

**SUPREME COURT OF PENNSYLVANIA**

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No. 63 MAP 2018

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**ADAM BRIGGS, PAULA BRIGGS, his wife, JOSHUA BRIGGS,  
and SARAH H. BRIGGS,**

Appellees,

vs.

**SOUTHWESTERN ENERGY PRODUCTION COMPANY,**

Appellant.

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**BRIEF OF APPELLANT**

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Appeal from the April 2, 2018 Order of the Superior Court at Docket No. 1351 MDA 2017, reversing the August 8, 2017 Order of the Court of Common Pleas of Susquehanna County at Docket No. 2015-01253

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## I. INTRODUCTION

The rule of capture, a long-recognized defense to claims like Plaintiffs' here, protects the right of all property owners to use their land to explore for oil and gas. The rule structures the relations between neighboring landowners whose property spans a common oil and gas resource to ensure that all property owners can exercise their right to engage in oil and gas exploration activities on their own property unimpeded by neighbors.

For over 130 years, this rule has firmly established that oil and gas is not owned until it is "captured" through production on lands where one has the right to operate, and that no person may recover damages for the value of oil and gas produced by his or her neighbor and "captured" on the neighbor's own lands. The rule derives from the practical reality that movements of fluids such as oil and gas thousands of feet below the earth's surface depend on existing natural formations and cannot be known with a degree of certainty that would justify allowing property owners to share in what their neighbors produce from activity occurring on their neighbors' own property. The rule has guided and shaped Pennsylvania's

property and tort laws applicable to the oil and gas industry since the first oil well was drilled in 1859.<sup>1</sup>

The principles underlying the rule of capture and its structuring of relations between neighboring owners do not change based on the method of production of oil and gas. Yet, the Superior Court rejected the continuing application of the rule of capture to oil and gas development completed by hydraulic fracturing. By concluding that Appellant Southwestern Energy Production Company (“SWN”)<sup>2</sup> may be

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<sup>1</sup> See Terence Daintith, *Finders Keepers? How the Law of Capture Shaped the World Oil Industry* at 52-55 (2010) (discussing the first oil well drilled at Titusville, Pennsylvania); Pennsylvania Department of Conservation and Natural Resources, *Oil and Gas*, <https://www.dcnr.pa.gov/Geology/GeologicEconomicResources/OilAndGas/Pages/default.aspx> (last visited January 13, 2019); American Chemical Society, *Development of the Pennsylvania Oil Industry*, <https://www.acs.org/content/acs/en/education/whatischemistry/landmarks/pennsylvaniaoilindustry.html> (last visited January 11, 2019); see also *Kier v. Peterson*, 41 Pa. 357, 361 (1862) (noting that the “great value” of oil “has not been fully appreciated until within a few years”).

<sup>2</sup> Since the initiation of this case, the company changed its name to SWN Production Company, LLC.

held liable for damages in trespass if its development of oil and gas through wells drilled on SWN's own property<sup>3</sup> and completed by hydraulic fracturing drains oil and gas from under Plaintiffs' adjacent property, the Superior Court restricted SWN's rights and restructured the relations between landowners in Pennsylvania.

The Superior Court's decision upends nearly a century and a half of property and tort law and disrupts the entire oil and gas industry.<sup>4</sup> This Court should reverse the Superior

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<sup>3</sup> SWN has entered into leases that grant it the exclusive right to produce oil and gas from wells drilled on or underneath the Briggses' neighbors' property. (R. 31a-109a). SWN owes and has been paying these neighbors royalties for the gas produced from their property. *Id.* When this brief refers to SWN's property, it means the property that SWN has so leased.

<sup>4</sup> Nearly all active commercial wells in Pennsylvania today are completed by hydraulic fracturing. *See Humberston v. Chevron U.S.A., Inc.*, 75 A.3d 504, 510-11 (Pa. Super. 2013); *Coastal Oil & Gas Corp. v. Garza Energy Trust*, 268 S.W.3d 1, 6 (Tex. 2008) ("First used commercially in 1949, fracing is now essential to economic production of oil and gas commonly used throughout Texas, the United States, and the world."); *see also* David E. Pierce, *Developing a Common Law of Hydraulic Fracturing*, 72 U. Pitt. L. Rev. 685 (2011); Kristin M. Carter et al., *Unconventional Natural Gas Resources in Pennsylvania: The Backstory of the Modern Marcellus Shale Play*, 18 *Envtl. Geosciences* 217 (2011).

Court and affirm the application of the rule of capture to the completion of wells by hydraulic fracturing.

## **II. STATEMENT OF JURISDICTION**

This Court has jurisdiction to review the Superior Court's April 2, 2018 order reversing the trial court's grant of summary judgment pursuant to 42 Pa.C.S. § 724(a), because this Court granted SWN's petition for allowance of appeal.

## **III. ORDER IN QUESTION**

The April 2, 2018 Order of the Superior Court reversing the trial court's entry of summary judgment in favor of SWN states:

Order reversed. Case remanded for further proceedings consistent with this Opinion. Jurisdiction relinquished.

A copy of the April 2, 2018 Opinion & Order is attached under Tab A.

## **IV. STATEMENT OF SCOPE AND STANDARD OF REVIEW**

The Court's standard of review of an order granting summary judgment is plenary. *O'Donoghue v. Laurel Savings Association*, 728 A.2d 914, 916 (Pa. 1999). The Court "need not defer to the determinations made by the lower tribunals," but



instead “may reverse the granting of a motion for summary judgment if there has been an error of law or abuse of discretion.” *Fine v. Checcio*, 870 A.2d 850, 857 n.3 (Pa. 2005) (citing *Atcovitz v. Gulph Mills Tennis Club, Inc.*, 812 A.2d 1218, 1221 (Pa. 2002); *Buffalo Township v. Jones*, 813 A.2d 659, 664 n.4 (Pa. 2002)).

## **V. STATEMENT OF QUESTION INVOLVED**

Does the rule of capture apply to oil and gas produced from wells that were completed using hydraulic fracturing and preclude trespass liability for allegedly draining oil or gas from under nearby property, where the well is drilled solely on and beneath the driller’s own property and the hydraulic fracturing fluids are injected solely on or beneath the driller’s own property?

*Answered in the negative by the Superior Court.*

## **VI. STATEMENT OF THE CASE**

### **A. The Briggses’ Complaint.**

Appellees Adam Briggs, Paula Briggs, Joshua Briggs, and Sarah H. Briggs own property in Harford Township, Susquehanna County, Pennsylvania. (R. 10a). Their property is adjacent to property that Appellant SWN leases for natural gas

extraction.<sup>5</sup> (R. 11a). The Briggses have not leased their property to SWN or any other entity for natural gas development. (R. 10a).

SWN began producing natural gas in Pennsylvania in 2008 using hydraulic fracturing,<sup>6</sup> and it has engaged in these

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<sup>5</sup> Under SWN's leases with the Briggses' neighbors, SWN has the exclusive right to produce oil and gas from wells drilled on or underneath the neighbors' property. (R. 31a-109a). SWN owes and has been paying these neighbors royalties for the gas produced from their property. *Id.* References in this brief to SWN's "property" means the property SWN has so leased.

<sup>6</sup> Hydraulic fracturing is a mechanical method of enhancing the permeability of rock to increase the amount of oil or gas produced from it. See U.S. Environmental Protection Agency, *The Process of Unconventional Natural Gas Production*, <https://www.epa.gov/uog/process-unconventional-natural-gas-production> (last visited January 11, 2019). The method uses hydraulic pressure to fracture the rock. See *T.W. Phillips Gas & Oil Co. v. Jedlicka*, 42 A.3d 261, 264 n.1 (Pa. 2012); *Coastal Oil & Gas Corp v. Garza Energy Trust*, 268 S.W.3d 1, 6-7 (Tex. 2008). "A specially blended liquid is pumped down the well and into a formation under pressure high enough to cause the formation to crack open, forming passages through which oil or gas can flow into the wellbore." *T.W. Phillips Gas & Oil Co.*, 42 A.3d at 264 n.1. When used to explore or produce oil and gas in shale formations, the producer starts drilling a well vertically and then turns the direction to horizontal. The producer next injects fluids and "proppant" materials that flow along existing

activities on property it leases near the Briggses' property since 2011. (R. 122a). SWN conducts its natural gas extraction activities lawfully in accordance with leases, unit agreements, and governmental permits. (R. 118a, 158a-266a, 319a-326a).

On November 5, 2015, the Briggses filed a complaint against SWN. (R. 9a-13a). The Briggses asserted counts of trespass, conversion, and punitive damages, alleging that SWN's natural gas extraction activities conducted on and underneath SWN's own leased property have caused natural gas to drain from below their property and into SWN's production wells. *Id.* The Briggses alleged that SWN's trespass is intentional, asserting that SWN's actions are "being done knowingly, willfully, unlawfully, outrageously and in complete disregard of the rights and title of the Plaintiffs in said land and the natural gas thereunder." (R. 11a).

However, the Briggses did not assert how SWN allegedly entered their property and thereby trespassed. (R. 9a-13a). They did not allege that SWN has drilled under and across their

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underground fissures and fracture the rock surrounding the horizontal wellbore. This is a one-time occurrence for each well, not a continuous process.

property line, nor that SWN's activity on its property has resulted in vibrations, odors, noise, or other effects that interfere with their enjoyment of their property. *Id.* Their allegations relate solely to drainage.<sup>7</sup> Based on these allegations, the Briggses request an award of damages "in an amount equal to the value of all the natural gas extracted by SWN from under [their] land . . . to the date of judgment in this case," along with "an amount equal to the value of all the natural gas extracted by SWN from under [their] land . . . for so long as natural gas is being extracted from under said land." (R. 11a-12a).

SWN filed an answer to the complaint with new matter and a counterclaim. (R. 14a-110a). As new matter, SWN pleaded, along with other defenses, that the Briggses' claims for damages are barred by the rule of capture. (R. 20a-26a). SWN

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<sup>7</sup> "Drainage" refers to an operator's production of oil and gas that migrated into the operator's well from adjacent property. *See, e.g., Hague v. Wheeler*, 27 A. 714 (Pa. 1893) ("The plaintiffs allege that the 'geological formation in that locality' is such, that the gas-bearing sand-rock underlying all these tracts and forming the common reservoir or deposit from which the gas is obtained, 'is subject to drainage by the drilling of wells on any part thereof.'").

alleged that the rule of capture precludes liability for drainage caused by its hydraulic fracturing activities, if any, because SWN had not drilled any wells on or underneath the Briggses' property, but instead had only drilled wells on and underneath the property SWN had leased from the Briggses' neighbors.<sup>8</sup> (R. 20a-21a).

The Briggses filed an answer to the new matter and counterclaim. (R. 111a-116a). The Briggses admitted that SWN's wells are located only on or under SWN's own property – not on or under the Briggses' property – and that SWN has not constructed any well pads on the Briggses' property or drilled any vertical or horizontal well bores into or under their property. (R. 113a, R. 270a, 273a, 275a, 277a, 291a). Indeed, the Briggses acknowledge that their claims against SWN relate solely to their belief that SWN's activities on or under SWN's own property cause gas to drain from beneath

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<sup>8</sup> Conducting all drilling activity and fluid injection on or beneath property that the producer owns or leases is the norm throughout the industry. When a producer conducts these activities on property that it does **not** own or lease, such as by physically drilling a well on a neighbor's property, it may be liable to the neighbor. *See infra* Argument Section B(2)(e).

the Briggses' property. (R. 127a); (R. 283a) (stating that the Briggses "believe that SWN is extracting natural gas from under their land"); (R. 315a) ("I do believe that their well bore is close enough to my property to be extracting gas out from under my property.").

**B. SWN's Motion for Summary Judgment.**

After discovery, SWN moved for summary judgment, arguing (among other issues) that, under the rule of capture recognized by Pennsylvania courts, SWN owns the gas it produces from the wells located on and under its leased property and cannot, as a matter of law, be held liable for drainage. (R. 118a-338a). The Briggses filed a motion to stay resolution of SWN's motion for summary judgment and then filed a motion for partial summary judgment, arguing that the rule of capture should not apply to hydraulic fracturing.

By order dated August 8, 2017, the trial court granted SWN's motion for summary judgment and denied the Briggses' motion for partial summary judgment. Tab B. The trial court concluded that the rule of capture applies to the production of gas through hydraulic fracturing, and that because SWN had produced gas through wells drilled on and under its own land,

it acquired title to all of the gas produced from those wells and could not be held liable for any drainage of gas from beneath the Briggses' property. *See* Tabs B & C.

**C. The Superior Court's Decision.**

The Briggses appealed the trial court's decision to the Superior Court, raising only the issue of whether the rule of capture applies to the production of natural gas through hydraulic fracturing. (Statement of Matters Complained of on Appeal; Brief of Appellants). Under Pa.R.A.P. 3521, the Briggses unilaterally elected not to request oral argument, and the case was submitted on briefs.

The appeal was assigned to a three-judge submission panel consisting of President Judge Gantman, Judge Murray, and Senior Judge Musmanno. Judge Murray did not participate in the case. As a result, only two judges decided the appeal, and only one of those two judges was a commissioned judge.

In deciding the appeal, the two-judge panel did not confine its review to the record. Instead, it conducted its own independent research on hydraulic fracturing. Tab A at 13, 20-21 (citing the U.S. Environmental Protection Agency's website

and SWN's website to describe hydraulic fracturing, and citing a U.S. Energy Information Administration report and a law review comment to support its conclusion that small landowners can more feasibly offset drainage caused by conventional drilling than by hydraulic fracturing).

The two-judge panel considered but expressly rejected the Texas Supreme Court's decision on this same issue in *Coastal Oil & Gas Corp. v. Garza Energy Trust*, 268 S.W.3d 1 (Tex. 2008). *Coastal Oil* held that a landowner cannot state a claim for trespass based solely on the possibility that fractures, fracturing fluids, and proppants from a producer's hydraulic fracturing activity may enter and cause oil or gas to flow from the landowner's property. *Coastal Oil* is the only decision by a state court of last resort to address this specific issue, and it has been a key legal building block supporting the "shale revolution" of the last decade.

Instead of following *Coastal Oil*, the panel largely relied on a **dissenting** opinion in that case and a **vacated** opinion from the United States District Court for the Northern District of West Virginia. Tab A at 12 (citing the *Coastal Oil* dissent and *Stone v. Chesapeake Appalachia, LLC*, No. 5:12-CV-102, 2013 WL



2097397 (N.D.W.Va. Apr. 10, 2013), *order vacated*, 2013 WL 7863861 (N.D.W.Va. July 30, 2013)). The panel thus consciously put Pennsylvania law in conflict with the only decision on this topic from a court of last resort in this country and with the law of the only state with greater gas production than Pennsylvania,<sup>9</sup> adopting the same reasoning the Texas Supreme Court rejected.<sup>10</sup>

Based in part on the inaccurate perception of hydraulic fracturing that it had formed from these sources, the two-judge panel concluded that there are “distinctions between hydraulic

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<sup>9</sup> See U.S. Energy Information Administration, *Rankings: Natural Gas Marketed Production, 2017*, <https://www.eia.gov/state/rankings/?sid=US#/series/47> (last visited January 12, 2019).

<sup>10</sup> The Superior Court also relied on a distinguishable case from the U.S. Court of Appeals for the Eighth Circuit that involved salt-water recycling for mining bromine—not hydraulic fracturing of oil or gas wells. *J.M. Young v. Ethyl Corp.*, 521 F.2d 771, 774 (8th Cir. 1975) (noting that the rule of capture applies to “the field of oil and gas,” and declining to extend the rule outside of this field to “the forced migration of minerals of different physical properties” such as bromides). No court has previously applied that decision in the oil and gas context, other than the now-vacated decision in *Stone v. Chesapeake Appalachia, LLC*.

fracturing and conventional gas drilling” that warrant not applying the rule of capture to hydraulic fracturing. Tab A at 20, 23. The Superior Court thus determined that an oil and gas producer may be held liable for damages for trespass if its hydraulic fracturing conducted on or under its *own land* captures oil or gas from under a neighbor’s property, and it therefore reversed the trial court’s entry of summary judgment in SWN’s favor and remanded the case for further proceedings. Tab A at 24.

