

FILED

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**RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

Albright, Justice, dissenting:

The *ultimate* question presented to this Court by the case before us requires an identification of who acquires the right to drill a coalbed methane gas well under the statutory scheme adopted in 1994 and set forth in Article 21, Chapter 22 of the Code of West Virginia of 1931, as amended. The *immediate* question posed to the Court, however, is whether, under leases executed in 1986, a lessor of “all of the oil and gas and all of the constituents of either” in and underlying certain tracts of land, acquired the right to explore for, extract and market coalbed methane gas from those tracts.

The majority answers the immediate question by skillfully: (1) finding ambiguity in the leases, (2) avoiding the determination of whether coalbed methane is “gas” within the meaning of the leases, and (3) proceeding to construe the leases in a manner that prevents the lessee from applying for a permit to explore for and produce coalbed methane. Moreover, the majority simply ignores the ultimate question of identifying the party or parties who may be entitled to drill a coalbed methane well. I respectfully suggest that the majority erred on the three points and by failing to address the ultimate issue.

We have consistently held that, in the absence of an ambiguity, a lease or other instrument may not be construed by the courts but must be applied according to its clear terms. *Cabot Oil & Gas Corp. v. Pocahontas Land Corp.*, 180 W.Va. 200, 376 S. E.2d 94 (1988). This Court has also consistently defined ambiguity as follows:

Ambiguity in a statute or other instrument consists of susceptibility of two or more meanings and uncertainty as to which was intended. Mere informality in phraseology or clumsiness of expression does not make it ambiguous, if the language imports one meaning or intention with reasonable certainty.

HN Corp v. Cyprus Kanawha Corp., 195 W.Va. 289, 294, 465 S. E.2d 391, 396 (1995) (quoting Syl. Pt. 13, *State v. Harden*, 62 W.Va. 313, 58 S. E. 715 (1907)).

Under our law an oil and gas lease grants first a contingent title – an inchoate right or mere license – to explore for oil and natural gas; if either is found, a right vests in the lessor to produce such minerals and, in turn, to take title to the oil or gas produced as personalty when either is actually extracted from the land. *See South Penn Oil Co. v. Haught*, 71 W. Va 720, 78 S. E. 759 (1913); *McGraw Oil Co. v. Kennedy*, 65 W.Va. 595, 64 S. E. 1027 (1909); *Lowther Oil Co. v. Miller-Sibley Oil Co.*, 53 W.Va. 501, 44 S. E. 433 (1903).

At the time of the execution of the leases at issue here, “natural gas” had been defined as:

A gas issuing from the earth's crust through natural openings or bored wells and frequently accompanied by petroleum. It occurs especially in the Paleozoic rocks of the United States and is of industrial importance in more than a dozen States. When combustible it consists chiefly of methane

Webster's New Intl. Dictionary 1631 (2nd ed 1958).

The same dictionary notes that in popular usage the term “gas” includes “[a]ny combustible gaseous mixture used for illuminating or as a fuel; as, natural *gas*, coal *gas*, etc.” and recites that a typical analysis of the composition of natural gas revealed the sample to be 92% methane, 3% hydrogen and 2% nitrogen. *See id.* at 1035-36 (defining “gas”). Under the Energy Policy Act of 1992, the United States Congress defined “coalbed methane gas” as “occluded natural gas produced (or which may be produced) from coalbeds and rock strata associated therewith.” 42 U.S.C. §13368(p)(2) (2000). In West Virginia’s response to the Energy Policy Act of 1992, as one of the named “affected states” particularly addressed by that federal legislation, our legislature adopted a somewhat more expansive definition: “‘Coalbed methane’ means gas which can be produced from a coal seam, the rock or other strata in communication with a coal seam, a mined-out area or a gob well.” W.Va. Code § 22-21-2(c) (1994) (2002 Repl. Vol.). Finally, it is noted that the leases in question granted the lessee rights to explore for and exploit *all* of the oil and gas underlying the tracts of land covered by the leases.

