RENDERED: JULY 22, 2016; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000490-MR

EQT GATHERING, LLC;
and EQT PRODUCTION
COMPANY — APPELLANTS

v.

APPEAL FROM PIKE CIRCUIT COURT
HONORABLE EDDY COLEMAN, JUDGE
ACTION NO. 13-CI-00617

BIG SANDY COMPANY, LP — APPELLEE

OPINION
REVERSING

** ** ** ** **

BEFORE: KRAMER, CHIEF JUDGE; TAYLOR AND THOMPSON, JUDGES.

KRAMER, CHIEF JUDGE: The above-captioned appellants (collectively "EQT") appeal a declaratory judgment entered in favor of appellee, Big Sandy Company, LP ("Big Sandy"), regarding the interpretation of a pipeline easement agreement. Finding error, we reverse.

Big Sandy and Kentucky West Virginia Gas Company, LLC ("KWVA"), a predecessor-in-interest to EQT, entered into the aforementioned easement agreement (the "Agreement") on August 1, 2003, for what the Agreement describes as "the construction, operation and maintenance of a pipeline over, through and across certain of Big Sandy's Surface Tracts and Mineral Tracts in Pike County, Kentucky[.]" More particularly, Paragraph 1 of the Agreement provides:

> Big Sandy hereby grants and conveys unto KWVA, subject to any conditions or reservations set forth herein or of record, and without warranty or representation of title or condition of the premises of any kind, a non-exclusive sixty foot (60') wide temporary easement for initial construction, and a non-exclusive thirty foot (30') wide right of way and easement (the "Easement") for a pipeline twelve inches (12") or less in diameter, for the transportation of natural gas (the "Pipeline") over, through and across *certain Surface Tracts and Mineral Tracts of Big Sandy* situated on the waters of Elkhorn Creek in Pike County, Kentucky, *the centerline of which is as shown in the color print attached hereto and made a part hereof and marked as Exhibit "A"*, being a portion of the property conveyed to Big Sandy by Big Sandy Company, Inc., by deed dated July 16, 1984, and recorded in the Clerk's Office of Pike County, in Deed Book No. 581, Page 477.

(Emphasis added.)

The parties generally refer to what is contemplated in this Agreement as the "Myra Pipeline."

Much of the conflict in this litigation has focused upon the meaning of the phrases emphasized above. Big Sandy owns a mineral estate in the thirty-five

or so numbered tracts of land depicted on the "color print attached" to the Agreement (the "Map"). In some, but not all of those tracts, it also owns a surface estate. The parties disagree whether "certain Surface Tracts and Mineral Tracts of Big Sandy," as stated above, refers to every tract owned by Big Sandy depicted on the color print map, or only to the tracts where Big Sandy owns both a mineral estate and surface estate.

This disagreement has arisen because, to the extent that Big Sandy eventually decides to engage in mining activities in the vicinity of an area covered by the easement described in the Agreement, the Agreement stipulates EQT is required to either purchase the minerals underlying its pipeline or remove and relocate its pipeline at its own expense. Conversely, if the pipeline is not covered by the Agreement, Big Sandy would be liable for these expenses under general principles of Kentucky law. *See Columbia Gas Transmission Corp. v. Limited Corp.*, 759 F.Supp. 343, 350-53 (E.D. Ky. 1990). And, as it happens, Big Sandy intends to commence mining operations in the vicinity of the Myra Pipeline on three of the numbered tracts in which it only holds a mineral estate (depicted in the lower right-hand corner of the Map as tracts "1," "2," and "3").

For its part, EQT found significance in the Map's use of different colors on the Map to differentiate Big Sandy's mineral estates from Big Sandy's mineral *and* surface estates, as well as the Map's use of colors and notations to differentiate sections of the Myra Pipeline that had already been constructed prior to the Agreement, from sections that had yet to be constructed (the map lists the

former as "pipe in ground" and the latter as "proposed route"). EQT noted that the purpose of the agreement was to allow "construction" of a pipeline and argued that because KWVA had already secured permission from the surface owners of tracts 1, 2, and 3 to construct part of the Myra Pipeline, and because KWVA had already constructed the section of the Myra Pipeline overlying those tracts prior to executing the Agreement with Big Sandy, the parties could not have intended tracts 1, 2, and 3 to be subject to the terms of the Agreement.