SWN filed an application for reargument *en banc* on April 16, 2018, and the Superior Court denied the application by order entered June 8, 2018. SWN then filed a petition for allowance of appeal with this Court. By order entered November 20, 2018, this Court granted the petition, allowing SWN to appeal the Superior Court’s decision.

## **VII. SUMMARY OF ARGUMENT**

This Court should reverse the Superior Court’s decision and confirm that the rule of capture applies to the production of oil and gas by hydraulic fracturing. The rule of capture structures the relations between landowners to protect each owner’s right to use his or her land to explore for oil and gas.

Although the rule was created before hydraulic fracturing was a scientifically available method of developing oil and gas, the same rationales that support its application to more traditional methods apply to development by hydraulic fracturing.

There is no basis to create an exception to the rule of capture as applied to hydraulic fracturing. The rule of capture is in part a rule of property law. Because the rule has shaped property law for over 130 years, settled expectations would be upended if this Court were to limit its application in this case. Longstanding precedent has applied the rule of capture to various means of well completion, like mechanical vacuum pumping and blasting, that create fractures in a manner indistinguishable from hydraulic fracturing.

In addition to being a rule of property law, the rule of capture is also a defense that precludes recovery of damages for drainage—in trespass and other theories. The policy factors that this Court articulated in *Althaus ex rel. Althaus v. Cohen*, 756 A.2d 1166 (Pa. 2000), provide a useful framework for considering this issue, and those factors do not support creating an exception to this rule of non-liability for drainage damages.

Finally, this Court should refrain from limiting the application of the rule of capture, because the rule of capture reflects important competing policy considerations and choices that are best left to the General Assembly.

## VIII. ARGUMENT

### A. The rule of capture precludes Plaintiffs' claims.

The Superior Court's decision should be reversed, because the rule of capture applies to wells on the driller's property completed by hydraulic fracturing and provides a complete defense to Plaintiffs' claims against SWN.

#### 1. The rule of capture applies to all methods of oil and gas development.

The rule of capture is a common law rule of non-liability for oil and gas development activities. Based on the difficulties of predicting the subsurface movements of fluids such as water, oil, and gas in response to extraction activities, the rule structures the relations between neighboring landowners by providing that title to oil and gas vests in the person who "captures" it by producing it from a well on her property, even if the oil and gas came from under adjacent lands. *See Westmoreland & Cambria Natural Gas Co. v. DeWitt*, 18 A. 724 (Pa. 1889). Correlatively, the rule provides that no liability attaches

to the production of oil and gas that might have come from under neighboring property. *See id.*; *Minard Run Oil Co. v. U.S. Forest Service*, 670 F.3d 236, 256 (3d Cir. 2011).<sup>11</sup>

This Court first articulated the rule and its underlying rationale in *Westmoreland & Cambria Natural Gas Co. v. DeWitt*, 18 A. 724 (Pa. 1889):

Water and oil, and still more strongly gas, may be classed by themselves, if the analogy be not too fanciful, as minerals *ferae naturae*. In common with animals, and unlike other minerals, they have the power and the tendency to escape without the volition of the owner. Their “fugitive and wandering existence within the limits of a particular tract [is] uncertain,” as said by Chief Justice AGNEW in *Brown v. Vandergrift*, 80 Pa. 147, 148. They belong to the owner of the land, and are part of it, so long as they are on or in it, and are subject to his control; but when they escape, and go into

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<sup>11</sup> *See also* Ross H. Pifer, Director, Penn State Dickenson School of Law, Agricultural Law Resource & Reference Center, *The Rule of Capture in Pennsylvania Oil and Gas Law*, at 4 (presentation at 2009 Pennsylvania Bar Institute Oil & Gas Law Colloquium), *available at* [https://pennstatelaw.psu.edu/file/aglaw/Rule of Capture in Pennsylvania Oil and Gas Law.pdf](https://pennstatelaw.psu.edu/file/aglaw/Rule%20of%20Capture%20in%20Pennsylvania%20Oil%20and%20Gas%20Law.pdf) (quoting Robert E. Hardwicke, *The Rule of Capture and Its Implications As Applied to Oil and Gas*, 13 Tex. L. Rev. 391, 393 (1935)).

other land, or come under another's control, the title of the former owner is gone. Possession of the land, therefore, is not necessarily possession of the gas. If an adjoining, or even a distant, owner, drills his own land, and taps your gas, so that it comes into his well and under his control, it is no longer yours, but his.

*Id.* at 725.

Following this statement of the rule, Pennsylvania courts have consistently invoked it to preclude liability for drainage. In *Barnard v. Monongahela Natural Gas Co.*, 65 A. 801 (Pa. 1907), for example, this Court affirmed the lower court's conclusion that "a landowner . . . [may] drill a well on his farm close to the line of his adjoining landowner and draw from the land of the latter three-fourths of the gas that his well may produce without so invading the property rights of the adjoining landowner as to be legally accountable therefor." *Id.* at 802. The Court determined that no legal liability attaches because "[a]n oil or gas well may draw its product from an indefinite distance and in time exhaust a large space," with exact knowledge about the movements of that product being unattainable. *Id.* (citing *Wettengel v. Gormley*, 28 A. 934 (Pa. 1894)). At the same time, "every landowner [has the right] to

drill a well on his own land at whatever spot he may see fit,” and an adjoining landowner “whose oil or gas may be drained by this well . . . ought not to be able to stop his neighbor from developing his own farm.” *Id.*

The rule of capture has been adopted by all other oil and gas producing states.<sup>12</sup> Federal courts applying Pennsylvania law have also recognized the rule. *See Minard Run Oil Co. v. U.S. Forest Service*, 670 F.3d 236, 256 (3d Cir. 2011).

**2. The facts Plaintiffs allege do not create any basis for distinguishing the application of the rule of capture in this case.**

Plaintiffs’ allegations in this case do not create a basis for distinguishing or limiting the application of the rule of capture. The only difference between the existing Pennsylvania cases

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<sup>12</sup> *See generally* Terence Daintith, *Finders Keepers? How the Law of Capture Shaped the World Oil Industry* (2010); Hardwicke, *supra* note 11, at 403 (“[I]n all jurisdictions, regardless of the rule of decision with respect to ownership in place, the owner of a tract of land who drills wells thereon acquires title to the oil and gas which are produced from such wells though it be proved or admitted that some of the oil and gas drained to the wells from adjoining lands. . . . [T]he rule of capture, as properly defined, is recognized in all states . . .”).

that apply the rule of capture and this case is that SWN is completing its wells using hydraulic fracturing.

But hydraulic fracturing involves the same considerations regarding the rights of adjacent landowners and the nature of oil and gas development as do other methods of production. Like other methods of production, hydraulic fracturing is a lawful activity that landowners have the right to engage in on their property.<sup>13</sup> Also like other methods, engaging in lawful

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<sup>13</sup> The General Assembly has enacted legislation that regulates hydraulic fracturing, including the Oil and Gas Act, 58 Pa.C.S. § 3201 *et seq.* The Pennsylvania Department of Environmental Protection regulates the location and operation of hydrofracturing activity and requires producers to obtain permits before engaging in this activity. *See* 25 Pa. Code § 78a.1. Municipalities may also regulate the location of hydrofracturing activities under their zoning ordinances pursuant to the Municipalities Planning Code, 53 P.S. § 10101 *et seq.*

This Court has also issued numerous decisions that recognize hydraulic fracturing as a lawful means of exploring for oil and gas. *See, e.g., Snyder Brothers, Inc. v. Pa. Public Utility Commission*, Nos. 47 & 48 WAP 2017, \_\_ A.3d \_\_ (Pa. Dec. 28, 2018); *Marcellus Shale Coalition v. Pa. DEP*, 185 A.3d 985 (Pa. 2018); *Gorsline v. Board of Supervisors of Fairfield Township*, 186 A.3d 375 (Pa. 2018); *EQT Production Co. v. Pa. DEP*, 181 A.3d 1128 (Pa. 2018); *see also Ely v. Cabot Oil & Gas Corp.*, 38 F. Supp.



production of oil and gas by hydraulic fracturing necessarily involves indeterminable subsurface movements—both of oil and gas<sup>14</sup> and of fractures and fracturing fluids.<sup>15</sup> The fact that the indeterminable movements involved in hydraulic

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3d 518 (M.D. Pa. 2014) (refusing to conclude that hydraulic fracturing is an ultra-hazardous activity).

<sup>14</sup> See, e.g., *Butler v. Charles Powers Estate*, 65 A.3d 885, 899 (Pa. 2013) (noting that Marcellus shale natural gas is not any different than natural gas found in sand deposits, stating: “Marcellus shale natural gas is merely natural gas that has become trapped within the Marcellus Shale, rather than rising to the more permeable sand formations below the surface,” and the fact that it is developed through hydrofracturing does not change its nature).

<sup>15</sup> See Owen L. Anderson, *Subsurface Trespass After Coastal v. Garza*, 60 Inst. on Oil & Gas L. & Taxation 65, 94 (2009) (“The extent of the fractures cannot be controlled. Hydraulically-injected fluids will follow a path pre-ordained by nature through those portions of reservoir rock most susceptible to fracturing. Because the fractured reservoir rock is thousands of feet below the surface, the precise location and extent of the fractures cannot be predicted beforehand and can only be indirectly estimated through microseismic surveying conducted during the frac.”); *Coastal Oil*, 268 S.W.3d at 7 (stating that estimates of the distances of fractures are “at best imprecise,” and “virtually nothing can be done to control [their] direction; the fractures will follow Mother Nature’s fault lines in the formation”).

fracturing include the creation of fractures and flow of fluids as well as the flow of oil and gas does not change the analysis.

In fact, early Pennsylvania cases applied the rule of capture in closely analogous cases where wells were completed by mechanical methods that created more subsurface impacts than just the flow of oil and gas. In *Jones v. Forest Oil Co.*, 44 A. 1074 (Pa. 1900), for instance, an operator extracted oil from a well by using vacuum pumps. The pumps were “used by oil operators for the purpose of withdrawing gas from the wells by suction, thereby increasing the well’s production of oil,” and “the distance from which these pumps . . . dr[e]w oil and gas depend[ed] upon the nature and quality of the oil-producing sand, its effect being felt to a much greater distance in a co[a]rse and loose land than in a hard and compact sand.” *Id.* at 1074. The plaintiff was a neighboring owner who sought an injunction against the operator’s use of the pumps, claiming that “the use of the gas pump in the production of oil is unlawful, because . . . by its powerful suction the oil and gas are drawn from his adjoining farm.” *Id.* at 1075. The Court rejected this claim, affirming the lower court’s conclusion that because “possession of the land is not necessarily possession of

the oil and gas . . . oil and gas operator[s may] . . . adopt any and all appliances known to the trade to make the production of [their] wells as large as possible.” *Id.* The Court further affirmed the lower court’s conclusion that it is lawful to produce oil by the exercise of “all the skill and invention of which [humankind] is capable,” even “the most artificial or most injurious methods.” *Id.*

Not only did early operators produce oil by using vacuum pumps, but they also used explosives to expand the production of their wells, in a manner similar to modern hydraulic fracturing. The Superior Court, in *Kepple v. Pennsylvania Torpedo Co.*, 7 Pa. Super. 620, 621 (1898), described the use of a torpedo explosive to “shoot” a well in order to increase its production.<sup>16</sup> These explosives helped to extract oil

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<sup>16</sup> The use of explosives to expand production was pioneered in Pennsylvania as early as the 1860s. *See* PA State Archives, *Manuscript Group 500, Roberts Family Business Records, 1856-1938, 115 Cubic Feet*, <http://www.phmc.state.pa.us/bah/dam/mg/mg500.htm> (last visited January 25, 2019) (“Roberts patented the use of the torpedo, black powder and the ‘super incombant water tamp’ in 1864. Together, these innovations provided a highly valuable oil producing technique that was soon used in wells throughout Pennsylvania.”); *Roberts Torpedo Historical Marker*,

from sandstone by “fractur[ing] the oil-bearing rock in proximity to the bore of the well, and for some distance around it, thus making artificial passages into seams or crevices containing oil, which, without such passages, would not be connected to the well.” *Roberts v. Dickey*, 20 F. Cas. 880 (W.D. Pa. May 1871).

The Court was thus aware at the time that it established the rule of capture that producers were capable of using artificial and mechanical methods to expand production that might have subsurface impacts on neighboring tracts—including creating almost exactly the same type of underground fractures around the wellbore that hydraulic fracturing creates. *See Roberts*, 20 F. Cas. 880. The courts did not impose liability on this type of production—in trespass or otherwise—instead concluding, as eloquently stated by the Indiana Supreme Court:

When it is once conceded that the owner of the surface has the right to sink a well and draw gas

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ExplorePAhistory.com,  
<http://explorepahistory.com/hmarker.php?markerId=1-A-9B>  
(last visited January 25, 2019) (identifying the location of the “[f]irst successful device for increasing the flow of oil by setting off an explosion deep in a well” near Titusville, Pennsylvania).

from the lands of an adjoining owner, no valid reason can be given why he may not enlarge his well by the explosion of nitro-glycerine therein for the purpose of increasing the flow.

*People's Gas Co. v. Tyner*, 31 N.E. 59, 60 (Ind. 1892).

Although the technique of using hydraulic fracturing developed later than other methods, it is not a new method to enhance production. Instead, wells have been completed by hydraulic fracturing for nearly 70 years. See *United States Steel Corporation v. Hoge*, 468 A.2d 1380, 1382 n.1 (Pa. 1983) (noting that hydrofracturing was “[d]eveloped by the drilling industry in the late 1940’s”); *T.W. Phillips Gas & Oil Co. v. Jedlicka*, 42 A.3d 261, 264 (Pa. 2012) (noting that four wells at issue in the case had been produced through hydraulic fracturing in 1967).

Until the Superior Court’s decision, no court in the Commonwealth had limited the application of the rule of capture based on the method of production or well completion. Moreover, the only other court in the country that has issued a precedential decision on this issue, the Texas Supreme Court, concluded that the rule of capture applies to the completion of wells by hydraulic fracturing and precludes the recovery of

drainage damages.<sup>17</sup> See *Coastal Oil & Gas Corp. v. Garza Energy Trust*, 268 S.W.3d 1 (Tex. 2008).

In *Coastal Oil*, the plaintiffs asserted nearly identical claims as the Briggses assert against SWN, seeking trespass damages for the value of oil and gas allegedly drained from neighboring property by hydraulic fracturing on the operator's property. *Id.* The Texas Supreme Court held that the rule of capture bars recovery of those damages, refusing to "change the rule of capture to allow one property owner to sue another

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<sup>17</sup> The U.S. District Court for the Western District of Virginia addressed this issue in *Stone v. Chesapeake Appalachia, LLC*, denying a motion for summary judgment on the grounds that it "believe[d] that the West Virginia Supreme Court of Appeals would find [] that hydraulic fracturing under the land of a neighboring property without that party's consent is not protected by the 'rule of capture.'" *Stone v. Chesapeake Appalachia, LLC*, No. 5:12-CV-102, 2013 WL 2097397 (N.D.W.Va. Apr. 10, 2013), *order vacated*, 2013 WL 7863861 (N.D.W.Va. July 30, 2013). However, not only was the federal court merely speculating about what the state's highest court would conclude, but it also later vacated its decision. *Id.* Because vacated opinions are not reviewable, they should not "spawn[] any legal consequences." *United States v. Munsingwear, Inc.*, 340 U.S. 36, 41 (1950).

for oil and gas drained by hydraulic fracturing that extends beyond lease lines.” *Id.* at 13-14, 17.

