

RENDERED: SEPTEMBER 5, 2008; 10:00 A.M.  
NOT TO BE PUBLISHED

DISCRETIONARY REVIEW GRANTED BY SUPREME COURT:  
OCTOBER 21, 2009  
(FILE NO. 2008-SC-0735-D)

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2007-CA-001712-MR

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

APPELLANTS

v. APPEAL FROM PERRY CIRCUIT COURT  
HONORABLE WILLIAM ENGLE III, JUDGE  
ACTION NO. 02-CI-00499

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

APPELLEES

OPINION  
REVERSING AND REMANDING

\*\* \*\*

BEFORE: DIXON, LAMBERT AND STUMBO, JUDGES.

DIXON, JUDGE: Appellants, Larry J. Knight, and his wife, Eileen Knight, and Larry E. Knight and his wife, Mary Knight, appeal from the Perry Circuit Court's Findings of Fact, Conclusions of Law and Judgment in this dispute over the use of a coal haul road. Because we find that the Appellants were denied their right to a trial by jury, we reverse.

Appellants are the owners of surface land located in Perry County, Kentucky. Appellees are the owners or assignees of the mineral rights on the same property, acquired by a severance deed from 1910. At issue is a "coal haul road" that crosses Appellants' property and has been used by Appellees to haul coal, mine supplies, equipment, coal refuse, and personnel.

On September 30, 2002, Appellants filed an action in the Perry Circuit Court alleging that Appellees:

wrongfully entered upon and mined coal and hauled other coal across plaintiff[s]' land, hauled rock, sludge, and waste from other land across plaintiffs' land, and erected power lines upon and across plaintiffs' land, otherwise used and utilized plaintiffs' land, or caused others to do so, from plaintiffs' land . . . excavated the land and destroyed and removed timber there from, all owned by the plaintiffs, without right, title, claim, interest or authority, and without consent or permission from the plaintiffs, and thereby damaged, destroyed and wasted said land.

Appellants specifically demanded a jury trial on all issues.

Appellees all responded that their right to access the coal haul road was established by the mineral severance deeds and was further permitted by prescriptive easement established by years of open, continuous and uninterrupted

use. As did Appellants, all Appellees, except for Hazard Coal Corporation, demanded a jury trial in their initial pleading.

In the fall of 2005, all parties filed motions for summary judgment. The trial court denied each motion on the grounds that there were genuine issues of material fact. A jury trial was thereafter scheduled for February 24, 2006. However, during a pretrial conference on February 20, 2006, the trial court announced, on its own initiative, that it would conduct a bench trial on all issues except damages. The court explained:

[T]here is no way that a jury can understand that part of it to even understand the questions, you all have not even been able to formulate the questions for them to answer. Therefore what I am going to do is this; I am going to have Friday a bench trial on the issue of whether or not that . . . construction of the deed. I'm gonna hear all evidence on the use . . . Then I'm gonna decide whether or not . . . the actions of the company have been violated . . . the conditions of the deed . . . I have to hear all the facts and then I have to apply the facts to my construction of the deed. I do not think a jury can do that. You all have convinced me of that . . . . Then we will have a jury trial on damages . . . .

I may be wrong, and I'm sorry if I'm not following the precedent of the Commonwealth of Kentucky, but you know, you got to realize I'm human, I'm trying to follow it . . . . You know cite me something in the law that says I have to be right all the time.

At the conclusion of the bench trial, the trial court ruled in favor of Appellees, finding that “the preponderance of the evidence shows the continuous, uninterrupted, notorious, open use by prescriptive easement grew clearly out of the original scope granted in the original grant.” The trial court did not rule on the

deed issue, but noted that such was unnecessary due to its finding of a prescriptive easement. The trial court entered its findings of fact, conclusions of law, and judgment on March 6, 2006.

Appellants thereafter filed a motion to reconsider, arguing, in part, that the trial court had violated their right to have all issues decided by a jury. The trial court denied the motion on July 24, 2007. This appeal ensued.

Appellants argue to this Court that the trial court erred in holding a bench trial when they clearly demanded a jury trial and did not waive the right to such during the proceedings. Further, Appellants contend that the trial court erred in finding the existence of a prescriptive easement. Because we conclude that the trial court improperly denied Appellants a trial by jury, we necessarily do not reach the merits of the easement issue.

CR 38.01 clearly states, “The right of trial by jury as declared by the Constitution of Kentucky or as given by a statute of Kentucky shall be preserved to the parties inviolate.” Our civil rules further provide that any party may demand a trial by jury and that such demand “may not be withdrawn without the consent of the parties.” CR 38.04. The limitations upon a trial by jury are pronounced in Civil Rule 39.01:

When trial by jury has been demanded . . . the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless (a) . . . by written stipulation filed with the court or by an oral stipulation . . . , consent to trial by the court sitting without a jury, or (b) the court upon motion or of its own initiative finds that a right of trial by jury of some

or all of the issues does not exist under the Constitution or Statutes of Kentucky.

The trial court herein concluded that a bench trial was necessary because a jury would be incapable of understanding and answering the questions the parties had formulated. And, in fact, the former CR 39.01 authorized a bench trial if, “the court upon motion or of its own initiative finds that because of the peculiar questions involved, or because the action involves complicated accounts, or a great detail of facts, it is impracticable for a jury intelligently to try the case.” CR 39.01(c). 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 detail 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 provides 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 “inviolable” 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 right 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 by 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.

*Steelevest, 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 39.01.

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.

BRIEF FOR APPELLANTS:

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