

SUPREME COURT OF APPEALS OF WEST VIRGINIA

McElroy Coal Co. v. Michael and Patricia Schoene

McElroy Coal Co. · No. No. 17-0641 · Decided April 12, 2018

SUMMARY

Justice Ketchum partially concurred with and partially dissented from the West Virginia Supreme Court of Appeals' decision in a certified-question case concerning whether a 1902 deed's waiver of subjacent support barred a common-law claim for subsidence damage. He concluded that the waiver did not encompass longwall mining because that method was not within the parties' contemplation when the deed was executed, while agreeing with the majority's answers to the other certified questions.

CASE DETAILS

COURT	Supreme Court of Appeals of West Virginia
WRITING FOR THE COURT	Justice Ketchum
JURISDICTION	West Virginia
DECIDED	April 12, 2018
DOCKET	No. 17-0641
DISPOSITION	other
PROCEDURAL POSTURE	Certified questions from a federal district court concerning whether a 1902 deed's waiver of subjacent support barred a common-law claim for subsidence damage caused by longwall mining.
PRECEDENTIAL VALUE	Separate concurring and dissenting opinion; nonbinding as to the matters on which it disagrees with the majority.
PARTIES	McElroy Coal Company v. Michael and Patricia Schoene

TOPICS

[mining law](#) [minerals](#) [deeds](#) [real estate](#)

PRACTICE AREAS

[mining law](#) [real property](#) [deeds](#) [torts](#)

QUESTIONS PRESENTED

1. Whether a broad waiver of subjacent support in a 1902 coal severance deed barred the plaintiffs' common-law claim for subsidence damage caused by longwall mining.
2. Whether a deed waiver of subjacent support applies to mining methods that were not within the contemplation of the parties when the deed was executed.

HOLDINGS

1. In Justice Ketchum's view, the waiver did not bar the claim because longwall mining was unknown in Marshall County in 1902 and therefore was not within the contemplation of the parties when the deed was executed.

KEY QUOTATIONS

“A release ordinarily covers only such matters as may fairly be said to have been within the contemplation of the parties at the time of its execution.” (1)

“Thus, a waiver of subjacent support is only valid when the type of mining activity was “within the contemplation” of the original parties to the deed containing the waiver.” (1)

“This Court holds that the broad form waiver of subjacent support is not a valid waiver against the subsidence damage caused by longwall mining.” (2)

“Longwall mining was unknown in Marshall County and to the lessors at the time the instrument was executed.” (2)

FACTUAL BACKGROUND

The plaintiffs' property was subject to a 1902 coal severance deed containing a broad waiver of subjacent support. McElroy Coal conducted longwall mining beneath the property, using large machines and continuously running conveyor belts; the asserted consequences included significant subsidence and loss of natural water sources. Justice Ketchum emphasized that longwall mining was unknown in Marshall County in 1902, when coal was generally mined with picks and shovels and removed by wagons or rail carts pulled by mules.

PROCEDURAL HISTORY

The federal district judge determined that the broad-form waiver of subjacent support in the 1902 deed was not enforceable against subsidence damage caused by longwall mining because that mining method was unknown and therefore not within the parties' contemplation when the deed was executed. Justice Ketchum disagreed with the majority's answer to the first certified question but agreed with the majority's answers to the other certified questions.

DISPOSITION

other

CASES CITED

- Cogar v. Sommerville, 180 W. Va. 714, 379 S.E.2d 764 (1989)
- Brown v. Crozer Coal & Land Co., 144 W. Va. 296, 107 S.E.2d 777 (1959)
- West Virginia-Pittsburgh Coal Co. v. Strong, 129 W. Va. 832, 42 S.E.2d 46 (1947)
- Winnings v. Wilpen Coal Co., 134 W. Va. 387, 59 S.E.2d 655 (1950)
- Conley v. Hill, 115 W. Va. 175, 174 S.E. 883 (1934)
- Thornton v. Charleston Area Medical Center, 158 W. Va. 504, 213 S.E.2d 102 (1975)
- Schoene v. McElroy Coal Co., 2016 WL 397636 (N.D. W. Va. Jan. 29, 2016)

OPINION

PER CURIAM.

