In the Supreme Court of Pennsylvania

Docket No. 63 MAP 2018

Adam Briggs, Paula Briggs, his wife, Joshua Briggs and Sarah Briggs,

Appellees,

vs.

Southwestern Energy Production Company,

Appellants.

On Petition for Allowance of Appeal from an opinion and order of the Superior Court of Pennsylvania dated April 2, 2018, reargument denied June 8, 2018, reversing an order entered August 8, 2017, in the Court of Common Pleas of Susquehanna County, Civil Division, at Docket No. 2015-01253

BRIEF OF *AMICI* MARCELLUS SHALE COALITION, PENNSYLVANIA INDEPENDENT OIL & GAS ASSOCIATION, AND INDIVIDUAL ROYALTY OWNERS

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January 30, 2019

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I. INTRODUCTION

The *amici* Marcellus Shale Coalition ("MSC"), the Pennsylvania Independent Oil & Gas Association ("PIOGA"), and individual royalty owners ("Royalty Owners")[1] urge the Court to reinstate the rule of capture and preclude an action to recover damages for drainage allegedly caused by any fracture-stimulation activities, including hydraulic fracturing, taking place within the boundaries of lands adjacent to an unleased landowner's property.[2]

II. INTERESTS OF *AMICI*

The MSC represents approximately 150 producers, midstream, and local supply-chain companies that promote the safe and responsible development of natural gas from the Marcellus and Utica geological formations located in the Commonwealth. In 2017, the Commonwealth

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[1] The "Royalty Owners" are Kristi Byham; William Folger; Tina Folger; Jeffrey Hoodak; John J. Hoodak; the "Montrose Hillbillies," consisting of approximately 80 individuals with several thousand acres leased; PIOGA's royalty-owner members (holding royalty interests in several thousands of acres throughout the state); Bow & Arrow Land Company LLC (holding royalty interests in more than 23,000 acres of land primarily in Southwestern Pennsylvania); H&M Holdings, LLC (holding royalty interests in more than 18,000 acres of land in Southwestern Pennsylvania); and Chestnut Resources, LLC (holding royalty interests in approximately 1,000 acres in Western Pennsylvania). Washington County, also a royalty owner, supports the position of *amici* here.

[2] No person or entity other than the *amici*, their members, or their counsel either paid in whole or in part for the preparation of the *amici's* brief or authored in whole or in part the *amici's* brief.

accounted for 19% of the nation's natural gas production and produced more natural gas than any state except Texas due predominately to the advent of "unconventional" development from tight shale formations like the Marcellus and Utica. MSC members produce more than 95% of the unconventional natural gas in the Commonwealth.

PIOGA is the largest and oldest association representing oil and natural gas interests in Pennsylvania. PIOGA's nearly 500 members – many of which are family-owned small businesses – include oil and natural gas producers, marketers, oil and gas field service companies, engineering companies, legal and accounting firms, and royalty owners. PIOGA producer members develop Pennsylvania crude oil and natural gas reserves from conventional and unconventional formations located under private and public lands.

The Royalty Owners are individuals and entities throughout Pennsylvania that receive and/or are entitled to receive royalty income from oil and gas production. They have entered into oil and gas leases authorizing the exploration and production of oil and natural gas underlying their properties or acquired royalty interests in exchange for

up-front payments and the opportunity to receive royalties upon production for as long as that production continues.[3]

Members of the MSC and PIOGA use hydraulic fracturing to stimulate wells to accelerate the flow of gas from conventional and unconventional formations into the wellbore. Hydraulic fracturing is a longstanding well-stimulation technique that is essential to oil and gas development. More than 80% of the approximately 92,000 wells drilled in the Commonwealth since 1970 have been hydraulically fractured – the majority being conventional wells – according to well-completion reports maintained by the Pennsylvania Department of Environmental Protection ("DEP").

Hydraulic fracturing is absolutely necessary for natural gas production from shale formations. David E. Pierce, *Developing a Common Law of Hydraulic Fracturing*, 72 U. PITT. L. REV. 685, 685 (2011). Shale

[3] *Amici* sometimes use "lessor" to refer to landowners or oil/gas owners who have executed oil and gas leases or acquired royalty interests in exchange for royalty opportunities if and when production occurs. "Lessor" and "royalty owner" may be used interchangeably in this brief but they mean the same thing. *Amici* also sometimes use "lessee" to refer to production companies who have obtained a lease from a lessor. "Lessee" and "production company" may be used interchangeably in this brief but they mean the same thing. General terms such as "landowner," "property owner," "owner," "neighbor," or "company" used throughout this brief have their general meaning.

lacks the permeability and porosity necessary for natural gas to flow through the formation to the same degree as conventional reservoirs. Without hydraulic fracturing, there would be no economically viable production from shale formations such as the Marcellus and Utica, the development of which has contributed to energy independence and economic growth in Pennsylvania and the nation since 2005.