This Court likewise should not change the rule of capture. SWN’s completion of wells by hydraulic fracturing is consistent with the early cases applying the rule of capture, including *Westmoreland*, *Barnard*, and *Jones*, and Plaintiffs do not allege anything different about SWN’s production of oil and gas than the plaintiffs alleged in those cases. Like the operators in each of those cases, SWN is conducting its activities from and on its own property.<sup>18</sup> And like the operator in *Jones*, SWN is using mechanical methods to enhance the production of its wells. The completion of those wells by the method of hydraulic fracturing does not take this case outside the rule of capture.

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<sup>18</sup> Applying the rule of capture in these circumstances in no way changes liability for drilling a well physically into a neighbor’s property. When a well is drilled into a neighbor’s property, the oil or gas is “captured” beneath the neighbor’s land, not the driller’s. *See Lynch v. Burford*, 50 A. 228 (Pa. 1901) (concluding that damages were recoverable where a landowner drilled a well on property that he had leased to a producer); *see also Edwards v. Lachman*, 534 P.2d 670 (Okla. 1974) (allowing the recovery of damages where an operator drilled into a neighbor’s property); *Hastings Oil Co. v. Texas Co.*, 234 S.W.2d 389, 398 (Tex. 1950) (same); *Gliptis v. Fifteen Oil Co.*, 16 So.2d 471, 474 (La. 1943) (same).

**B. This Court should not create an exception to the rule of capture.**

**1. Limiting the application of the rule of capture based on the method of completion of a well would upend settled property rights.**

The Court should reverse the Superior Court and refuse to change the rule of capture as applied to wells completed by hydraulic fracturing because the rule is a rule of property law that has shaped landowners' expectations for over 130 years.<sup>19</sup>

Most fundamentally, the rule of capture defines ownership of oil and gas. Under Pennsylvania law, oil and gas are owned by a surface owner only as long as they remain part of the property. *Hamilton v. Foster*, 116 A. 50, 52 (Pa. 1922); *Westmoreland*, 18 A. at 725 (“[Oil and gas] belong to the owner of the land, and are part of it, so long as they are on or in it, and are subject to his control; but when they escape, and go into other land, or come under another’s control, the title of the former owner is gone. Possession of the land, therefore, is not necessarily possession of the gas.”). If a landowner produces gas from his or her own property that previously was beneath

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<sup>19</sup> This Court first articulated the rule of capture in *Westmoreland* in 1889, but the rule had developed before then.



neighboring property, then that gas is no longer owned by the neighboring owner, but instead is owned by the producing landowner who has reduced it to possession. 18 A. at 725.

Legal rules governing property should not be easily overturned. *See Butler*, 65 A.3d 885 (affirming the continuing validity of the *Dunham* Rule, concluding that it has “been an unaltered, unwavering rule of property law for 131 years,” and stating that a “rule of property long acquiesced in should not be overthrown except for compelling reasons of public policy or the imperative demands of justice”). When a rule of property has been recognized for many years, too many settled expectations rely upon it for the courts to upset it retroactively. *Id.* at 100 (Saylor, J., concurring); *see also Stilp v. Commonwealth*, 905 A.2d 918, 966-67 (Pa. 2006) (“[W]e recognize the importance of reliance on settled jurisprudence when asked to overturn precedent . . .”).<sup>20</sup>

This admonition applies with particular force to the rule of capture, because the aspect of the rule of capture that precludes liability for drainage works in tandem with its law of

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<sup>20</sup> *See also* Bryan A. Garner et al., *The Law of Judicial Precedent* 407-409 (2016).

ownership. The rule acknowledges that because landowners do not own the oil and gas that neighbors capture through production activities conducted from their own property, those landowners cannot recover damages for any oil and gas the neighbors capture that drained from their property. If this Court were to overrule the rule of capture as applied to hydraulic fracturing, then neighboring owners would be given greater ownership rights to the oil and gas beneath their property than the courts have ever recognized. Conversely, the ownership rights of those drilling on property where they have the right to do so would be diminished.

Additionally, the legal principles that govern oil and gas leases have developed around the rule of capture. Recognizing that the rule of capture allows a neighboring landowner to tap a common resource, the courts have concluded that every oil and gas lease contains an implied covenant that the lessee will develop the leased property and protect against drainage (unless the parties agree otherwise). *See Jacobs v. CNG Transmission Corp.*, 772 A.2d 445, 452-55 (Pa. 2001); *Kleppner v. Lemon*, 176 Pa. 502 (1896); *Adams v. Stage*, 18 Pa. Super. 308, 311 (1901); *see also Coastal Oil*, 268 S.W.3d at 14 (discussing the

availability of a claim for a breach of the implied covenant to protect against drainage as part of the analysis of the rule of capture). The lessee must act as a prudent operator, which includes protecting against drainage by activity on neighboring property. If the rule of capture does not apply to hydraulic fracturing, then the rights and obligations under oil and gas leases will be thrown into flux. To prevent against upsetting these settled expectations, the Court should confirm the application of the rule of capture to the production of wells by hydraulic fracturing.

**2. Policy concerns dictate against creating an exception to the rule of capture.**

Because the rule of capture applies to all methods of oil and gas development, allowing Plaintiffs to recover drainage damages from SWN based on its hydraulic fracturing activities would create an unjustified exception to the rule. The creation of an exception to a rule of non-liability is analogous to the recognition of a new tort duty, because both allow recovery of damages based on actions that were previously non-actionable. The policy-based test that this Court articulated in *Althaus ex rel. Althaus v. Cohen*, 756 A.2d 1166 (Pa. 2000), for the creation of

new tort duties thus provides a useful framework to analyze the creation of an exception to the rule of capture.

Under *Althaus*, the following factors should be weighed when determining whether to impose a new duty (and, analogously, when determining whether to create an exception to a rule of non-liability):

- (1) the relationship between the parties;
- (2) the social utility of the actor's conduct;
- (3) the nature of the risk imposed and foreseeability of the harm incurred;
- (4) the consequences of imposing a duty upon the actor; and
- (5) the overall public interest in the proposed solution.

*Id.* at 1169.

Here, none of these factors weighs in favor of creating an exception to the rule of capture as applied to the completion of wells by hydraulic fracturing.

- a. **The parties are adjacent landowners who have the right use their own property.**

Under the first *Althaus* factor, the parties are neighboring property owners whose land spans a common oil and gas

resource. Owners of property may use their property for any legally permissible purpose. *Lord Appeal*, 81 A.2d 533, 535 (Pa. 1951) (“[A]n owner of property . . . in Pennsylvania . . . [has] a right to use his home in any way he desires, provided he does not (1) violate any provisions of the Federal or State Constitutions; or (2) create a nuisance; or (3) violate any covenant, restriction or easement; or (4) violate any laws or zoning or police regulations which are constitutional.”). Indeed, the Commonwealth’s Constitution, statutes, and common law strongly protect property rights and the ability of a property owner to use her property without undue restriction. *See, e.g.*, Pa. Const. art. I, § 1 (“All men . . . have certain inherent and inalienable rights, among which are those of . . . acquiring, possessing and protecting property . . .”); *id.* § 10 (“[N]or shall private property be taken or applied to public use, without authority of law and without just compensation being first made or secured.”).

Property owners thus do not have an expectation that their neighbors owe them special duties. They expect to be able to use their land freely, and they expect that their neighbors will do likewise.

With respect to the use of land for oil and gas development specifically, landowners do not own the oil and gas underneath their property until they capture it. *Westmoreland*, 18 A. at 725. Landowners thus understand that, if they want the oil or gas, they must capture it before it migrates away; their neighbors do not owe them a duty to prevent against its migration. *Id.*; *Barnard*, 65 A. at 802 (Pa. 1907) (“[A] landowner . . . [may] drill a well on his farm close to the line of his adjoining landowner and draw from the land of the latter three-fourths of the gas that his well may produce without so invading the property rights of the adjoining landowner as to be legally accountable therefor.”). Indeed, in *Coastal Oil*, the Texas Supreme Court cited this relationship as one of the bases for its decision not to change the rule of capture, concluding that neighboring owners whose oil and gas may be drained by hydraulic fracturing activities do not need to be able to recover damages for recourse, because they already have a remedy—namely, the ability to drill wells on their own property to offset the drainage. 268 S.W.3d at 14-17.

As such, the relationship in this case between SWN and the Briggses as neighboring property owners does not weigh in

favor of creating an exception to the rule of capture, which would allow the Briggses to recover drainage damages from SWN for SWN's legally permissible use of its own property.

**b. Completing wells by hydraulic fracturing allows for the production of fuel necessary to power modern society.**

Under the second *Althaus* factor, oil and gas exploration is a highly socially beneficial activity.<sup>21</sup> Oil and gas are necessary fuels to power modern society, and the majority of commercially developable oil and gas in Pennsylvania today lies within shale formations.<sup>22</sup> This oil and gas cannot be

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<sup>21</sup> In fact, the General Assembly has stated: "It is hereby declared as an expression of policy to be in the public interest to foster, encourage, and promote the development, production, and utilization of the natural oil and gas resources in this Commonwealth . . . in such manner as will encourage discovery, exploration, and development without waste . . . ." Preamble to the Oil and Gas Conservation Law, Act of July 25, 1961, P.L. 825, No. 359, reprinted at 58 P.S. § 401 (Note).

<sup>22</sup> See *Coastal Oil*, 268 S.W.3d at 6 ("First used commercially in 1949, fracing is now essential to economic production of oil and gas commonly used throughout Texas, the United States, and the world."); see also Pierce, *supra* note 4; Carter et al., *supra* note 4.

developed without hydraulic fracturing.<sup>23</sup>

In *Coastal Oil*, Justice (now Fifth Circuit Judge) Willett issued a concurring opinion concluding that the rule of capture should not be changed precisely because oil and gas development activities must be shielded from liability in order to facilitate the production of these resources. 268 S.W.3d at 29. He stated: “[M]aximizing recovery [of oil and gas] via fracing is essential; enshrining trespass liability for fracing (a ‘tres-frac’ claim) is not. . . . Open-ended liability threatens to inflict grave and unmitigable harm, ensuring that much of our State’s undeveloped energy supplies would stay that way— undeveloped. . . . Texas common law must accommodate cutting-edge technologies able to extract untold reserves from unconventional fields.” *Id.*

Then-Justice Willett’s concerns are equally applicable to the development of Pennsylvania’s oil and gas resources, which

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<sup>23</sup> See, e.g., Kathy J. Flaherty & Thomas Flaherty, III, Pennsylvania Department of Conservation & Natural Resources, Bureau of Topographic & Geologic Survey, *Oil and Gas in Pennsylvania* (3d ed., 2014), available at [http://www.docs.dcnr.pa.gov/cs/groups/public/documents/document/dcnr\\_014593.pdf](http://www.docs.dcnr.pa.gov/cs/groups/public/documents/document/dcnr_014593.pdf).



would not be maximized if plaintiffs like the Briggses could recover drainage damages based on hydraulic fracturing.

c. **The underground movements of oil and gas and the directions of fractures are unknowable and uncontrollable.**

Under the third *Althaus* factor, the nature of the risk in this case is that landowners who are not actively developing their property will not capture the oil and gas that at one time lay beneath their property, because their neighbor's development activities will cause those products to drain into the neighbor's well. Although this result may seem unfair to the non-producing landowners, this Court considered it in the early rule of capture cases and determined that it is more fair than any other solution because of the nature of oil and gas development. *See Barnard*, 65 A. at 802; *Jones*, 44 A. 1074.

This result is fairer than any other because drainage is unpreventable when engaging in oil and gas production. The movements of oil, gas, and other fluids below the earth are uncontrollable and unknowable. *See Westmoreland*, 18 A. at 725; *Barnard*, 65 A. at 802. Likewise, the directions and extent of underground fractures created by hydraulic fracturing (which allow oil and gas to be produced from the Marcellus shale

region) are also unknowable and uncontrollable, because they depend on the formation of rocks miles below the surface of the earth.<sup>24</sup> There is no reliable method to accurately predict where fractures will form as a result of producing a well by hydraulic fracturing.<sup>25</sup> Thus, the risk to a neighboring owner is not sufficiently foreseeable to impose a duty. Indeed, this balance of risk and lack of foreseeability is the precise rationale behind the rule of capture.

d. **Allowing the recovery of damages for drainage of oil and gas would result in numerous negative consequences.**

Under the fourth *Althaus* factor, numerous negative consequences would result from creating an exception to the rule of capture that would allow the recovery of damages for drainage caused by the production of oil and gas by hydraulic fracturing.

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<sup>24</sup> See *supra* note 15.

<sup>25</sup> See Brief of *Amicus Curiae* Thomas D. Gillespie, Professional Geologist (discussing the geological aspects of hydraulic fracturing); Brief of *Amicus Curiae* Professor Terry Engelder (same); see also R.J. Cuss et al., *Hydraulic Fracturing: A Review of Theory and Field Experience*, British Geological Survey, Open Report (2015), available at <https://core.ac.uk/download/pdf/76971121.pdf>.

**i. Pennsylvania's economy would be harmed and the cost of energy would increase.**

Most significantly, exposing oil and gas operators to liability for their development activities would harm Pennsylvania's economy and increase the cost of energy. Without the protection from liability that the rule of capture provides, oil and gas producers will be discouraged from engaging in efficient oil and gas production, because they will have to limit their hydraulic fracturing activities to avoid incurring liability. Pennsylvania's status as the nation's second largest gas producer will be placed in jeopardy, as its law will differ from those of other gas-producing states. This result will be harmful to Pennsylvanians.<sup>26</sup>

Hydraulic fracturing has benefitted Pennsylvania's economy in numerous ways. It has generated royalty and leasing income for landowners, increased hiring and wages in areas of the Commonwealth where drilling occurs, generated

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<sup>26</sup> See, e.g., Brief of *Amici Curiae* The Pennsylvania Chamber of Business and Industry and Chamber of Commerce of the United States of America (discussing the negative consequences the Superior Court's decision would have on Pennsylvania's industry and economy).

property tax revenue for local governments and impact fee revenue for the Commonwealth, and created new jobs. *See, e.g., Ely v. Cabot Oil & Gas Corp.*, 38 F. Supp. 3d 518, 533-34 (M.D. Pa. 2014) (discussing the “various economic benefits that have been shown to flow from natural gas drilling”). A report prepared by PricewaterhouseCoopers LLP concluded that in 2015, the oil and gas industry supported nearly 322,600 jobs in Pennsylvania, provided nearly \$23 million in wages, and contributed nearly \$44.5 billion to the state’s economy.<sup>27</sup>

In addition to benefitting the economy, hydraulic fracturing has also lowered the cost and ensured the availability of energy for Pennsylvanians. Most of Pennsylvania’s oil and gas resources currently lie in shale formations, which can be accessed only through hydraulic fracturing.<sup>28</sup> By opening access to this previously untapped

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<sup>27</sup> PwC, *Impacts of the Natural Gas and Oil Industry* (July 2017), <http://www.api.org/~media/Files/Policy/Jobs/Oil-and-Gas-2015-Economic-Impacts-Final-Cover-07-17-2017.pdf>; *see also* PwC, *Pennsylvania Factsheet* (July 2017), [http://www.api.org/~media/Files/Policy/Jobs/Economics-Nat-Gas-Oil/API OilEconomy Pennsylvania.pdf](http://www.api.org/~media/Files/Policy/Jobs/Economics-Nat-Gas-Oil/API%20OilEconomy%20Pennsylvania.pdf).

<sup>28</sup> *See* Pierce, *supra* note 4; Pennsylvania Independent Oil & Gas Association, *Oil and Gas from Shale Resources*,

resource, hydraulic fracturing has increased the availability of oil and gas, lowering the price of gas used not only in households, but also in power generation and manufacturing, reducing the prices of electricity and consumer goods.<sup>29</sup>

If hydraulic fracturing were curtailed by allowing unleased owners to recover damages for drainage from wells not drilled on their property, then these important resources will decrease in availability, and their price will increase. Pennsylvanians may face a shortage of these resources, and they will not receive the benefits that would otherwise be available if the efficient extraction of oil and gas through hydraulic fracturing were encouraged.