In its own analysis of the Agreement, however, the circuit court shared Big Sandy's point of view and focused almost exclusively upon the Map. In relevant part, the circuit court held:

> Attached to the Agreement is a map depicting the location of the Myra Pipeline where it crosses Big Sandy's mineral and surface tracts (the "Myra Pipeline Map"). The Myra Pipeline Map is referred to in the Agreement and is a part of the Agreement. On the Myra Pipeline Map the color print indicates pipe in ground in red ink and proposed route in blue ink. Nothing in the Agreement states that it is limited to new pipeline construction. Nothing in the Agreement indicates that the parties would have different duties between the centerline of the pipeline; whether the line was new or old or depicted in blue or red.
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> . . . .
>
> The Agreement unambiguously states that the easement is "for a pipeline twelve inches (12") or less in diameter, . . . the centerline of which is as shown on the color print attached hereto and made a part hereof and marked as Exhibit 'A'. . . ." The parties agree that the Myra Pipeline Map was made a part of the Pipeline Easement Agreement. The Myra Pipeline Map shows numbered tracts of land along the Pipeline's route, and the tracts are

> color-coded to indicate where Big Sandy is the "coal owner" and where it has "right of way" rights. The numbered tracts are not addressed in the Agreement itself. Had the parties intended to exclude specific tracts from the scope of the Pipeline Easement Agreement, they would have included language to that effect in the Agreement or on the Myra Pipeline Map. No such language is evident. Therefore, according to the plain and unambiguous language of the Agreement, the Court holds that the parties intended for the Agreement to cover the entire pipeline depicted on the Myra Pipeline Map, including the portion overlying Tracts 1, 2 and 3. The same reasoning applies to the different colors of the pipe center line.

With that said, we now proceed to address the arguments raised by EQT on appeal.

In its brief, EQT summarizes its first argument as follows: "The notice provision in the Pipeline Easement Agreement is vague and ambiguous, requiring a determination of fact as to whether Big Sandy provided sufficient notice to EQT to require EQT to make an election under the Agreement."

We have no jurisdiction to review this argument because it is unrelated to the scope of the easement contemplated in the Agreement, the sole issue addressed in the circuit court's judgment that was made appealable pursuant to Kentucky Rules of Civil Procedure 54.02. Rather, this argument is directed toward an issue that remains pending and has yet to be addressed below, *i.e.*, whether, as a predicate to declaring EQT in breach of contract, Big Sandy properly invoked its rights under the notice provision of their Agreement.

Next, EQT argues the only proper interpretation of the Agreement (or, at least for purposes of determining ambiguity, an equally reasonable interpretation of the Agreement) is that it excludes the portion of the "pipe in ground" pipeline depicted on the Map overlying Tracts 1, 2, and 3. This, it reasons, is because (1) nothing in the Agreement specifically states that *all* of the pipeline, as depicted on the Myra Pipeline map, is subject to the Agreement; (2) the map uses colors to differentiate pipeline that has already been constructed ("pipe in ground") from additional segments of the pipeline that would later connect to the already-constructed pipeline ("proposed route"); (3) the Agreement specifically grants an easement for the "construction, operation and maintenance of a pipeline" (EQT's emphasis), which must mean that it only applies to pipeline segments that will be constructed; and (4) in any event, it would have made no sense for EQT to secure some sort of easement from Big Sandy to place a pipeline on the surface of tracts where Big Sandy did not own the surface, but only owned the minerals (*i.e.*, tracts 1, 2, and 3).

Findings of fact resulting from a trial in a declaratory action shall not be set aside unless clearly erroneous. *Baze v. Rees*, 217 S.W.3d 207, 210 (Ky. 2006) (citing *Largent v. Largent*, 643 S.W.2d 261 (Ky. 1982)); *see also American Interinsurance Exchange v. Norton*, 631 S.W.2d 851, 852 (Ky. App. 1982). However, our review is *de novo* as to the trial court's conclusions of law. *Baze*, 217 S.W.3d at 210. The "interpretation and construction of a contract is a matter of law for the courts to decide." *New Life Cleaners v. Tuttle*, 292 S.W.3d 318, 321

(Ky. App. 2009). When interpreting a contract, the primary purpose is "to effectuate the intentions of the parties." *Cantrell Supply, Inc. v. Liberty Mut. Ins. Co.*, 94 S.W.3d 381, 384 (Ky. App. 2002). The best evidence of the intent of the parties is the words the parties deliberately included in their agreement. When a court finds the language of the agreement to be clear and unambiguous, the "written instrument will be strictly enforced according to its terms." *Mounts v. Roberts*, 388 S.W.2d 117, 119 (Ky. 1965).