The majority found an ambiguity in the grant of a lease of “all of the oil and gas and all of the constituents of either” where reasonable minds could not differ as to the true and intended meaning of that language. Moreover, it appears beyond cavil that coalbed methane is gas, that is natural gas. Each of the dictionary definitions clearly identify methane as the principal component of natural gas and both the federal and state definitions of “coalbed methane” describe it as a gas. Consequently, the majority erred in finding ambiguity and, in the larger picture, in failing to clearly define coalbed methane as a gas, as natural gas.

I turn now to a review of the impact of the decision of the majority to construe the leases at issue here, rather than to apply their clear language. The majority construed the leases in a manner that prevents the oil and gas lessees here from applying for a permit to explore for and produce coalbed methane and led to the corollary decision to ignore the ultimate question of who may apply for a permit to drill such a well. In setting forth its reasoning, the majority relied heavily on the analysis employed by the trial court. In its opinion, the trial court relied upon factors I consider extraneous, such as the regulatory requirements for oil and gas wells drilled through workable coal seams, requiring such wells to be sealed throughout the length of their passage through workable coal seams, and the absence of coalbed methane wells throughout the long history of oil and gas exploration in this state. The trial court also cited the lack of experience of the oil and gas lessees in this case with coalbed methane exploration or production and the fixed state policy of

encouraging the safe handling and dispersal of methane gas during mining operations, etc. The majority opinion continued this analytical theme throughout its fine discussion of the issues the majority deemed dispositive of the case. I do not challenge these points. I simply find them irrelevant to the question of whether an oil and gas lessee retains the right under our law to search for and, with the proper permit, produce methane gas from a mined or unmined coalbed. These factors, however important, are not determinative of whether the leases executed in 1986 conferred on the lessees rights to explore for and produce coalbed methane or who may drill a coalbed methane well under this state's statutory scheme for permitting such wells.

Why do I say this? First, I note that the regulatory requirements for sealing drill holes running through coal seams apply only to workable coal seams. For the purposes of applying those requirements, "coal seam" and "workable coal bed" are interchangeably defined by statute as "any seam of coal twenty inches or more in thickness, unless a seam of less thickness is being commercially worked, or can in the judgment of the department foreseeably [sic] be commercially worked and will require protection if wells are drilled through it." W.Va. Code § 22-6-1(e) (1994). In other words, for a coal seam of less than twenty inches thickness that is neither being worked nor considered by the regulatory authorities as capable of being worked, the statutory and regulatory sealing requirements upon which the trial court and the majority relied are simply inapposite. The majority failed to consider that as a result of the limitation of the sealing requirements to workable coal

seams, generally of twenty or more inches thickness, an oil and gas lessee always had the expectation and the right to explore for and capture gas – including methane – in, under and above any coal seam not considered workable. In other terms, the words in a lease granting the right to explore for and extract “all” oil and gas have always included the right to extract methane gas. The extraction of methane has not been limited by the terms of the lease; the extraction of methane has heretofore been limited only by the state’s regulatory scheme for protecting coal miners and coal mining and the lack of technology for the commercially justified production of methane gas from coalbeds.

Secondly, without regard to coal seams, it is simply a fact that methane can be found in a variety of strata, near or far from coal seams, and there has never been any doubt that such gas may be found, captured and extracted under standard oil and gas leases such as the lease at issue in this case.¹

Both the trial court and the majority ignore the historic ability of oil and gas lessees to explore for and capture methane under the circumstances here described and literally jump to the conclusion that coalbed methane found in workable or previously

¹The majority’s attempt to bolster its position by reference to *West Virginia-Pittsburgh Coal Co. v. Strong*, 129 W.Va. 832, 42 S. E.2d 46 (1947), wherein this Court determined that a right to remove all coal did not entitle the coal owner to remove the coal by destroying the surface of the land is misplaced. Lessee in the case before us does not seek to essentially destroy the estate of the surface owner, as in *Strong*, but only to seek a permit for a coalbed methane well, not unlike other oil and gas wells.

worked coal seams cannot fall within the ambit of an older, standard oil and gas lease that does not specifically mention coalbed methane. Put directly, a grant of the right to explore for and exploit “all of the oil and gas” under a tract does not mean merely a right to explore for and extract only *some* of that oil and gas; “all” means *all*. Accordingly, I particularly dissent from the ruling forth in syllabus point eight of the majority opinion.²

I suspect that a substantial factor in the majority’s narrow decision in this case proceeds from a belief that the ruling protects surface owners, who, in the case before us, also retained ownership of the coal in and underlying their land, free and clear of any coal lease or deed severing ownership of the coal from ownership of the surface. I fear that in more instances than not the majority’s position accomplishes the opposite effect: It may well freeze out of the permit process for drilling a coalbed methane well the economic interests of the very small landowners the majority intended its ruling to protect.