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<https://www.pioga.org/education/oil-and-gas-from-shale-resources/> (last visited January 28, 2019).

<sup>29</sup> See Christina Simeone, Kleinman Center for Energy Policy, *Pennsylvania's Gas Decade: Insights into Consumer Pricing Impacts from Shale Gas (2007-2016)* (Oct. 27, 2017), <https://kleinmanenergy.upenn.edu/paper/pennsylvanias-gas-decade>.

**ii. Courts would be burdened with speculative and unwieldy litigation.**

In addition to negative economic consequences, creating an exception to the rule of capture that would allow for the recovery of damages for drainage of oil and gas from wells completed by hydraulic fracturing would also burden the courts with speculative and unwieldy litigation that would pit landowners against each other. In particular, allowing recovery of damages for drainage would encourage unleased landowners to claim an interest in the production from the thousands of existing wells located on other landowners' property. Unleased property is located near each of the hydraulically fractured wells currently producing oil and gas in Pennsylvania,<sup>30</sup> and the owners of that unleased property could

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<sup>30</sup> A list of hydraulically fractured wells in Pennsylvania identified by API (American Petroleum Institute) Number lists 8,067 wells drilled since 2008. FracFocus, *Find a Well*, <https://fracfocusdata.org/DisclosureSearch/Search.aspx> (last visited January 13, 2019) (click "Pennsylvania" in the "State" drop-down search bar). A map showing all active hydraulically fractured wells in Pennsylvania is available from the Pennsylvania Department of Environmental Protection's website at

claim to have an interest in the production from those wells—as the Briggses do here. If those neighboring landowners are entitled to claim a share in the production from the existing wells off their property, then the interests of the landowners on whose property the wells were drilled will decrease.

In litigating these claims, the courts would have to grapple with how future and past royalties should be paid to unleased neighbors. This may require the courts to reduce and perhaps even recapture royalties paid to the operator's existing lessors who have already received royalties for past production and who expect to continue receiving royalties for future production.<sup>31</sup> Existing royalty owners may also be necessary and indispensable parties to any action brought by a neighboring owner regarding the ownership of oil and gas produced from a particular well, which would lead to complex litigation involving numerous parties. The litigation over each well would be unique, based on its geology, so these challenges

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<http://www.depgis.state.pa.us/PaOilAndGasMapping/OilGasWellsStrayGasMap.html>.

<sup>31</sup> See, e.g., Brief of *Amici Curiae* Marcellus Shale Coalition, Pennsylvania Independent Oil & Gas Association, and Royalty Owners.

would not be amenable to class actions or other techniques that conserve judicial resources.

Not only would the litigation spawned by allowing the recovery of damages for drainage be procedurally complex, but it would also require courts and juries to decide how far from a well an operator must lease property in order to avoid liability. The answer to this question is speculative, because the extent and location of fractures miles below the earth is unpredictable, as is the movement of oil and gas.<sup>32</sup> If damages for drainage caused by hydraulic fracturing are recoverable, then courts and juries will have to determine where fractures occur, where hydraulic fracturing fluids flow, and what impact those fractures and fluids have on the movement of oil and gas—something science has not been able to do with any precision.<sup>33</sup> There are no reliable means of proof that would enable a jury or court to determine whether oil or gas produced from a well includes oil or gas that came from under a different property, let alone the quantity of the oil or gas that so moved.

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<sup>32</sup> *See supra* note 15.

<sup>33</sup> *Id.*



The Texas Supreme Court in *Coastal Oil* cited this concern as one of its main bases for refusing to change the rule of capture as applied to hydraulic fracturing, noting that allowing recovery of damages for drainage would require litigating issues that “the litigation process is least equipped to handle.” 268 S.W.3d at 16. The Ohio Supreme Court also relied upon a similar concern in refusing to allow recovery of damages for the underground migration of injectate used in a waste disposal process in *Chance v. BP Chemicals, Inc.*, 670 N.E.2d 985, 992 (Ohio 1996). There, the court noted that determining the underground movements of injectate is factually difficult, and the plaintiffs’ claims were thus “speculative.” *Id.* at 993.

**iii. Other types of land use would be negatively impacted.**

Allowing the recovery of damages in this case would also spawn negative effects in contexts beyond hydraulic fracturing, because the Briggses’ claims for damages are pleaded in trespass. As such, rejecting the application of the rule of capture and allowing the Briggses to recover damages under their trespass claim would affect trespass liability as applied to other subsurface uses of property.

Many types of subsurface uses of property other than hydraulic fracturing are practicable only if they are insulated from liability for modest or undeterminable and inconsequential subsurface intrusions. For instance, carbon sequestration projects, which help decrease the emission of greenhouse gases into the atmosphere, rely upon the subsurface use of property.<sup>34</sup> Waste disposal wells and gas storage wells—which ensure gas supplies in high-use winter and summer months and thus avoid supply shortages and price spikes—are also dependent on the subsurface use of property.<sup>35</sup> If damages are recoverable for oil and gas

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<sup>34</sup> See U.S. Geological Survey, *The Concept of Geologic Carbon Sequestration* (Mar. 2011), <https://pubs.usgs.gov/fs/2010/3122/pdf/FS2010-3122.pdf>; U.S. Environmental Protection Agency, *Background Information About Geologic Sequestration*, <https://www.epa.gov/uic/background-information-about-geologic-sequestration> (last visited January 29, 2019).

<sup>35</sup> See Owen L. Anderson, *Subsurface Trespass: A Man's Subsurface Is Not His Castle*, 49 Washburn L.J. 247 (2010) (“If traditional surface trespass law is applied to the subsurface, numerous subsurface uses could be greatly hindered, if not made impracticable. These include the injection of substances for enhanced recovery of oil, gas, brine, and other native fluids; the injection of fluids and proppants in the course of hydraulic

production through hydraulic fracturing, then they may also be recoverable for these other beneficial activities.

Even aboveground uses of property may be impacted by a decision to allow the Briggses to recover damages in this case based on their trespass claim. Surface owners typically do not have claims against aviators who fly through the airspace above their property. *See United States v. Causby*, 328 U.S. 256, 260-61 (1945) (noting that if traditional trespass rules applied to the use of airspace, then “every transcontinental flight would subject the operator to countless trespass suits”). Instead, intrusion into the space miles above property is treated differently from intrusion onto the surface of property. *See*

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fracturing of tight oil and gas reservoirs, the underground injection of natural gas for storage; the underground injection of wastes for disposal, including saltwater disposal relating to hydrocarbon exploitation; underground geologic carbon sequestration to decrease the emission of greenhouse gases into the atmosphere; and the gathering of subsurface information through various kinds of exploration activities, particularly, conventional and 3-D seismic surveys.”); Christopher S. Kulanter & R. Jordan Shaw, *Comparing Subsurface Trespass Jurisprudence—Geophysical Surveying and Hydraulic Fracturing*, 46 N.M. L. Rev. 67, 110-16 (2016).

*Coastal Oil*, 268 S.W.3d at 11 (“Wheeling an airplane across the surface of one’s property without permission is a trespass; flying the plane through the airspace two miles above the property is not.”). Capturing a wild animal that was previously located on neighboring property is also not actionable, even if the animal was lured or chased off the neighboring property. See *Wallis v. Mease*, 3 Binney 546 (Pa. 1811); *Pierson v. Post*, 3 Cai. R. 175, 2 Am. Dec. 264 (N.Y. Sup. Ct. 1805). These time-honored, clear rules, and the beneficial uses of property they allow for, may be called into question if trespass claims for the extraction of oil and gas through hydraulic fracturing are actionable.

Indeed, property rights and the concept of trespass below the surface are not necessarily the same as on the surface.<sup>36</sup>

Although Lord Coke famously pronounced the maxim *cujus est solum ejus est usque ad coelum et ad inferos* (roughly, the owner of

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<sup>36</sup> In addition to oil and gas, the property laws surrounding the use of subsurface water are different than the laws surrounding surface uses of property. See *Haldeman v. Bruckhart*, 45 Pa. 514 (1863) (providing that a landowner may use his land “for any useful purpose” and in so doing “cut off or divert subterraneous water flowing through it to the land of his neighbor, without any responsibility to that neighbor”).

the soil owns all the way to heaven and to hell), courts regularly conclude that this statement does not compel trespass law to be the same throughout. *See Causby*, 328 U.S. at 260-61 (concluding that the common law doctrine that “ownership of the land extend[s] to the periphery of the universe . . . has no place in the modern world”); *Coastal Oil*, 268 S.W.3d at 11 (stating that Lord Coke “did not consider the possibility of airplanes. But neither did he imagine oil wells,” and concluding that the “law of trespass need no more be the same two miles below the surface than two miles above” (internal citations omitted)); *Chance*, 670 N.E.2d at 992 (Ohio 1996) (refusing to apply surface trespass law to the underground movements of injectate used in a hazardous waste disposal process, concluding that “subsurface ownership rights are limited”). The laws of surface trespass do not map neatly onto subsurface trespass, and the rule of capture is a recognition of this distinction. Rejecting the rule’s application to hydraulic fracturing would create unworkable standards that do not align with practical realities.

e. **The public interest is already adequately protected by existing remedies.**

Under the fifth *Althaus* factor, no exception to the rule of capture is required to protect the public interest, because remedies are already available to address actionable conduct that may occur in connection with the production of oil and gas by hydraulic fracturing.

While drainage alone cannot result in liability under the rule of capture, not all activity connected with hydraulic fracturing is immunized from liability. In particular, damage to the surface of neighboring property (including damage to any improvements located on the property) that may occur as a result of subsurface hydraulic fracturing could be actionable in nuisance law. *See Roth v. Cabot Oil & Gas Corp.*, 919 F. Supp. 2d 476 (M.D. Pa. 2013) (addressing claims that may be actionable related to hydraulic fracturing activities).

An operator may also be liable to a neighboring landowner if it physically drills a well into the neighbor's property without the right to do so. *See, e.g., Lynch v. Burford*, 50 A. 228 (Pa. 1901) (concluding that damages were recoverable where a landowner drilled a well on property that he had

leased to a producer); *Edwards v. Lachman*, 534 P.2d 670 (Okla. 1974) (drilling into neighboring property); *Hastings Oil Co. v. Texas Co.*, 234 S.W.2d 389, 398 (Tex. 1950) (same); *Gliptis v. Fifteen Oil Co.*, 16 So.2d 471, 474 (La. 1943) (same). Where an operator engages in conduct of this sort, the neighbor could recover damages for trespass, because the “capture” does not occur on the operator’s property, but rather on the neighbor’s property.<sup>37</sup>

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<sup>37</sup> Absent such conduct, any intrusion upon oil and gas underneath adjacent land is legally harmless. Oil and gas that is drained does not belong to the neighboring owner because that neighbor has not yet captured it; thus, there is no legally protected interest that is injured by the drainage. See *Hamilton*, 116 A. at 52; *Westmoreland*, 18 A. at 725. As the Texas Supreme Court stated in *Coastal Oil*:

In this case, actionable trespass requires injury, and [plaintiff’s] only claim of injury—that Coastal’s fracturing operation made it possible for gas to flow from beneath [plaintiff’s property] to [Coastal’s] wells—is precluded by the rule of capture. That rule gives a mineral rights owner title to the oil and gas produced from a lawful well bottomed on the property, even if the oil and gas flowed to the well from beneath another owner’s tract. . . . Thus, the gas [plaintiff] claims to have lost simply does not belong to him. He does not claim that the hydraulic fracturing operation damaged his wells or the

Thus, while completion of wells by hydraulic fracturing alone is not actionable conduct, other types of activities connected to it could be, under circumstances that are not present in this case. Because remedies are available for these sorts of injuries, no exception to the rule of capture need be created to allow for the recovery of damages for oil and gas that are drained by adjacent well production.

Combined, the *Althaus* factors all strongly weigh against creating an exception to the rule of capture that would allow plaintiffs like the Briggses to recover damages for the drainage of oil and gas caused by the completion of wells by hydraulic fracturing.

This Court has refused to create new grounds for recovery of damages based on similar considerations. In *Pyeritz v. Commonwealth*, 32 A.3d 687 (Pa. 2011), for example, this Court refused to create a cause of action for negligent spoliation of evidence because “the tort would permit the imposition of

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Vicksburg T formation beneath his property. In sum, [plaintiff] does not claim damages that are recoverable.

268 S.W.3d at 12-13 (internal citations and footnotes omitted).



liability based on speculation, would create the potential for the proliferation of litigation, and would confer a benefit already sufficiently achievable under existing law.” *Id.* at 695. As such, the Court concluded that “it is in the overall public interest not to recognize the tort.” *Id.*; see also *Kazatsky v. King David Memorial Park*, 527 A.2d 988 (Pa. 1987) (refusing to allow plaintiffs to recover for intentional infliction of severe emotional distress by outrageous conduct where the plaintiffs had not presented any medical evidence to establish their injuries and where the court concluded that there were “concerns over proof of causation”).

The cases in which this Court has created new grounds for the recovery of damages vary significantly from this case. For instance, in this Court’s most recent case, *Walters v. UPMC Presbyterian Shadyside*, 187 A.3d 214 (Pa. 2018), this Court imposed a new duty on hospitals to prevent employees who have been terminated for misconduct from causing injury to patients at other health care facilities. The injury that the plaintiffs suffered in that case was the contraction of hepatitis C from the criminal actions of an employee who had been fired from his previous job for engaging in these same criminal

actions, and the Court imposed a duty on his prior employer to report his misconduct. *Id.* at 219.

Unlike SWN's conduct here, which allegedly deprives the Briggses of the value of oil and gas underneath their property and which could only be prevented if SWN ceased using its own property for oil and gas development, the conduct in *Walters* resulted in severe bodily harm that could have been prevented if the hospital had reported the terminated employee to the appropriate authorities. *Id.* Further, the conduct in *Walters* related to the provision of a service, which is not present in this case. Hospitals operate to provide service to others, and it is reasonable that they should expect to owe duties relating to the service they provide. In contrast, SWN is not providing a service to anyone; it is merely using its own private property for legally permissible purposes. Thus, the circumstances that are present when this Court has created new grounds for the recovery of damages are not present in this case.

**C. The creation of a judicial remedy for the drainage of oil and gas would invade the General Assembly's province.**

The Court should also confirm the application of the rule of capture to wells completed by hydraulic fracturing to avoid a judicial invasion into the General Assembly's province. In concluding that the rule of capture should not apply to the development of oil and gas by hydraulic fracturing, despite its continuous application to the entire industry since the 1860s, the Superior Court relied upon policy-based concerns.

In particular, the Superior Court determined that liability for drainage should be imposed in order to protect small landowners from large oil and gas developers. The Superior Court made a policy choice that large oil and gas extractors can too easily trample the rights of small landowners by drilling close to their property lines and taking the gas under their property without entering into leases and paying royalties, and that small landowners do not have sufficient recourse under existing law because they cannot feasibly drill their own wells to prevent the drainage of oil and gas from under their

property. Tab A at 21.<sup>38</sup> As such, the Superior Court determined that imposing liability on large extractors would provide small landowners the necessary recourse.

But in making this policy choice, the Superior Court failed to recognize that the rights of small landowners have always been tempered by a competing concern: encouraging the efficient production of oil and gas and preventing the waste of these resources.<sup>39</sup> Balancing these two competing policy

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<sup>38</sup> Without adequate support, the Superior Court concluded that this remedy is not readily available to counteract drainage by hydraulic fracturing, because hydraulic fracturing is a more “costly and highly specialized endeavor” than drilling a conventional well. Tab A at 21. In fact, the availability of the remedy is the same for both types of oil and gas exploration. Engaging in oil and gas production of any type is a costly endeavor. As such, in either case, a landowner’s remedy is to enter into lease with an oil and gas exploration company so that the company may produce the gas and pay the landowner royalties. These other producers have the wherewithal to drill wells on property—hydraulically fractured or otherwise.

