimony of plaintiff's expert as to drafting such a map. Therefore, we affirm the trial court's findings and conclusions in this case.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR
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