FILED April 12, 2018 No. 17-0641 McElroy Coal Company v. Schoene released at 3:00 p.m. EDYTHE NASH GAISER, CLERK SUPREME COURT OF APPEALS OF WEST VIRGINIA Justice Ketchum, concurring, in part, and dissenting, in part: I disagree with the majority's answer to the first certified question.

The federal district judge thoroughly examined the West Virginia law and correctly determined that the waiver of subjacent support in the 1902 deed did not prohibit the Plaintiffs from pursuing a common law claim for subsidence damage to their home.

The resolution of this issue only required a simple application of this Court's plain, clear, unambiguous holding in Cogar v. Sommerville, 180 W.Va. 714, 379 S.E.2d 764 (1989). In Syllabus Point 3 of Cogar, the Court held, in relevant part, "A release ordinarily covers only such matters as may fairly be said to have been within the contemplation of the parties at the time of its execution." (Emphasis added).

Thus, a waiver of subjacent support is only valid when the type of mining activity was "within the contemplation" of the original parties to the deed containing the waiver. The Court's holding in Cogar followed a long line of mining cases.

As it explained, the Court's ruling was consistent with our mining cases holding that a severance deed is to be construed in light of the conditions and reasonable expectations of the parties at the time it is made.

As a consequence, mining methods not contemplated at the time of the severance deed may not be utilized. See Brown v. Crozer Coal & Land Co., 144 W.Va. 296, 107 S.E.2d 777 (1959) (auger mining); West Virginia-Pittsburgh Coal Co. v. Strong, 129 W.Va. 832, 42 S.E.2d 46 (1947) (strip mining). It would be impossible to conceive that the parties to old severance deeds would have any contemplation of waiving future statutory rights.

1 Furthermore, in Syllabus Point 1, in part, of Winnings v. Wilpen Coal Co., 134 W.Va. 387, 59 S.E.2d 655 (1950), we held that a coal severance deed containing broad mining rights would not

be construed to waive the right of subjacent support “unless [the surface owner’s] intention so to do clearly appears from express language or by necessary implication.” Finally, our conclusion is in accord with the general principle that a release or waiver of liability or damages covers only those items that are within the ordinary contemplation of the parties.

As we stated in Syllabus Point 2 of *Conley v. Hill*, 115 W.Va. 175, 174 S.E. 883 (1934), overruled on other grounds, *Thornton v. Charleston Area Medical Center*, 158 W.Va. 504, 213 S.E.2d 102 (1975): “A release ordinarily covers only such matters as may fairly be said to have been within the contemplation of the parties at the time of its execution.” *Cogar*, 180 W.Va. at 719-20, 379 S.E.2d at 769-70 (emphasis added).

The deed in the present case was made in 1902. In 1902, most coal was mined by miners using picks and shovels. Additionally, most coal was removed from coal mines by wagon or carts on rails pulled by mules. The defendants’ mining operations under the plaintiffs’ property in the instant case was done using the longwall method of mining. Longwall mining uses huge million dollar machines that rip out tons of coal in seconds, shooting it out of the mine on continuously running conveyor belts.

The federal district judge did extensive research on longwall mining and concluded as follows: This Court holds that the broad form waiver of subjacent support is not a valid waiver against the subsidence damage caused by longwall mining. Longwall mining was unknown in Marshall County and to the lessors at the time the instrument was executed. Longwall mining provides almost 2 a certainty of significant subsidence and the loss of all natural water sources.

On the other hand, room and pillar mining, that known in 1902, carries with it only the possibility of subsidence and not commonly the loss of water resources. *Schoene v. McElroy Coal Co.*, 2016 WL 397636, at 6 (N.D. W.Va. Jan. 29, 2016) (emphasis added).

The federal district judge was correct in ruling that the waiver of subjacent support was not enforceable because longwall mining was unknown in Marshall County in 1902, and, therefore, not contemplated by the parties to the 1902 deed. I agree with the majority opinion’s answers to the other certified questions. 3