With this standard in mind, we agree with EQT's conclusion that the Agreement unambiguously excludes the section of its pipeline overlying tracts 1, 2, and 3, but EQT's reasoning largely ignores the contractual language supporting this conclusion. Paragraph 5, for example, provides:

> There is expressly excepted from the foregoing grant and demise [*i.e.*, the entire easement contemplated in the Agreement], and reserved unto Big Sandy, its successors, assigns and lessees: (i) subject to the provisions of Paragraph 9, below, *the right to utilize the surface of the lands effected by the Easement for any and all purposes* . . . .

(Emphasis added.)

Paragraph 7 provides EQT with the option to choose between two mutually exclusive remedies, stating in relevant part:

> If Big Sandy or its lessee(s) hereafter conduct, or Big Sandy grants a lease to conduct operations for the mining, removal or development of coal or other minerals by deep or surface mining, including the construction of roads or other operations, and Big Sandy has reasonable basis to believe that such operations may, within a period of no more than twelve (12) calendar

> months, cause an additional loss of lateral or subjacent support with respect to, or further endanger the safety of persons or the Pipeline or interfere with the construction, operation or maintenance of the Pipeline, Big Sandy or its lessee(s) shall so notify KWVA by certified mail, return receipt requested (a "Notice"). Following receipt of a Notice, KWVA shall have the option to *either*:
>
> > (a) relocate the Pipeline at its own expense to another suitable location, which, to the extent the same is reasonably available, *shall be elsewhere on Big Sandy's Surface Tracts*, in which event Big Sandy and KWVA shall execute an Amendment to this Agreement depicting the new location of the Pipeline and Easement; *or*
> >
> > (b) purchase Big Sandy's interest in whatever otherwise economically recoverable coal or other minerals are left in place as are reasonably necessary to preserve the lateral or subjacent support with respect to the Easement and the Pipeline in their then existing locations . . .

(Emphasis added.) As emphasized, Paragraph 7(a) likewise underscores that the pipeline contemplated in this agreement will be located on "surface tracts."

Paragraph 10 then discusses Big Sandy's right of reversion with respect to the easement:

> KWVA shall have thirty calendar (30) days following receipt of a Notice within which to notify Big Sandy and its lessee(s) of whether it shall proceed under subparagraph 7(a) or 7(b) above. KWVA shall take whatever actions are necessary to completely perform its obligations under the option so selected, within a reasonable time, which in the case of subparagraph 7(a) shall be six (6) months with respect to the first one (1) mile of Pipeline or portion thereof, and an additional thirty (30) days with respect to each additional one

> thousand (1,000) feet of Pipeline, or portion thereof. *In the event KWVA elects to proceed under subparagraph 7(a) above, that portion of the Easement from which the Pipeline is removed shall automatically and without cost revert to Big Sandy immediately upon completion of such removal*.

(Emphasis added.)

Finally, Paragraph 14 reemphasizes that Big Sandy has a reversionary interest in all of the land contemplated in the easement by providing, in relevant part, "In the event KWVA, its successors or assigns shall abandon or cease to use the Easement, either in whole or in part, the abandoned portion or portions shall thereupon automatically and immediately revert to Big Sandy without execution of release[.]"

To be clear, the owner of only a mineral estate does not own the surface. As explained in *General Refractories Co. v. Swetman*, 303 Ky. 427, 197 S.W.2d 908, 910 (1946), the mineral estate owner has only an attenuated right of access to the surface:

> The owner of the surface of the land and the owner of the minerals when they are severed from the surface estate have separate and distinct titles. With the ownership of these separate estates go rights of use and enjoyment which are in a sense relative and which should be exercised by each owner with due regard to the rights of the other owner. So far as it is possible, these respective rights should be adjusted to each other, so as to conduce to the full enjoyment of the property. The surface owner may use and deal with his property in any legitimate manner not inconsistent with the rights acquired by the owner of the minerals; and as will be seen, the owner of the minerals has a limited right to use the surface in reaching and removing the minerals.

Thus, interpreting the Agreement to apply to tracts where Big Sandy has only a mineral estate, as opposed to a surface *and* mineral estate, would lead to absurdity and render much of the contractual language meaningless. Big Sandy cannot, as described in Paragraphs 10 and 14, have a reversionary ownership interest in something it never owned. Big Sandy cannot, as described in Paragraph 5, "utilize the surface of the lands effected by the Easement for any and all purposes" if it did not own the surface upon which the easement was situated. Moreover, if Big Sandy decided to commence mining operations in the vicinity of EQT's pipeline, Big Sandy could not, if EQT elected to proceed under Paragraph 7(a), offer an alternative route for EQT's pipeline over any surface property unless it owned the surface property in question.

Indeed, the plain language of Paragraph 7(a) states in unambiguous terms that the Agreement only applies to pipeline that *is* situated on Big Sandy's surface property because it provides EQT with the option to relocate its pipeline "elsewhere"—*i.e.*, somewhere *else*—"on Big Sandy's Surface Tracts."