<sup>39</sup> See Frank Sylvester & Robert W. Malmsheimer, *Oil and Gas Spacing and Forced Pooling Requirements: How States Balance Energy Development and Landowner Rights*, 40 U. Dayton L. Rev. 47, 47 (2015) (noting that oil and gas laws “attempt to balance states’ goals of resource development with landowners’ rights”).

interests is a task for the General Assembly, not the courts.<sup>40</sup> See *Hunter Co. v. McHugh*, 320 U.S. 222, 227 (1943) (“[A] state has constitutional power to regulate production of oil and gas so as to prevent waste and to secure equitable apportionment among landowners of the migratory gas and oil underlying their land, fairly distributing among them the costs of production and of the apportionment.”). Indeed, “[i]t is a legislative function to establish policy . . . . [T]he judiciary is not the policy-making branch of our Commonwealth’s government.” *Snyder Brothers, Inc. v. Pa. Public Utility Commission*, Nos. 47 & 48 WAP 2017, \_\_ A.3d \_\_, slip op. at 49 & n.9 (Pa. Dec. 28, 2018) (Wecht, J., concurring); see also *Conway v. Cutler Group, Inc.*, 99 A.3d 67, 72 (Pa. 2014) (reversing the Superior Court’s decision to extend a builder’s implied warranty of habitability to a subsequent purchaser, concluding: “[T]he question of whether and/or under what circumstances to

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<sup>40</sup> Numerous academics also have concluded that the best approach is legislative, not judicial. See, e.g., Emeka Duruigbo, *Small Tract Owners and Shale Gas Drilling in Texas: Sanctity of Property, Holdout Power or Compulsory Pooling*, 70 *Baylor L. Rev.* 527 (2018); Heidi Gorovitz Robertson, *Get Out From Under My Land! Hydraulic Fracturing, Forced Pooling or Unitization, and the Role of the Dissenting Landowner*, 30 *Geo. Int’l L. Rev.* 633 (2018).

extend an implied warranty of habitability to subsequent purchasers of a newly constructed residence is a matter of public policy properly left to the General Assembly.”); *Weaver v. Harpster*, 975 A.2d 555, 563 (Pa. 2009) (“It is for the legislature to formulate the public policies of the Commonwealth. The right of a court to declare what is or is not in accord with public policy exists only when a given policy is so obviously for or against public health, safety, morals, or welfare that there is a virtual unanimity of opinion in regard to it. Only in the clearest of cases may a court make public policy the basis of its decision.” (internal citation omitted)).

Not only is this a task appropriately left to the General Assembly, but legislative schemes already exist to address the Superior Court’s concerns. Well spacing requirements and pooling legislation are widely employed both in the Commonwealth<sup>41</sup> and in other states to balance resource

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<sup>41</sup> The Oil and Gas Conservation Law, Act of July 25, 1961, P.L. 825, No. 359, 58 P.S. §§ 401-419, and regulations issued thereunder, 25 Pa. Code §§ 79.21-28 (which applies only to wells drilled below the Onondaga horizon, and does not include the area where most hydraulic fracturing occurs), authorizes the Department of Environmental Protection to pool landowners’ oil and gas interests in order to maximize the

development and landowners' rights.<sup>42</sup> This type of legislative solution ensures that landowners will be compensated for the

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benefits of oil and gas production, while also providing fair compensation for landowners. *See* Preamble to Oil and Gas Conservation Law, Act 1961, July 25, P.L. 825, No. 359, reprinted at 58 P.S. § 401 (Note) (“It is hereby declared as an expression of policy to be in the public interest to foster, encourage, and promote the development, production, and utilization of the natural oil and gas resources in this Commonwealth . . . in such manner as will encourage discovery, exploration, and development without waste; and to provide for the drilling, equipping, locating, spacing and operating of oil and gas wells so as to protect correlative rights and prevent waste of oil or gas or loss in the ultimate recovery thereof, and to regulate such operations so as to protect fully the rights of royalty owners and producers of oil and gas to the end that the people of the Commonwealth shall realize and enjoy the maximum benefit of these natural resources . . .”).

<sup>42</sup> *See* Sylvester & Malmsheimer, *supra* note 39 (noting that “[w]ell spacing and pooling laws are two of the mechanisms used to accomplish” the balance between resource development and landowners’ rights). Most oil and gas producing states have enacted legislative solutions addressing the Superior Court’s concerns. *See, e.g.*, Texas Mineral Interest Pooling Act, Tex. Nat. Res. Code § 102.001 *et seq.* (providing the Texas Railroad Commission with authority to regulate well spacing and unit pooling); Utah Oil and Gas Conservation Act, Utah Code § 40-6-1 *et seq.* (providing that the Board of Oil, Gas and Mining may issue pooling orders to establish the area that a single well may drain and the amount of royalties that

production of oil and gas beneath their property, which might otherwise be extracted without compensation under the rule of capture.<sup>43</sup>

If the General Assembly wished to apply similar rules to hydraulic fracturing in the Marcellus Shale, it could do so. In fact, the Pennsylvania House of Representatives considered amending the Oil and Gas Conservation Law in 2008 and 2009 to make its spacing and pooling rules applicable to hydraulic fracturing in the Marcellus Shale. H.B. 2453 (2008); H.B. 977 (2009). The Pennsylvania State Senate also considered bills in 2011, 2013, 2015, and 2017 that would have provided rules for hydraulic fracturing to “promote the development of the

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adjacent landowners are entitled to receive from the production).

<sup>43</sup> See DEP, *Conservation Law Background*, <http://files.dep.state.pa.us/OilGas/BOGM/BOGMPortalFiles/ConservationLaw/Conservation%20Law%20Background.pdf> (last visited January 13, 2019) (“[T]he act is intended to protect the correlative rights of property owners who may either be prevented from participating in a voluntary development unit, or who may receive no compensation for the development of their oil and gas resources due to the development and extraction of the mineral resource from adjacent property, which is subject to the Rule of Capture.”).



unconventional oil and gas resources of this Commonwealth . . . while reasonably protecting the correlative rights of the person affected.” S.B. 447 (2011); S.B. 355 (2013); S.B. 313 (2015); S.B. 142 (2017). This legislation would have protected the rights of “owners of oil and gas interests in properties adjacent to properties included or proposed to be included” within a unit. *Id.*

A prior Governor also appointed an advisory commission during his administration to consider how oil and gas rules and regulations could be changed to address the needs of the unconventional gas industry and the exploration of the Marcellus Shale.<sup>44</sup> The advisory commission considered applying similar spacing and pooling rules to hydraulic fracturing in the Marcellus Shale, but no legislation was enacted as a result of its report. The General Assembly is presumptively aware of the rule of capture, and its failure to

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<sup>44</sup> Pa. Exec. Order No. 2011-01, 41 Pa.B. 1754 (Apr. 2, 2011); Governor’s Marcellus Shale Advisory Commission, Report (July 22, 2011), *available at* [http://files.dep.state.pa.us/PublicParticipation/MarcellusShaleAdvisoryCommission/MarcellusShaleAdvisoryPortalFiles/MSAC\\_Final\\_Report.pdf](http://files.dep.state.pa.us/PublicParticipation/MarcellusShaleAdvisoryCommission/MarcellusShaleAdvisoryPortalFiles/MSAC_Final_Report.pdf).

pass legislation changing its application to hydraulic fracturing is an indication that it has chosen not to tamper with existing law.

In the absence of such legislation, the Court should refrain from declaring public policy by modifying the longstanding rule of capture.

#### IX. CONCLUSION

This Court should reverse the Superior Court's April 2, 2018 Order and reinstate the trial court's August 8, 2017 order entering summary judgment for SWN.



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Respectfully submitted,

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January 30, 2019

**CERTIFICATE OF COMPLIANCE WITH WORD LIMIT**

I certify that this Brief complies with the word limit in Pa.R.A.P. 2135 because it contains 12,525 words.

/s/ Robert L. Byer

# APPENDIX A

ADAM BRIGGS, PAULA BRIGGS, HIS	:	IN THE SUPERIOR COURT OF
WIFE, JOSHUA BRIGGS AND SARAH	:	PENNSYLVANIA
BRIGGS,	:	
	:	
Appellants	:	
	:	
v.	:	
	:	
SOUTHWESTERN ENERGY	:	
PRODUCTION COMPANY	:	No. 1351 MDA 2017

Appeal from the Order Entered August 8, 2017  
in the Court of Common Pleas of Susquehanna County,  
Civil Division at No(s): 2015-01253

BEFORE: GANTMAN, P.J., MURRAY, J., and MUSMANNNO, J.

OPINION BY MUSMANNNO, J.: **FILED APRIL 02, 2018**

Adam Briggs, Paula Briggs, his wife, Joshua Briggs, and Sarah Briggs (collectively, "Appellants") appeal from the Order granting Southwestern Energy Production Company's ("Southwestern") Motion for Summary Judgment, denying Appellants' Motion for Partial Summary Judgment, and

denying as moot Appellants' Motion to Compel.<sup>1</sup> We reverse and remand for further proceedings consistent with this Opinion.

Appellants own an approximately 11.07-acre parcel of land in Harford Township, Susquehanna County, Pennsylvania.

Southwestern is the lessee of oil and gas rights on a tract of land adjoining Appellants' property. Since 2011, Southwestern has continuously operated gas wells, known as the Innes Gas Unit and the Folger Gas Unit, respectively, on property adjacent to Appellants' property. Southwestern engages in hydraulic fracturing to extract natural gas from the Marcellus Shale formation through wellbores located on the Innes and Folger Gas Units.

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<sup>1</sup> After Appellants filed the instant appeal, Southwestern filed a Motion to confirm jurisdiction and/or quash appeal, seeking a determination of whether the trial court's August 8, 2017 Order is a final and appealable order because judgment had not been entered on the docket. Appellants filed a Response, arguing that because the trial court granted summary judgment, no further action was necessary. This Court subsequently entered an Order denying Southwestern's Motion, without prejudice. Southwestern raised the issue again in its appellate brief. **See** Brief for Appellee at 30-31. We conclude that the trial court's Order granting summary judgment in favor of Southwestern is final and appealable, as it effectively resolved all of the claims presented in the action, including Southwestern's counterclaim, Appellants' Motion for Partial Summary Judgment and the outstanding Motion to Compel. **See** Pa.R.A.P. 341(b)(1) (providing that "[a] final order is any order that disposes of all claims and of all parties"); **see also Feidler v. Morris Coupling Co.**, 784 A.2d 812, 814 n.1 (Pa. Super. 2001) (stating that trial court's order granting motion for summary judgment was final and appealable because it disposed of the entire matter).

Southwestern does not have an oil and gas lease concerning Appellants' property.

On November 5, 2015, Appellants filed a Complaint, asserting claims of trespass and conversion, and requesting punitive damages. Appellants alleged that Southwestern, in its operation of drilling units located on the adjoining property, has unlawfully been extracting natural gas from beneath Appellants' property. Appellants also alleged that Southwestern's actions constituted a past and continuing trespass.

Southwestern filed an Answer and New Matter on December 23, 2015, asserting, *inter alia*, that Appellants' claims were barred by the rule of capture.<sup>2</sup> Southwestern also filed a counterclaim for declaratory relief, requesting that the trial court confirm that Southwestern did not trespass on Appellants' property.

Appellants filed an Answer to Southwestern's New Matter on January 7, 2016.

Both parties engaged in discovery. Relevantly, Appellants sent Southwestern three sets of Interrogatories. Southwestern filed Objections and Answers to each of Appellants' Interrogatories. On May 16, 2016,

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<sup>2</sup> The rule of capture is "[a] fundamental principle of oil[]and[]gas law holding that there is no liability for drainage of oil and gas from under the lands of another so long as there has been no trespass and all relevant statutes and regulations have been observed." *Rule of Capture*, BLACK'S LAW DICTIONARY (10th ed. 2014).

Appellants filed a Motion to Compel answers to Interrogatories and a Motion for Sanctions. Specifically, Appellants claimed that Southwestern's responses to the Second and Third Interrogatories were evasive and "demonstrate[d] a calculated scheme of obduration[.]" Southwestern filed an Answer on June 3, 2016.

On April 24, 2017, Southwestern filed a Motion for Summary Judgment and brief in support thereof, asserting, *inter alia*, that Appellants' trespass claim must fail because Southwestern had not entered Appellants' property, and the rule of capture bars damages for drainage of natural gas due to hydraulic fracturing. Additionally, Southwestern requested summary judgment as to its counterclaim for a declaratory judgment.

On May 15, 2017, Appellants filed a Motion to Stay Resolution of Southwestern's Motion for Summary Judgment. Appellants argued that the case was not yet "ripe" for resolution on summary judgment because Southwestern had not provided Appellants with sufficient answers to their Interrogatories, which are necessary to determine the extent of Southwestern's actions in extracting natural gas. Southwestern filed an Answer.

On June 14, 2017, Appellants filed a Motion for Partial Summary Judgment, and a brief in support thereof, as to the issue of liability.



The trial court held oral argument on both Motions. By an Order dated August 8, 2017,<sup>3</sup> the trial court granted Southwestern's Motion for Summary Judgment, denied Appellants' Motion for Partial Summary Judgment, and denied as moot Appellants' Motion to Compel. Therein, the trial court agreed with Southwestern that, as a matter of law, the rule of capture precluded recovery by Appellants.

Appellants filed a timely Notice of Appeal and a court-ordered Pa.R.A.P. 1925(b) Concise Statement of matters complained of on appeal.

On appeal, Appellants present the following claims for our review:

I. Did the [trial court] err in determining that the rule of capture precluded any liability on the part of [Southwestern] under the theories of trespass or conversion for natural gas extracted by [Southwestern,] even if said natural gas originated under the lands of [] Appellants and was extracted from under Appellants' land by [Southwestern] through hydr[aulic ]fracturing?

II. Does the rule of capture apply to the extraction of natural gas from under land owned by a third party (such as [] Appellants here) through the process of hydr[aulic ]fracturing[, ] so as to preclude any liability on the part of [Southwestern] under the theories of trespass or conversion for natural gas extracted by [Southwestern,] even if said natural gas originated under the lands of [] Appellants and was extracted from under Appellants' land?

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<sup>3</sup> The Order was docketed on August 21, 2017.

Brief for Appellants at 2 (quotation marks omitted).<sup>4</sup>

Our standard of review in evaluating a trial court's grant or denial of summary judgment is well-settled:

Summary judgment is proper only when the pleadings, depositions, answers to interrogatories, admissions and affidavits and other materials demonstrate that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. The reviewing court must view the record in the light most favorable to the non[-] moving party and resolve all doubts as to the existence of a genuine issue of material fact against the moving party. Only when the facts are so clear that reasonable minds could not differ can a trial court properly enter summary judgment.

**Wall Rose Mut. Ins. Co. v. Manross**, 939 A.2d 958, 962 (Pa. Super. 2007) (citations omitted). “[T]he trial court’s order will be reversed only where it is established that the court committed an error of law or abused its discretion.” **Good v. Frankie & Eddie’s Hanover Inn, LLP**, 171 A.3d 792, 795 (Pa. Super. 2017) (citation omitted).

Appellants argue that the extraction of natural gas from beneath their property is a trespass, despite the lack of physical intrusion by

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<sup>4</sup> In its summary judgment Order, the trial court, applying the rule of capture, determined that both the trespass and conversion claims failed as a matter of law. **See** Trial Court Order, 8/21/17, at 8-9. However, because Appellants’ brief does not include a separate discussion of their conversion claim, **see** Pa.R.A.P. 2119(a), we will limit our discussion to Appellants’ trespass claim. Additionally, we observe that Appellants set forth only one claim in their Concise Statement. **See** Pa.R.A.P. 1925(b)(4)(vii) (providing that “[i]ssues not included in the Statement ... are waived.”). Because both of Appellants’ claims present substantially the same issue, we decline to find waiver on this basis, and will address the claims simultaneously.