Similarly, hydraulic fracturing has created opportunities for lessors to lease their oil and gas rights and receive royalty income from natural gas production targeting deeper shale formations underlying their properties. Without hydraulic fracturing, those properties would remain unleased and undeveloped.

The MSC, PIOGA, and the Royalty Owners have a direct interest in this case. A two-judge panel of the Superior Court abrogated the "rule of capture" when hydraulic fracturing is involved in natural gas development. The rule of capture is a property right that immunizes lessors and their lessees from lawsuits brought by adjacent unleased landowners who seek to recover money damages for the amount of oil and gas allegedly drained from their property. The Superior Court held that

the possibility of fractures or fluids crossing subsurface boundaries thousands of feet below the surface eliminates the century-old immunity.

The Court should reverse. The rule of capture is the bedrock property right governing oil and gas development on which landowners and production companies have relied for more than a century. By the time this Court first announced the rule in the late 1800s, the oil and gas industry for decades already had been using any number of methods to fracture reservoir rocks and increase the flow of oil and gas – such as weights, drill bits, pumps, explosives, or fluids – all of which increase the risk of fractures extending across subsurface boundaries but none of which prevented the Court from adopting the rule or caused the Court to depart from the rule. The same should be true with hydraulic fracturing.

The Court should not depart from the rule simply because production companies use hydraulic fracturing to increase oil and gas production. The Superior Court's contrary decision represents a drastic change in established precedent, contradicts longstanding public policy that encourages natural gas development for the benefit of all citizens of the Commonwealth, and threatens to wreak havoc on an industry that supports jobs and drives the economy.

All landowners have the same rights as their neighbors who have elected to lease their oil or natural gas rights. Adjacent landowners may elect to do nothing with their property. If they wish to realize value for the underlying natural gas or prevent what they perceive to be drainage from their property, they may pursue oil and gas leases with a production company in exchange for payments and the opportunity for royalties if production occurs. But they should not be encouraged to file lawsuits for speculative drainage damages that inevitably will discourage others from exercising their property rights.

If the Court does not reinstate the rule of capture, there will be negative consequences that extend beyond the interests of the parties to the case. The decision to abrogate the rule and remove an immunity from a trespass lawsuit greatly discourages continued economic growth and prosperity throughout the Commonwealth and impairs other landowners' long-recognized right to develop their natural resources. If left to stand, the decision will affect hundreds of thousands of family-sustaining jobs in the state, reduce local and state revenues, and threaten the income of tens of thousands of Pennsylvania's royalty owners.

In the end, there is no legal or factual basis to depart from the rule of capture. Given the impact of natural gas development on the economy of Pennsylvania, any departure from the rule that inevitably and negatively affects the royalty owner community, their lessees, the public, and the economies of local and state governments should be decided by the General Assembly, not dictated by individual tort plaintiffs.

III. BACKGROUND

The Court may benefit from a summary of the lessor-lessee relationship pursuant to an oil and gas lease and the process by which lessees produce natural gas from their leased properties.

A. The lessor-lessee relationship.

Landowners generally realize value for the oil and gas resources underlying their property by entering into a lease with a production company. The lease is a contract that conveys property rights and establishes the rights and obligations of the parties. Gary B. Conine, *Speculation, Prudent Operation, and the Economics of Oil and Gas*, 33 WASHBURN L.J. 670, 679 (1994). In turn, MSC and PIOGA members acquire rights to explore for, develop, and produce natural through oil and gas leases with Pennsylvania landowners.

Under the terms of a standard lease, the granting clause conveys to the production company the lessor's oil and gas interests underlying the property as a fee simple determinable interest along with exclusive exploration and production rights. *Blakely v. Marshall*, 34 A. 564, 565 (Pa. 1896); *Penn-Ohio Gas Co. v. Franks's Heirs*, 185 A. 280, 281-82 (Pa. 1936). In exchange, the lessor receives an up-front payment and the opportunity for royalties if and when production occurs.