Consider this scenario. In 1900, landowners’ predecessor in title gave a severance deed for all the coal in and underlying their land, which coal is now owned by A. In later years it was determined that the coal seam was only 30 inches thick at best and is too gaseous and of such low quality as to not justify efforts to extract the coal. In 1986,

²Syllabus point eight of the majority opinion states: “In the absence of specific language to the contrary or other indicia of the parties’ intent, an oil and gas lease does not give the oil and gas lessee the right to drill into the lessor’s coal seams to produce coalbed methane gas.”

landowners gave B an ordinary oil and gas lease, reserving “the usual 1/8th” royalty. In 2004, A elects to grant to C the right to “drill into C’s coal seam to produce coalbed methane gas” horizontally from adjoining coal lands owned by A, and gives the necessary written consent to C so that C can obtain a coalbed methane permit. Under the majority’s ruling, the oil and gas lessee, B, has no standing to claim an ownership interest; landowners will get no royalty under their oil and gas lease; and such landowners will have a royal fight on their hands to get one dime from the production of coalbed methane “occluded” in the coal under their land. Their sole recourse is to litigate an assertion that the severed coal owner has no right to allow the extraction of the coalbed methane gas from the coal owner’s coal.

On the other hand, had the majority preserved the oil and gas lessee’s ability to search for and produce gas even from a coalbed, such a lessee would have been entitled to negotiate with the coal owner for its permission to “drill through the coal seams to produce coalbed methane gas,” and, if successful, would be duty bound to pay lessor land and surface owners the agreed upon royalty had the well or wells proven productive. Alternatively, if the coalbed owner desired to extract and commercially market coalbed methane found in the coal seams, both the owner of unleased oil and gas and an owner-lessor of the oil and gas in place could then expect to share in the proceeds, at least to the extent of the usual royalty, if not more. In my view, the majority’s opinion achieves the opposite result. It enhances the ability of holders of severed interests in minerals to grant methane rights on properties where the surface owner or the owner’s lessee holds oil and gas rights. The reality is that the

majority's ruling is not a victory for most small landowners in this state. Nor is it simply a defeat for active oil and gas operators under a current oil and gas lease. Rather, it is a huge victory for the owners of large tracts of coal who hold that coal by virtue of severance deeds made decades ago, often long before the economic potential of coalbed methane or, for that matter, the economic potential of natural gas generally had been recognized.³ The majority erred in not definitively preserving the right of owners of oil and gas in place, under lease or not, to share in the fruits of the production of coalbed methane extracted from their lands by virtue of the ownership of oil and gas rights in the real property. It appears that the majority's failure to preserve those rights proceeded, at least in part, from the fact that the majority considered this case in a virtual vacuum, without thorough attention to its ramifications upon the system suggested by the Congress, and adopted by our Legislature with modifications, to encourage the production of coalbed methane gas from coal seams, nearby strata, mined-out areas and gob wells.

By adopting West Virginia Code § 22-21-1, *et seq.*, the Legislature established a system whereby the production of coalbed methane might be encouraged while also stringently safeguarding the safety and economic viability of coal mining and providing at least the framework for protecting the economic interests of all owners or potential owners

³It is also worthy of note that, unlike a severance deed, which fixes for all time the separation of title to severed minerals from the title to the surface of the land, most, but not all, oil and gas leases expire after a fixed term of years, unless oil or gas production is actually occurring under the lease.

of rights in any given source of coalbed methane. The majority's opinion effectively excludes from that process both the lessors and the lessees under most existing oil and gas leases, in favor of owners of coal in place, be they also owners of the surface or, as is the case in so many situations, simply the owners of a coalbed, the title to which was long ago severed from the ownership of the surface. A frequent result of the majority's limited analysis of the issues presented by this case may well be that landowners who are lessors or potential lessors of oil and gas rights in and under their lands will be excluded from the coalbed methane income stream because the title to the coal in and underlying their land has long since been severed from the ownership of the surface.