Southwestern. Brief for Appellants at 5-6. Appellants point to the differences between hydraulic fracturing and the “conventional process of tapping into a pool or reservoir of fluids that flow according only to high and low pressure...” *Id.* at 8. Appellants argue that, in the context of conventional oil and gas extraction, “the rule of capture is a rule of necessity caused by the inability to determine the ownership of natural gas or oil located in an underground pool...” *Id.* at 11. Appellants claim that this case is analogous to *Young v. Ethyl Corp.*, 521 F.2d 771 (8th Cir. 1975).<sup>5</sup> Brief for Appellants at 8-11. Appellants assert that, like the minerals in *Young*, natural gas contained in shale formations would remain trapped there forever if not for the “forced extraction” through hydraulic fracturing. Brief for Appellants at 8. According to Appellants, it is possible to measure

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<sup>5</sup> In *Young*, the defendants operated a salt-water recycling operation whereby production wells were used to bring salt water to the surface; bromine was extracted from the brine; and the debrominated water was then injected into the ground, forcing subterranean brine toward the production wells. *See Young*, 521 F.2d at 772. Young, whose property was surrounded by land for which the defendants held mineral leases, sought an injunction for the defendants’ forcible removal of minerals from beneath his land. *See id.* The United States Court of Appeals for the Eighth Circuit, applying Arkansas state law, concluded that the forcible removal of minerals from beneath Young’s land constituted an actionable trespass. *See id.* at 774. The *Young* Court reasoned that “[t]he rule of capture has been applied exclusively ... to the escape, seepage, or drainage of ‘fugacious’ minerals which occurs as the inevitable result of the tapping of a common reservoir.” *Id.* (footnotes omitted). The Court further explained that Young had established “that the brine solution under his land would not migrate to the defendants’ production wells but for the force exerted by injection wells; in other words, that the brine is primarily ‘non-fugacious.’” *Id.*

the source of natural gas obtained through hydraulic fracturing, and therefore, the rule of capture should not apply. *Id.* at 11.

Southwestern argues that it cannot be held liable for trespass because it has never entered, or drilled any gas wells on, Appellants' property. Brief for Appellee at 14-15. Southwestern also contends that Appellants' trespass claim is precluded by the rule of capture. *Id.* at 17. Southwestern asserts that the rule of capture should be applied to natural gas obtained through hydraulic fracturing, which it describes as a "mechanical method of increasing the permeability of rock, and, thus, increasing the amount of oil or gas produced from it..." *Id.* at 21-22. Further, Southwestern argues that Appellants' reliance on *Young* is misplaced, as the process involved was different than hydraulic fracturing, and *Young* did not claim to lose minerals due to "seepage or drainage" toward the defendants' production wells. *Id.* at 26-27.

"In Pennsylvania, a person is subject to liability for trespass on land in accordance with the dictates of Restatement (Second) of Torts § 158." *Gavin v. Loeffelbein*, 161 A.3d 340, 355 (Pa. Super. 2017).

One is subject to liability to another for trespass, irrespective of whether he thereby causes harm to any legally protected interest of the other, if he intentionally

- (a) enters land in the possession of the other, or causes a thing or a third person to do so, or
- (b) remains on the land, or

- (c) fails to remove from the land a thing which he is under a duty to remove.

Restatement (Second) of Torts § 158. “The actor, without himself entering the land, may invade another’s interest in its exclusive possession by throwing, propelling, or placing a thing ... beneath the surface of the land ....”

**Id.**, cmt. i.

The rule of capture, which precludes liability for drainage of oil and gas from under another’s land, has long been applied in the context of conventional oil and gas extraction. In **Westmoreland & Cambria Natural Gas Co. v. De Witt**, 18 A. 724 (Pa. 1889), the Pennsylvania Supreme Court recognized that gas “is a mineral with peculiar attributes,” and therefore, the question of possession requires a different analysis than that applied to ordinary mineral rights. **Id.** at 725. The Court noted that “unlike other minerals, [oil and gas] have the power and the tendency to escape without the volition of the owner.” **Id.**; **see also Brown v. Vandergrift**, 80 Pa. 142, 147 (Pa. 1875) (describing oil’s “fugitive and wandering existence”).

The **Westmoreland** Court stated that oil and gas

belong to the owner of the land, and are part of it, so long as they are on or in it, and are subject to his control; but when they escape, and go into other land, or come under another’s control, the title of the former owner is gone. Possession of the land, therefore, is not necessarily possession of the gas. If an adjoining, or even a distant, owner, drills his own land, and taps your gas, so that it comes into his well and under his control, it is no longer yours, but his. ... [T]he one who controls the gas—has it in his grasp, so to speak—is the one who has possession in the legal as well as in the ordinary sense of the word.

**Westmoreland**, 18 A. at 725; *see also* **Brown v. Spilman**, 155 U.S. 665, 669-70 (1895) (citing **Vandergrift** and **Westmoreland**, acknowledging the “peculiar character” of oil and gas, and reiterating the **Westmoreland** rule).

In **Jones v. Forest Oil Co.**, 44 A. 1074 (Pa. 1900), the Pennsylvania Supreme Court considered the extent to which an owner of oil wells may use mechanical devices, such as gas pumps, to help bring oil to the surface, even when doing so would affect the production of neighboring wells. The Court adopted the lower court’s Decree, which considered **Vandergrift** and **Westmoreland**, and concluded that “the property of the owner of lands in oil and gas is not absolute until it is actually within his grasp, and brought to the surface.” **Jones**, 44 A. at 1075. The Court analogized to the use of steam pumps, and reasoned that because, like water, possession of land does not give an owner possession of the underlying oil and gas, it is lawful to produce oil by the “exercise of all the skill and invention of which man is capable.” **Jones**, 44 A. at 1075 (citation omitted). Additionally, the Court noted that without the lawful use of gas pumps, few would be willing to assume the expense of drilling and operating a well. *See id.*

The Pennsylvania Supreme Court reaffirmed the rule of capture in **Barnard v. Monongahela Natural Gas Co.**, 65 A. 801 (Pa. 1907). In **Barnard**, the Court considered whether a landowner may drill a well close to his property line, and draw gas from beneath the adjoining property, without invading his neighbor’s property rights. *See id.* at 802. The **Barnard** Court

described the fugitive nature of oil and gas, and concluded that “every landowner or his lessee may locate his wells wherever he pleases, regardless of the interests of others. ... He may crowd the adjoining farms so as to enable him to draw the oil and gas from them.” *Id.* The Court additionally stated that the adjoining landowner’s only recourse is to “go and do likewise.” *Id.*

More recently, in *Minard Run Oil Co. v. United States Forest Service*, 670 F.3d 236 (3d Cir. 2011), the United States Court of Appeals for the Third Circuit recognized that “[u]nder Pennsylvania law, oil and gas resources are subject to the ‘rule of capture,’ which permits an owner to extract oil and gas even when extraction depletes a single oil or gas reservoir lying beneath adjoining lands.” *Id.* at 256.

Appellants argue that hydraulic fracturing “differs dramatically” from conventional gas drilling, and that the principles underlying the common law rule of capture do not apply to natural gas obtained through the process of hydraulic fracturing. Brief for Appellants at 7-8, 12. Pennsylvania courts have not yet considered whether subsurface hydraulic fracturing, which extends into an adjoining landowner’s property and results in the withdrawal of natural gas from beneath that property, constitutes an actionable

trespass. In fact, our extensive research reveals only two cases<sup>6</sup> which have considered whether the rule of capture applies to hydraulic fracturing, and we look to those jurisdictions for guidance. However, we first find it necessary to examine the process of hydraulic fracturing.

Our Supreme Court has explained that “shale gas is [] natural gas that has been trapped by the shale rock formation from reaching the sandy, higher levels in the ground. The trapping of the natural gas by shale rock forces gas drillers to employ [hydraulic fracturing] to obtain the gas.” ***Butler v. Charles Powers Estate ex rel. Warren***, 65 A.3d 885, 894 (Pa. 2013) (citation omitted). In its summary judgment Order, the trial court relied on the following explanation of the process:

[Hydraulic fracturing] is done by pumping fluid down a well at high pressure so that it is forced out into the formation. The pressure creates cracks in the rock that propagate along the azimuth of natural fault lines in an elongated elliptical pattern in opposite directions from the well. Behind the fluid comes a slurry containing small granules called proppants—sand, ceramic beads, or bauxite are used—that lodge themselves in the cracks, propping them open against the enormous subsurface pressure that would force them shut as soon as the fluid was gone. The fluid is then drained, leaving the cracks open for gas or oil to flow to the wellbore. [Hydraulic fracturing] in effect increases the well’s exposure to the formation, allowing greater production. First used commercially in 1949, [hydraulic fracturing] is now essential to economic production of oil and gas

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<sup>6</sup> See ***Coastal Oil & Gas Corp. v. Garza Energy Trust***, 268 S.W.3d 1 (Tex. 2008), and ***Stone v. Chesapeake Appalachia, LLC***, No. 5:12-CV-102, 2013 WL 2097397 (N.D.W.Va. Apr. 10, 2013), ***order vacated***, 2013 WL 7863861 (N.D.W.Va. July 30, 2013).



and commonly used throughout Texas, the United States[] and the world.

Engineers design a [hydraulic fracturing] operation for a particular well, selecting the injection pressure, volumes of material injected, and type of proppant to achieve a desired result based on data regarding the porosity, permeability, and modulus (elasticity) of the rock, and the pressure and other aspects of the reservoir. The design projects the length of the fractures from the well measured three ways: the hydraulic length, which is the distance the [hydraulic fracturing] fluid will travel, sometimes as far as 3,000 feet from the well; the propped length, which is the slightly shorter distance the proppant will reach; and the effective length, the still shorter distance within which the [hydraulic fracturing] operation will actually improve production. Estimates of these distances are dependent on available data and are at best imprecise. Clues about the direction in which fractures are likely to run horizontally from the well may be derived from seismic and other data, but virtually nothing can be done to control that direction; the fractures will follow Mother Nature's fault lines in the formation. The vertical dimension of the [hydraulic fracturing] pattern is confined by barriers—in this case, shale—or other lithological changes above and below the reservoir.

Trial Court Order, 8/21/17, at 7 (citing ***Coastal Oil***, 268 S.W.3d at 6-7); ***see also*** *The Process of Unconventional Natural Gas Production*, EPA, <https://www.epa.gov/uog/process-unconventional-gas-production> (last updated Jan. 26, 2018) (describing hydraulic fracturing as a process used to extract natural gas from rock formations whereby large quantities of fluid (consisting of water, proppant and chemical additives) are pumped down a wellbore at high pressure to enlarge fractures within the target rock formation to stimulate the flow of natural gas).

In ***Coastal Oil***, the Supreme Court of Texas considered “whether subsurface hydraulic fracturing of a natural gas well that extends into

another's property is a trespass for which the value of the gas drained as a result may be recovered as damages." **Coastal Oil**, 268 S.W.3d at 4. The plaintiffs were the owners of the minerals contained in a 748-acre tract of land known as Share 13. **Id.** at 5. Coastal Oil and Gas Corporation ("Coastal") was the mineral lessee of Share 13, as well as two adjoining tracts of land not owned by the plaintiffs, all of which are situated above the Vicksburg T formation. **Id.** at 5, 6. Coastal drilled several wells on Share 13, one of which was an "exceptional producer." **Id.** at 6. Thereafter, Coastal shut in one of its producing wells on an adjoining share, and drilled two additional wells on that share, close to the Share 13 boundary line. **Id.** The plaintiffs subsequently sued Coastal, as they were concerned that Coastal was allowing gas from Share 13 to drain to the adjoining share, where Coastal could retrieve the gas, unburdened by an obligation to pay a royalty. **Id.** at 6. The parties agreed that the hydraulic and propped lengths of the first well on the adjoining share exceeded the distance between the well and the Share 13 lease line. **Id.** at 7. The plaintiffs subsequently amended their pleadings to assert a claim for trespass. **Id.** The plaintiffs' expert estimated that, of the two Coastal wells located on the adjoining share, the well closest to the boundary line had drained 25-35% of the gas it produced from Share 13 due to hydraulic fracturing. **Id.** at 8. Coastal's expert testified that no gas had drained from Share 13. **Id.** The jury found, *inter alia*, that Coastal's hydraulic fracturing of the well closest to the

boundary line had trespassed on Share 13, causing substantial drainage, and Coastal did not dispute that finding on appeal. *Id.*

The Supreme Court of Texas initially determined that because the plaintiffs, as the mineral lessors, had only a reversion interest in the minerals leased to Coastal, they had to establish actual injury. *Id.* at 10-11. The ***Coastal Oil*** Court then indicated that it “need not decide the broader issue” of whether the hydraulic fracturing constituted a trespass. *Id.* at 12. The Court reiterated that the plaintiffs had to establish injury, and determined that “[the plaintiffs’] only claim of injury—that Coastal’s [hydraulic fracturing] operation made it possible for gas to flow from beneath Share 13 to the [adjoining share’s] wells—is precluded by the law of capture.” *Id.* at 12-13; ***see also id.*** at 12 n.36 (noting that a case involving a trespass against a possessory interest would not require a showing of actual injury to be actionable). The ***Coastal Oil*** Court therefore held that “damages for drainage by hydraulic fracturing are precluded by the rule of capture,” citing the following four justifications for its holding: (1) “the law already affords the owner who claims damage full recourse;” (2) “allowing recovery for the value of gas drained by hydraulic fracturing usurps to the courts and juries the lawful and preferable authority of the Railroad Commission to regulate oil and gas production;” (3) “determining the value of oil and gas drained by hydraulic fracturing is the kind of issue the litigation process is least equipped to handle” because “trial judges and

juries cannot take into account social policies, industry operations, and the greater good[,], which are all tremendously important in deciding whether [hydraulic fracturing] should or should not be against the law;" and (4) "the law of capture should not be changed to apply differently to hydraulic fracturing because no one in the industry appears to want or need the change." *Id.* at 14-17.

In a concurring and dissenting Opinion joined by two additional justices, Justice Phil Johnson<sup>7</sup> considered the rationale for the rule of capture, and pointed out that "[t]he gas at issue ... did not migrate to Coastal's well because of naturally occurring pressure changes in the reservoir." *Coastal Oil*, 268 S.W.3d at 42 (Johnson, J., dissenting). Justice Johnson stated that he "would not apply the rule [of capture] to a situation ... in which a party effectively enters another's lease without consent, drains minerals by means of an artificially created channel or device, and then 'captures' the minerals on the trespasser's lease." *Coastal Oil*, 268 S.W.3d at 43 (Johnson, J., dissenting). Justice Johnson also opined that the majority had prematurely addressed the issue of damages before determining whether hydraulic fractures that extend across lease lines constitute a trespass. *Id.* at 42; *see also id.* at 43 (stating that "[u]ntil the

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<sup>7</sup> Justice Johnson dissented only as to the majority's consideration of the trespass issue, and concurred as to a separate issue that is not relevant to the instant case. Thus, for our purposes, we will refer to Justice Johnson's minority decision as "the *Coastal Oil* dissent."

issue of trespass is addressed, Coastal's fractures into Share 13 must be considered an illegal trespass.").

Regarding the majority's four reasons "not to change the rule of capture," Justice Johnson stated that, although he disagreed with some of those reasons, his fundamental disagreement was that he believed the majority was, in fact, changing the rule of capture. ***Id.*** at 45. Justice Johnson also stated that "not all property owners ... are knowledgeable enough or have the resources to benefit from" the alternative remedies suggested by the majority, *i.e.*, self-help, lawsuits, and pooling. ***Id.*** Moreover, Justice Johnson reasoned that the majority holding "reduces incentives for operators to lease from small property owners" because it "effectively allows a lessee to change and expand the boundary lines of its lease by unilateral decision and action—fracturing its wells—as opposed to contracting for new lease lines ... or paying compensatory royalties." ***Id.*** at 45.