In contract law, we presume that parties include contractual provisions and terms for a reason. It is a basic tenet of contract construction that if two interpretations are reasonable and one renders the provision meaningless and one does not, the courts should adopt the interpretation that gives meaning to the terms and provisions the parties included in their contract. *See Harbison–Walker Refractories Co. v. United Brick and Clay Workers of America, AFL–CIO Local*

No. 702, 339 S.W.2d 933, 935 (Ky. 1960). Here, the interpretation offered by Big Sandy and adopted by the circuit court renders several terms and provisions of the Agreement meaningless. The interpretation offered by EQT does not, and it is otherwise reasonable.

Before concluding and for the sake of clarity, we note that this is not a case where a narrow contractual issue was presented to a circuit court, and some alternative, unrelated issue has been raised for the first time on appeal or *sua sponte*. *See, e.g., Fischer v. Fischer*, 348 S.W.3d 582, 586-591 (Ky. 2011). The broad issue presented to this Court, as well as to the circuit court, has always been the interpretation of the *entire* contract. And the law that applied to the circuit court's interpretation of the entire contract-- and which similarly must apply to our own interpretation-- mandates that "a contract is to be interpreted *as a whole and the entire instrument considered to determine the meaning of each part*." *International Union of Operating Engineers v. J. A. Jones Const. Co.*, 240 S.W.2d 49, 54 (Ky. 1951) (emphasis added). Stated differently, we have not raised any new issues that require supplemental briefing; rather, we have followed our mandated duty.

In light of the foregoing, the circuit court is REVERSED.

TAYLOR, JUDGE, CONCURS.

THOMPSON, JUDGE, DISSENTS, AND FILES SEPARATE OPINION.

THOMPSON, JUDGE, DISSENTING: Respectfully, I dissent. I agree that the agreement is unambiguous but differ with the majority's conclusion that the

agreement, which incorporates the Myra Pipeline map, does not include the pipeline overlying tracts 1, 2, and 3.

Because the agreement is unambiguous, the parties intent must be "discerned from the four corners of the instrument[.]" *Cantrell Supply Inc. v. Liberty Mut. Ins. Co.*, 94 S.W.3d 381, 385 (Ky. App. 2002). The majority deviates from the express language of the agreement.

The agreement grants KWVA and its successors in interest, "a nonexclusive sixty foot (60') wide temporary easement" to construct a pipeline "over, through and across certain Surface Tracts and Mineral Tracts of Big Sandy." The agreement further provides that "the center of [the pipeline] is as shown on the color print attached hereto and made a part hereof[.]" There is nothing demonstrated on the Myra Pipeline map or stated in the agreement to indicate that a portion of the pipeline is excluded from the parties' agreement.

The map contains numbered tracts along the pipeline route which are color-coded to illustrate those which Big Sandy owns mineral interests and those it owns surface interests. As the trial court noted, if the parties intended to exclude a portion of the pipeline from the agreement, they could have easily done so in the agreement or on the Myra Pipeline map. To the contrary, the agreement expressly states the pipeline covered by its terms runs "over, through and across certain Surface Tract and Mineral Tracts of Big Sandy." Therefore, the agreement clearly applies to pipeline affecting its surface and mineral estates.

The majority agrees with EQT's conclusion but for reasons not argued by EQT. Unfortunately, Big Sandy has not been given the opportunity to address the majority's interpretation of paragraphs 5, 7, 10 and 14. I believe that before the majority reverses based on an argument not raised by EQT, Big Sandy should have been granted the opportunity to brief the issue. With that said, I state my reason for disagreeing with the majority that those terms of the agreement support its conclusion.

The majority finds significance in the right of reversion in the land contemplated by the easement if KWVA or its successors or assigns abandons or ceases to use the easement. The stated general right of reversion is not, as the majority suggests, absurd. It has no impact on the interpretation of the agreement between these parties. That portion of the agreement is merely a general right of reversion of any interest Big Sandy owns in the easement granted and is commonly found in easement agreements where both mineral and surface estates are involved. If Big Sandy does not own the surface estate in any portion of the easement, Big Sandy would obviously not have a reversionary ownership interest superior to the true owner. The agreement only contemplates that Big Sandy would have a reversionary interest superior to any claim of an interest by KWVA.

The plain and unambiguous language of the agreement provides that the parties intended the entire pipeline depicted on the Myra Pipeline map to be included. It should be "strictly enforced according to its terms." *Mounts v. Roberts*, 388 S.W.2d 117, 119 (Ky. 1965). I would affirm.

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