It is clear that the majority intended its decision to apply only to the narrow issue the majority addressed in its opinion: Whether the lease at issue contemplated that the lessee might explore for and extract coalbed methane gas from the leased premises. Accordingly, this Court retains some ability to further examine the ramifications of its ruling in future cases. If that opportunity arises, this Court should, as the majority did not, give careful consideration to the framework adopted by the Legislature in West Virginia Code § 22-21-1, *et seq.* for (1) encouraging the production of coalbed methane from workable coal seams, mined out areas and potential gob wells, (2) protecting as a first priority the safety of ongoing mining operations, and (3) providing a means of apportioning both the cost and profit from the production of coalbed methane among all the parties with legitimate claim to an economic interest in the coalbed methane.

To be sure, the process spelled out by the legislation is not without some uncertainty or even ambiguity.⁴ However, the legislation clearly contemplates that methane is a gas to be explored for, captured and marketed by an “operator,” under a permit issued by our state’s oil and gas regulatory authorities. The legislation, enacted to remove coalbed methane wells in West Virginia from the direct regulatory control of the United States Secretary of the Interior under the national Energy Policy Act of 1992, closely mirrors the procedures established by that federal act for the authorization of coalbed methane wells in workable coal seams.

The state law contemplates that, with the permission of the owner of the workable or mined out coal seam involved, an “operator” may be permitted to drill and operate a coalbed methane well. It does not undertake to define who is the “owner” of the coalbed methane nor does the legislation specify who may or may not be an “operator” of such a coalbed methane well. However, the law does provide three separate, alternative means of allocating the cost and, in due course, the profit, from such an operation.

It appears that this comprehensive legislation was intended to broadly encourage the development of the coalbed methane resources of this state by providing that

⁴Discussion in this opinion of the apparent effect or impact of various provisions of this complex legislation should not be construed as an expression of any opinion on legal issues that may arise in the future related to the operation, effect or use of the subject statute or rules promulgated under its authority.

either the owner or the owner's lessee of the oil and gas in an underlying a tract of land, or the owner or the owner's assignee of a workable coal seam underlying a tract of land may become the "operator" of a coalbed methane gas well on such a tract. The legislation appears to also contemplate that the owner or lessor of such oil and gas would, in all events, be entitled to the payment of a royalty on the extraction of such gas, subject to the resolution by the owner of the working interest in the oil and gas and by the owner of the coalbed of the means by which, under the statute, the costs of drilling the well are to be recovered and the profits allocated. Of course, the legislation expressly provides that the owner of the coal must consent to the drilling of such a coalbed methane well. Correspondingly, the legislation appears to contemplate that the owner of the coalbed in which methane may be found may elect to become the "operator" of a coalbed methane well, directly or by an assignee, again subject to the resolution by the owner of the working interest in the oil and gas and by the owner of the coal in place of the means by which, under the statute, the well costs and profits are to be allocated. I suggest that the owner of the coal in place holds an equal right to be an operator because, while the methane is in the coal ("occluded" in the words of the federal Energy Policy Act of 1992) it is a constituent part of the coal. The right to mine the coal has always been seen to include the right, indeed the duty, to disperse such methane in the interests of the safety of miners and mining operations. By failing to recognize and underscore the goals of the legislation to encourage in appropriate circumstances, the "fullest practical recovery of coal and coalbed methane," as set out among the statements of policy and purpose found in the coalbed methane well act in West Virginia Code § 22-21-1, the

majority has set the our law on this subject upon an unduly restrictive course. Hopefully, this misguided result will be rectified at the first opportune moment, without lasting damage to the landowners whose rights to compensation for methane gas removed from their lands has been seriously eroded as the result of the majority decision.

I regret that the majority did not address the ultimate issue of who might be an “operator” under the coalbed methane well act and did not embrace the view that the lessees here, as well as the owners of the coal in place and all other parties having an interest in the land, could be an “operator” under the coalbed methane well act.

For the reasons assigned, I respectfully dissent.