The United States District Court for the Northern District of West Virginia considered the applicability of the rule of capture to hydraulic fracturing in ***Stone, supra***.<sup>8</sup> In ***Stone***, the plaintiffs were the owners of a

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<sup>8</sup> The parties subsequently settled the case, at which time the district court granted the parties' Joint Motion to vacate, and vacated its Order denying summary judgment. ***See Stone***, 2013 WL 7863861 (N.D.W.Va. July 30, 2013).

combined 217.77-acre tract of land. **Stone**, 2013 WL 2097397, at \*1. Chesapeake Appalachia, LLC (“Chesapeake”), by assignment, acquired a lease for the oil and gas underlying the plaintiffs’ property, which provided for “the right to pool and unitize the Onondaga, Oriskany, or deeper formations under all or any part of the land...” **Id.**<sup>9</sup> Chesapeake drilled a horizontal well on a neighboring property; the vertical wellbore was located approximately 200 feet from the plaintiffs’ property, and the horizontal bore came within tens of feet of the property line. **Id.** The plaintiffs filed a Complaint, alleging, *inter alia*, that Chesapeake had trespassed on their property by engaging in hydraulic fracturing. **Id.** Chesapeake subsequently filed a Motion for summary judgment, asserting, *inter alia*, that the plaintiffs’ trespass claim was barred by the rule of capture, and urging the district court to apply the majority decision in **Coastal Oil**. **See id.** at \*1, 2.

In its Order denying summary judgment, the district court, persuaded by the **Coastal Oil** dissent, stated that

[t]he [**Coastal Oil**] opinion gives oil and gas operators a blank check to steal from the small landowner. Under such a rule, the companies may tell a small landowner that either they sign a lease on the company’s terms or the company will just hydraulically fracture under the property and take the oil and gas without compensation. In the alternative, a company may just take the gas without even contacting a small landowner.

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<sup>9</sup> The Marcellus Shale formation is situated above both the Onondaga and Oriskany foundations. **See id.** at \*1. The parties were unable to agree to a lease modification that would allow for pooling and unitization of the Marcellus Shale formation. **See id.**

**Id.** at \*6. The court pointed to the **Coastal Oil** dissent's "most significant and compelling criticism" that not all property owners are able to drill their own well in order to protect their rights. **Id.** The district court also stated that West Virginia's regulatory authority does not have as much power as the Texas Railroad Commission. **Id.** at \*7. Regarding the **Coastal Oil** majority's third justification, the district court pointed out that the relevant issue is not whether hydraulic fracturing should or should not be against the law, but instead, "whether an operator may use hydraulic fracturing on neighboring property, thereby taking the neighbor's oil and gas without compensation." **Id.** As to the fourth justification, the district court stated that "[it] sees no reason why the desires of the industry should overcome the property rights of small landowners." **Id.** Accordingly, the district court concluded that hydraulic fracturing beneath a neighbor's land without consent constitutes an actionable trespass. **Id.** at \*8.

Here, in its summary judgment Order, the trial court stated that it "[found] no case[]law that would imply th[e] rule [of capture] is any less applicable when the gas is extracted using modern techniques, such as hydraulic fracturing." Trial Court Order, 8/21/17, at 5-6. The trial court, believing itself bound by the reasoning in **Barnard** and the rule of capture, concluded that Southwestern could not be held liable for trespass. **See id.** at 8-9. Additionally, in its Pa.R.A.P. 1925(a) Opinion, the trial court stated that even if Southwestern had recovered natural gas from beneath

Appellants' land, the gas was legally and permissibly extracted. **See** 1925(a) Opinion, 10/16/17, at 3.

Based upon our review of relevant case law and the principles underlying oil and gas extraction, we are persuaded by the analysis in the **Coastal Oil** dissent and **Stone**, and conclude that hydraulic fracturing is distinguishable from conventional methods of oil and gas extraction. Traditionally, the rule of capture assumes that oil and gas originate in subsurface reservoirs or pools, and can migrate freely within the reservoir and across property lines, according to changes in pressure. **See Barnard**, 65 A. at 802 (referring to the fugitive nature of oil and gas); **see also Coastal Oil**, 268 S.W.3d at 42 (Johnson, J., dissenting) (explaining that "[t]he rationale for the rule of capture is the 'fugitive nature' of hydrocarbons. They flow to places of lesser pressure and do not respect property lines." (citation omitted)); **Young**, 521 F.2d at 774 (stating that the rule of capture is traditionally applied where the drainage of minerals "occurs as the inevitable result of the tapping of a common reservoir." (citation omitted)). Unlike oil and gas originating in a common reservoir, natural gas, when trapped in a shale formation, is non-migratory in nature. **See Butler**, 65 A.3d at 984. Shale gas does not merely "escape" to adjoining land absent the application of an external force. **See Completion**, SOUTHWESTERN ENERGY, <https://www.swn.com/operations/Pages/completions.aspx> (last visited Mar. 15, 2018) (stating that many natural gas discoveries "are made in tight, relatively impermeable rocks, and natural gas will not



flow easily from these tight reservoirs without some assistance.”). Instead, the shale must be fractured through the process of hydraulic fracturing; only then may the natural gas contained in the shale move freely through the “artificially created channel[s].” ***Coastal Oil***, 268 S.W.3d at 43 (Johnson, J., dissenting); **see also id.** at 42 (stating that “[t]he rule of capture precludes liability for capturing oil or gas drained from a neighboring property whenever such flow occurs solely through the operation of natural agencies in a normal manner, **as distinguished from artificial means applied to stimulate such a flow.**” (citation omitted; emphasis added)); ***Young***, 521 F.2d at 774 (concluding that the defendants’ forcible removal of brine—a primarily non-fugacious mineral—from beneath Young’s land, where the brine would not have migrated to defendants’ wells without the exertion of force, constituted an actionable trespass).

Further, we are not persuaded by the ***Coastal Oil*** Court’s rationale that a landowner can adequately protect his interests by drilling his own well to prevent drainage to an adjoining property. **See *Coastal Oil***, 268 S.W.3d at 14; **see also *Barnard***, 65 A. at 802. Hydraulic fracturing is a costly and highly specialized endeavor, and the traditional recourse to “go and do likewise” is not necessarily readily available for an average landowner. **See *Coastal Oil***, 268 S.W.3d at 45 (Johnson, J., dissenting) (indicating that not all property owners have the resources to benefit from alternative remedies); **see also** U.S. ENERGY INFORMATION ADMINISTRATION, TRENDS IN U.S. OIL AND NATURAL GAS UPSTREAM COSTS, 1, 19 (March 2016),

<http://www.eia.gov/analysis/studies/drilling/pdf/upstream.pdf> (estimating an average Marcellus Shale well cost of \$6.1 million in 2015); Samuel C. Stephens, Comment, *Poison Under Pressure: The EPA's New Hydraulic Fracturing Study and the Case for Rational Regulation*, 43 CUMB. L. REV. 63, 74 (2013) (indicating that a single hydraulic fracturing well in the Marcellus Shale region has an estimated cost of over \$5 million). Additionally, while we are cognizant that establishing the occurrence of a subsurface trespass determining the value of natural gas drained through hydraulic fracturing will present evidentiary difficulties, *see Coastal Oil*, 268 S.W.3d at 16, we do not believe that such difficulty, in itself, is a sufficient justification for precluding recovery. *See id.* at 44 (Johnson, J., dissenting) (stating that “[t]he evidence showed that the effective length of a fracture can be fairly closely determined after the fracture operation,” and juries may resolve conflicts in expert testimony on the subject), 45 n.3 (stating that “[d]ifficulty in proving matters is not a new problem to trial lawyers.”).

We additionally echo the concern raised in both the *Coastal Oil* dissent and *Stone* that precluding trespass liability based on the rule of capture would effectively allow a mineral lessee to expand its lease by locating a well near the lease’s boundary line and withdrawing natural gas from beneath the adjoining property, for which it does not have a lease. *See id.* at 43, 45 (Johnson, J., dissenting); *see also Stone*, 2013 WL 2097397 at \*6. Such an allowance would nearly eradicate a mineral lessee’s incentive to negotiate mineral leases with small property owners, as the

lessee could use hydraulic fracturing to create an artificial channel beneath an adjoining property, and withdraw natural gas from beneath the neighbor's land without paying a royalty. **See *Coastal Oil***, 268 S.W.3d at 45 (Johnson, J., dissenting); **see also *Stone***, 2013 WL 2097397 at \*6.

In light of the distinctions between hydraulic fracturing and conventional gas drilling, we conclude that the rule of capture does not preclude liability for trespass due to hydraulic fracturing. Therefore, hydraulic fracturing may constitute an actionable trespass where subsurface fractures, fracturing fluid and proppant cross boundary lines and extend into the subsurface estate of an adjoining property for which the operator does not have a mineral lease, resulting in the extraction of natural gas from beneath the adjoining landowner's property.

In the instant case, it is unclear from the record before us<sup>10</sup> whether Southwestern's hydraulic fracturing operations resulted in a subsurface trespass to Appellants' property. There does not appear to be any evidence, or even an estimate, as to how far the subsurface fractures extend from each of the wellbore on Southwestern's lease. However, we conclude that Appellants' allegations are sufficient to raise an issue as to whether there has been a trespass, and thus, the entry of summary judgment in favor of

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<sup>10</sup> The record does not contain any depositions (although Southwestern cites to the depositions of Adam and Paula Briggs in its appellate brief), nor does it contain complete copies of all three sets of Interrogatories.

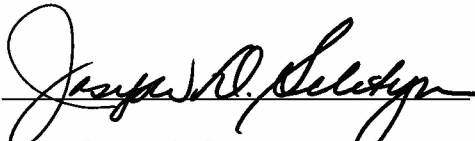
Southwestern was premature. We therefore reverse the summary judgment Order and remand the case to the trial court for further proceedings. On remand, Appellants must be afforded the opportunity to fully develop their trespass claim. Moreover, because the trial court concluded that Appellants' conversion claim was precluded by the rule of capture, Appellants must also be afforded the opportunity to develop their conversion claim on remand.

Order reversed. Case remanded for further proceedings consistent with this Opinion. Jurisdiction relinquished.

President Judge Gantman joins the opinion.

Judge Murray did not participate in the consideration or decision of this case.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.  
Prothonotary

Date: 4/2/2018

# APPENDIX B

IN THE COURT OF COMMON PLEAS OF  
SUSQUEHANNA COUNTY, PENNSYLVANIA  
CIVIL DIVISION

ADAM BRIGGS, PAULA BRIGGS, his  
wife, JOSHUA BRIGGS, and SARAH H.  
BRIGGS,

Plaintiffs,

v.

SOUTHWESTERN ENERGY  
PRODUCTION COMPANY,

Defendant.

No. 2015-1253 CIVIL

Motions for Summary Judgment

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SUSQUEHANNA COUNTY

**ORDER**

AND NOW, this 2<sup>nd</sup> day of August, 2017 upon consideration of Defendant Southwestern Energy Production Company's Motion for Summary Judgment and brief in support thereof, Plaintiff's response in opposition and brief in support thereof, oral argument held thereon and a review of the entire record, it is **ORDERED** that the Defendant's Motion for Summary Judgment is **GRANTED**.

IT IS **FUTHER ORDERED** that Plaintiffs' Motion for Partial Summary Judgment and brief in support thereof, Defendant's Answer and supplemental brief in support thereof, oral argument held thereon and a review of the entire record, it is **ORDERED** that the Plaintiffs' Motion for Partial Summary Judgment is **DENIED**.

IT IS **FUTHER ORDERED** that Plaintiffs' Motion to Compel Answers to Plaintiff's Interrogatories Directed to Defendants and Sanctions, Defendant's Answer and a review of the entire record, it is **ORDERED** that Plaintiffs' Motion to Compel is **DENIED** as moot.

8/22/17 IS COPY ANY KELLY, MALCOLM

## I. BACKGROUND

Plaintiffs, Adam Briggs, Paula Briggs, his wife, Joshua Briggs, and Sarah H. Briggs ("Plaintiffs") are the owners of a 11.7 acre parcel in Harford Township, Susquehanna County, Pennsylvania. Defendant Southwestern Energy Production Company ("Defendant") is the leasee of oil and gas rights on property adjacent to Plaintiffs' parcel and since 2011 Defendant has continuously operated gas wells using hydraulic fracturing<sup>1</sup> on the adjacent property. Defendant has no lease for the oil and gas rights associated with Plaintiffs' property.

On November 5, 2015, Plaintiffs filed a Complaint asserting claims of trespass, conversion, and punitive damages against Defendant. All of Plaintiffs' claims rest on the argument that lawful hydrofracturing activities conducted by Defendant on property adjoining Plaintiffs' property amounts to a trespass because the activities result in the allegedly improper capture of gas which seeps or flows from under Plaintiffs' property.

Defendant filed an Answer, New Matter, and Counterclaim on December 23, 2015 and Plaintiffs filed an Answer to the New Matter and Counterclaim on January 7, 2016. Both parties engaged in discovery.

On May 16, 2016, Plaintiffs filed a Motion to Compel Answers to Interrogatories and for Sanctions. Defendant filed an Answer on June 3, 2016.

Following the close of relevant discovery, Defendant filed a Motion of Summary Judgment and supporting brief on April 24, 2017. The Motion asserts that the rule of capture applies to the case and therefore Defendant is entitled to summary judgment as a matter of law because it did not engage in any physical intrusion onto Plaintiffs' property.

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<sup>1</sup> Also referred to as hydrofracturing, hydrofracing, or simple fracing. The terms are used interchangeably throughout this Opinion.

On May 15, 2017, Plaintiffs filed a Motion to Stay the Resolution of Defendant's Motion for Summary Judgment on the grounds that the outstanding discovery Motion, which related to the extent of the gas removed by Defendant, remained unresolved. Defendant filed an Answer on May 17, 2017.

On June 14, 2017, Plaintiffs filed a Motion for Partial Summary Judgment on the issue of liability, asserting that the rule of capture should not apply to the use of hydrofracturing. The same day, Plaintiffs also filed a combined brief opposing Defendant's Motion for Summary Judgment and supporting their Motion for Partial Summary Judgment. Defendant subsequently filed an Answer to Plaintiffs' Motion and a supplemental brief.

We heard oral argument on both Motions for Summary Judgment on June 27, 2017. As both Motions can be resolved with the application of the rule of capture and title concepts for natural gas we resolve both in this Opinion.

## II. DISCUSSION

### Standard of Review for Summary Judgment

Summary judgment is proper: "(1) whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report; or (2) if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury." Pa.R.C.P. 1035.2.

The party moving for summary judgment has the burden of demonstrating that there



are no genuine issues of material fact. *Acter v. Polena*, 393 A.2d 1230, 1232 (Pa. Super. 1978). All doubts as to whether a genuine issue of material fact exists are to be resolved against the movant. *Thompson Coal Co. v. Pike Coal Co.*, 412 A.2d 466, 469 (Pa. 1979). Once the moving party shows that no genuine issues of material fact exist, summary judgment is appropriate where the adverse party is unable to produce probative evidence to the contrary. See *Phaff v. Gerner*, 451 Pa. 1462 (1973).

The adverse party may not claim that the averments of their pleadings, alone, are sufficient to raise a genuine issue of fact so as to defeat the motion. See *Id.* The Pennsylvania Rules of Civil Procedure specifically provide, in relevant part, that the adverse party may not rest upon the mere allegations or denials of the pleadings, but must file a response within thirty days after service of the motion identifying one or more issues of fact arising from evidence in the record controverting the evidence cited in support of the motion. See Pa.R.C.P. 1035.3(a)(1).

As Rule 1035.2 and the relevant case law clearly indicate, a motion for Summary Judgment may only be granted when there is no dispute of material fact and no evidence sufficient to permit a jury to find a fact essential to the cause of action or defense. In fact, summary judgment is to be entered only in the clearest of cases where there is not the slightest doubt as to the absence of triable issue of fact. *Cercone v. Cercone*, 386 A.2d 3 (Pa. Super. 1978). All doubts as to whether a genuine issue of material fact exists are to be resolved against the movant. *Thompson Coal Co. v. Pike Coal Co.*, 412 A.2d 466, 469 (Pa. 1979).

#### Standard for the Rule of Capture and Basic Title Concepts

##### *a. The Rule of Capture and Gas Title Rights in Pennsylvania*

It is well established Pennsylvania law that the rule of capture applies to wells drilled for gas exploration and production. *Barnard v. Monongahela Natural Gas Co.*, 65 A. 801 (Pa. 1907). The plaintiffs in *Barnard* alleged that a gas well placed near their property line, which pulled gas from a pool lying partly under their property amounted to a trespass. *Id.* at 1. However, the *Barnard* Court found that short of actual fraudulent behavior, a property owner is free to drill anywhere he pleases on his property without liability for the gas drained from under neighboring properties. *Id.* at 5. If a property owner's neighbor took umbrage with such action then his remedy was to "go and do likewise." *Id.* at 6. While the *Barnard* Court acknowledged that this was not an ideal solution, it is still the law in this Commonwealth. *Id.*

It is also important to note that advances in technology do not change the rule articulated in *Barnard* and that property owners in Pennsylvania may use "all the skill and invention of which man is capable" in order to legally extract oil and gas from the ground. *Jones v. Forest Oil Co.*, 44 A. 1074 (Pa. 1900). While, Plaintiffs correctly point out that *Jones* predates the practice of hydraulic fracturing and does not use the term, this does not negate the binding authority of the case's basic holding. Moreover, we note that the Federal Courts have concluded the rule of capture still applies to oil and gas in Pennsylvania. *Minard Run Oil, Co. v. United Forest Service*, 670 F.3d 236, 256 (3d Cir. 2011).

Finally we note that because gas is "a mineral with peculiar attributes" title to such minerals is not as clear cut as title to the land above it. *Westmoreland v. Dewitt*, 18 A. 724, 249 (Pa. 1889). As the *Westmoreland* Court opined:

Water and oil, and still more strongly gas, may be classed by themselves, if the analogy be not too fanciful, as minerals *ferae naturae*. In common with animals, and unlike other minerals, they have the power and the tendency to escape without the violation of the owner. Their "fugitive and wandering existence within the limits of a particular tract is uncertain." *Id.* (citing *Brown v. Vandergift*, 80 Pa. 142, 147 (Pa. 1875) (emphasis added)).

Based on the particular nature of gas the *Westmoreland* Court found that so long as gas remained under a property owner's land and in his control he held title to the mineral. *Westmoreland* at 249. However if the gas escaped, flowed onto another's property, or came under another's control, the property owner lost his title. *Id.* The Court thus concluded that "[i]f an adjoining, or even a distant, owner, drills his own land, and taps your gas, so that it comes into his well and under his control, it is no longer yours, but his." *Id.* Therefore, control of the land is not automatically control of the gas below it. *Id.* We find no caselaw that would imply this rule is any less applicable when the gas is extracted using modern techniques, such as hydraulic fracturing.

*b. Hydrofracturing and the Rule of Capture*

Hydrofracturing is a process by which natural gas is coaxed to the surface and has been in use in Pennsylvania since at least 1954. *N.Y. Natural Gas Corp. v. Swan-Finch Gas Development Corp.*, F.Supp. 184, 198 (W.D. Pa. 1959); *Humberston v. Chevron U.S.A., Inc.*, 75 A.3d 504, 510 (Pa. Super. 2013) (citing and confirming a trial court opinion, which explicitly rejected the argument that hydrofracing was a new or novel technique in the drilling industry, and noted that the technique was initially developed for commercial use in the late 1940s).

While no Pennsylvania state case directly addresses the application of the rule of capture in situations involving fracing, several state and federal courts have addressed the issue. See e.g. *Minard Rim Oil Co., supra*; *Coastal Oil & Gas Corp. v. Garza Energy Trust*, 268 S.W. 3d 1 (Tex. 2008); *Young v. Estyl Corp.*, 521 F. 2d 771 (8<sup>th</sup> Cir. 1975). We find a recent decision by the Texas Supreme Court particularly instructive. See *Coastal Oil & Gas Corp., supra*. The *Coastal Oil* case, addresses the issue of whether a hydraulic

fracturing well that drains gas from an adjacent property constitutes a trespass for which the value of the drained gas can be recovered, or whether such recovery is barred by the rule of capture. *Id.* at 4.

Following a recitation of the relevant facts, the *Coastal Oil* Court laid out an excellent explanation of the hydraulic fracturing process. *Id.* at 6. Essentially fracturing

<sup>2</sup>is done by pumping fluid down a well at high pressure so that it is forced out into [a] formation. The pressure creates cracks in the rock that propagate along the azimuth of natural fault lines in an elongated elliptical pattern in opposite directions from the well. Behind the fluid comes a slurry containing small granules called proppants - sand, ceramic beads, or bentonite are used - that lodge themselves in the cracks, propping them open against the enormous subsurface pressure that would force them shut as soon as the fluid was gone. The fluid is then drained, leaving the cracks open for gas or oil to flow to the wellbore. Fracturing in effect increases the well's exposure to the formation, allowing greater production. First used commercially in 1949, fracking is now essential to economic production of oil and gas commonly used throughout Texas, the United States, and the world.

Engineers design a fracking operation for a particular well, selecting the injection pressure, volumes of material injected, and type of proppant to achieve a desired result based on data regarding the porosity, permeability, and modulus (elasticity) of the rock, and the pressure and other aspects of the reservoir. The design projects the length of the fracking fluid well travel, sometimes as far as 3,000 feet from the well; the proposed length, which is the slightly shorter distance the proppant will reach, and the effective length, the still shorter distance within which the fracking operation will actually improve production. Estimates of these distances are dependent on available data and are at best imprecise. Clues about the direction in which fractures are likely to run horizontally from the well may be derived from seismic and other data, but virtually nothing can be done to control direction; the fracture will follow Mother Nature's fault line in the formation. The vertical dimension of the fracking pattern is confined by barriers - in this case, shale - or other lithological changes above and below the reservoir. *Id.*

After explaining the fracking process, the *Coastal Oil* Court concluded that the plaintiffs could not sustain their action for trespass specifically because the rule of capture applied making the drainage of gas from under the plaintiffs' land an injury without a legal remedy. *Id.* at 12. In reaching this conclusion the *Coastal Oil* Court echoed the principles and logic of present Pennsylvania law on the matter. In particular, the first rationale relied upon *Coastal Oil* is that the rule of capture is justified in a hydraulic fracturing context because

<sup>2</sup>The formation in *Coastal Oil* is the Victoria T, which like the Marcellus Shale (at issue here) is a "tight" sandstone formation, so the mechanics of the hydraulic fracturing process are the same. See U.S. Energy Information Administration, *Marcellus Shale: Plow, Girdle, Review* (January 2017), <https://www.eia.gov/images/pdf/Marcellus.pdf> by Upsilon Jan2017.pdf

the ability to drill an off-set well is still readily available to disgruntled property owners. *Id.* at 33. This is the precise reasoning in *Barnard* and we are persuaded that we continue to be bound by it in a hydrofracing context.

Plaintiffs' Claims for Trespass, Conversion, and Punitive Damages Must Fail as a Matter of Law. Therefore Summary Judgment in Defendant's Favor is Proper in this Matter.

*a. Plaintiffs' Trespass Claim is Barred by the Rule of Capture and Relevant Title Concepts.*

Initially, we note that there is a dispute between the parties, based on dueling alleged judicial admissions, as to the exact nature of Plaintiffs' trespass claim. Defendant asserts that Plaintiffs base their claim solely on the fact that Defendant has drilled gas wells "too close" or "nearby" Plaintiffs' property. Def.'s Mot. at 10; Def.'s Br. at 5. Meanwhile, Plaintiffs assert that the placement of Defendant's wells is not at the heart of their claim, but rather their trespass claim, and by extension their other claims, rest on the removal of gas from under their property by the well that is "too close" to their property line. Pls.' Br. at 2. Ultimately, we need not decide which party's interpretation of the claim is correct, because assuming *arguendo* that Plaintiffs' broader assertion is right, their claim still fails as a matter of law.

Here, Defendant drilled wells only on property to which it had a valid lease and used commercially available techniques to remove natural gas from the ground. In doing so, Defendant acted within the contractual bounds of its lease agreement and the dictates of *Barnard* and *Jones*. Under these circumstances and based the principles outlined above, Plaintiffs were not perpetually guaranteed title to the gas lying under their land. Rather once the gas came under Defendant's control through legal means, title to the gas vested in Defendant. Thus, we find that Defendant cannot be held liable for trespass of Plaintiffs

property.

*b. Conversion and Punitive Damage Claims*

Plaintiffs' remaining claims rest on the removal of gas from under their property by Defendant. Because, as explained above, the gas was removed by Defendant through legal and permissible means, Plaintiffs cannot sustain their trespass claim, and by extension, they cannot sustain their claims for conversion or punitive damages.

**III. CONCLUSION**

Accordingly, it is hereby **ORDERED** that the Defendant's Motion for Summary Judgment is **GRANTED** and Plaintiffs' Motion for Partial Summary Judgment is **DENIED**.

**IT IS FURTHER ORDERED** that based on the resolution of the Motions for Summary Judgment, Plaintiffs' Motion to Compel Answers to Plaintiff's Interrogatories Directed to Defendants and Sanctions is **DENIED** as moot.

BY THE COURT:

  
HON. LINDA WALLACH MILLER, S.J.  
Specially Presiding

cc: Laurence M. Kelly, Esq., Attorney for Plaintiffs  
Jeffrey J. Malak, Esq., Attorney for Defendant

RJF

# APPENDIX C

**IN THE COURT OF COMMON PLEAS OF  
SUSQUEHANNA COUNTY, PENNSYLVANIA  
CIVIL DIVISION**

**ADAM BRIGGS, PAULA BRIGGS, his  
wife, JOSHUA BRIGGS, and SARAH H.  
BRIGGS,**

**Plaintiffs,**

**v.**

**SOUTHWESTERN ENERGY  
PRODUCTION COMPANY,**

**Defendant.**

**2015-1253 CIVIL**

**1351 MDA 2017**

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PROthonotary**

*10/17/17 Amy Kelly Moore*

**OPINION SUBMITTED PURSUANT TO PENNSYLVANIA RULE OF  
APPELLATE PROCEDURE 1925**

AND NOW, this 14<sup>th</sup> day of October, 2017, after careful review of the record and of Appellant's Concise Statement of Matters Complained of on Appeal, this Court continues to stand by its decision in the above-captioned matter and respectfully requests the Superior Court uphold this Court's Order of August 8, 2017. This Court would like to add, pursuant to Pennsylvania Rule of Appellate Procedure 1925, the following:

**I. FACTUAL AND PROCEDURAL HISTORY.**

Plaintiffs, Adam Briggs, Paula Briggs, his wife, Joshua Biggs, and Sarah H. Briggs ("Appellants") are the owners of an 11.7 acre parcel in Harford Township, Susquehanna County, Pennsylvania. Defendant Southwestern Energy Production Company ("Appellee") is the lessee of oil and gas rights on property adjacent to Appellants' parcel and has continuously operated gas wells using hydraulic fracturing<sup>1</sup> on the adjacent

<sup>1</sup> Also referred to as hydrofracturing, hydrofracing, or simple fracing. The terms are used interchangeably throughout this Opinion.



property. Appellee has no lease for the oil and gas rights associated with Appellants' property.

On November 5, 2015, Appellants filed a Complaint asserting claims of trespass, conversion, and punitive damages against Appellee. All of Appellants' claims rest on the argument that lawful hydrofracturing activities conducted by Appellee on property adjoining Appellants' property amounts to a trespass because the activities result in the allegedly improper capture of gas which seeps or flows from under Appellants' property.

Following the close of relevant discovery, Appellee filed a Motion of Summary Judgment and supporting brief, asserting that the rule of capture applies to the case and Appellee is therefore entitled to summary judgment as a matter of law because it did not engage in any physical intrusion onto Appellants' property.

Following oral argument, this Court granted Appellee's Motion for Summary Judgment, denied Appellants' Motion for Partial Summary Judgment, and denied Appellants' Motion to Compel as moot, by Order dated August 8, 2017. This appeal followed.

Appellants' Concise Statement of Matters Complained of on Appeal avers that this Court committed an error of law by determining that the Rule of Capture precluded any liability on the part of the Appellee under the theories of trespass or conversion for natural gas extracted by Appellee, even if the natural gas "originated" under the lands of the Appellants and was extracted from Appellants' land by Appellee through hydrofracturing.

## **II. STANDARD OF REVIEW.**

The scope of review of a trial court's order granting or denying summary judgment is plenary. *Pappas v. Asbel*, 768 A.2d 1089, 1095 (Pa. 2001). The trial court's order will be reversed only where it is established that the court committed an error of law or abused

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its discretion. *Id.*, citing *Cochran v. GAF Corp.*, 666 A.2d 245, 248 (Pa. 1995). "An abuse of discretion is not merely an error in judgment; rather it occurs when the law is overridden or misapplied, or where the judgment exercised is manifestly unreasonable or the result of partiality, prejudice, bias or ill will." *Pilon v. Bally Engineering Structures*, 645 A.2d 282, 285 (Pa. Super. 1994).

### III. DISCUSSION.

The issue presented by the instant appeal is whether this Court committed an error of law in determining that the Rule of Capture precluded liability from attaching to the Appellee under theories of trespass or conversion when Appellee extracted natural gas from land not owned by Appellants but which natural gas may have originated on land owned by Appellants. This Court avers that no error of law was committed because the natural gas was legally and permissibly extracted by Appellee.

It is well established Pennsylvania law that the rule of capture applies to wells drilled for gas exploration and production. *Barnard v. Monongahela Natural Gas Co.*, 65 A. 801 (Pa. 1907). It is also important to note that advances in technology do not change the rule articulated in *Barnard* and that property owners in Pennsylvania may use "all the skill and invention of which man is capable" in order to legally extract oil and gas from the ground. *Jones v. Forest Oil Co.*, 44 A. 1074 (Pa. 1900). Gas is "a mineral with peculiar attributes," title to which is not as clear cut as title to the land above it. *Westmoreland v. Dewitt*, 18 A. 724, 249 (Pa. 1889). So long as gas remains under a property owner's land and in his control, he holds title to the mineral. *Westmoreland* at 249. However if the gas escapes, flows onto another's property, or comes under another's control, the property owner loses his title. *Id.* "[I]f an adjoining, or even a distant, owner, drills his own land, and taps your gas, so that it comes into his well and under his control, it is no longer yours,

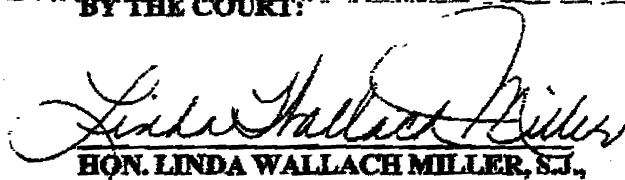
but his." *Id.* Control of land does not automatically impart control of the gas below it. *Id.*

Here, Appellee drilled wells only on property to which it had a valid lease, using commercially available techniques to remove natural gas from the ground. In so doing, Appellee acted within the contractual bounds of its lease agreement and the dictates of *Barnard and Jones*. Under these circumstances and based on the principles outlined *supra*, Appellants were not perpetually guaranteed title to the gas beneath the surface of their land. Rather, once the gas legally came under Appellee's control, title to same vested in Appellee. Thus, we found that Appellee cannot be held liable for trespass on Appellants' property.

#### IV. CONCLUSION.

Following thorough review of the record, this Court avers that the Order dated August 8, 2017, contained no error of law, that no law was overridden or misapplied, and that the judgment rendered was neither manifestly unreasonable, nor the result of partiality, prejudice, bias or ill will. As the decision was a sound application of the applicable law and supported by the facts, circumstances, and evidence in the case, this Court respectfully requests the Superior Court uphold our Order of August 8, 2017.

BY THE COURT:

  
HON. LINDA WALLACH MILLER, S.J.

cc: Laurence M. Kelly, Esq., *Attorney for Plaintiffs*  
Jeffrey J. Malak, Esq., *Attorney for Defendant*  
Court Administration

JC