The lease sets forth (a) a primary, fixed term of years during which lessees (if they so elect) can engage in activities or operations to secure production and (b) a secondary term that lasts as long as production continues. *Balfour v. Russell*, 31 A. 570 (Pa. 1895). If lessees engage in production operations, they incur 100% of the production costs. Lessors do not share in those costs. Some of those activities include:

- building a well-pad site and access road(s) to access underlying natural gas;
- hiring the drilling company and its crew to secure the rig and drill the wellbore (which, on average, requires the expensive endeavor of drilling many thousands of feet down into the ground just to reach the shale);
- procuring all the steel casing and other materials needed to construct the well;
- hiring transportation trucks and crews to deliver all the materials to the well pad site;

- procuring and transporting water for hydraulic fracturing activities;
- installing wellhead and related facilities once the well is completed; and
- building pipelines to transport the gas from the wellsite.

The leasing, well-planning, and well-execution process can take years.

In many leases, lessors agree to have their lands "pooled" (*i.e.*, combined) with other leased properties to form a larger drilling unit to support these production activities. *Snyder Bros., Inc. v. Yohe*, 676 A.2d 1226, 1228 (Pa. Super. 1996); *Fox v. Wainoco Oil & Gas Co.*, 64 Pa. D. & C.3d 439 (Crawford County C.P. 1986). Once combined, any activity on the unit is treated as though it took place on all of the properties in the unit. *Roe v. Chief Exploration & Development, LLC*, No. 11-00816, 2013 WL 4083326 (M.D. Pa. Aug. 13, 2013). In turn, the pooling clause creates an opportunity for lessors who own smaller tracts – whose properties cannot support drilling activities on their own – to be combined with others and share royalties on production.

Consistent with environmental standards and conservation principles, *see* 58 Pa.C.S. §§ 3201 *et seq*. and 58 P.S. §§ 401 *et seq*., production companies routinely exercise the pooling authority and create drilling units to maximize recovery efforts in a given area, utilizing fewer

wells on the surface and multiple lateral wellbores in the subsurface rather than drilling one vertical well per tract. For example, if a unit contains 100 tracts, lessees can develop the entire unit with a few horizontal wells rather than by drilling 100 vertical wells. In turn, all the lessors in the unit share proportionately in royalties even if their lessee never drills a well on or under their property.

B. Natural gas production.

Although production companies have known for many decades that formations like the Marcellus and Utica contain vast natural gas reserves, *see* ROBERT G. PIOTROWSKI & JOHN A. HARPER, BLACK SHALE AND SANDSTONE FACIES OF THE DEVONIAN "CATSKILL" CLASTIC WEDGE IN THE SUBSURFACE OF WESTERN PENNSYLVANIA 6–8 (1979), the costs of drilling many vertical wells deep enough to produce from the formation outweighed the return on investment. By combining the techniques of horizontal drilling and hydraulic fracturing, production companies can access more of the shale with the lateral portion of the wellbore and produce more gas more efficiently and economically. John A. Harper, *The Marcellus Shale—An Old "New" Gas Reservoir in Pennsylvania*, 38 PA. GEOLOGY 2, 2 (2008).

MSC and PIOGA member companies in Pennsylvania began engaging in horizontal drilling and hydraulic fracturing in earnest roughly 15 years ago. Since that time, production companies have spent billions of dollars acquiring leases, equipment, crews, and materials to develop wells and produce gas from the Marcellus and Utica shales.

To access the natural gas in shale, production companies first drill a vertical wellbore several thousand feet below the surface until they reach an area at or above the target shale formation. At that point, they turn the drill gradually to bore through the shale formation horizontally for many more thousands of feet. After installing steel and cement in the wellbore at various stages of the drilling process pursuant to state regulations, production companies perforate the wellbore to expose the shale and inject a mixture largely consisting of water and some sand into the wellbore under high pressure to fracture the shale formation and prop open the cracks to allow the gas to make its way into the wellbore. Bruce M. Kramer, *Pooling for Horizontal Wells: Can They Teach an Old Dog New Tricks?*, 55 ROCKY MTN. MIN. L. INST. § 8.01, at 8-3 (2009) (summarizing the process).

Given the substantial capital investment and geological considerations, MSC and PIOGA member companies plan their activities carefully. The Marcellus shale in Pennsylvania contains different concentrations of natural gas in different parts of the formation, and the thickness of the shale varies throughout the state. Harper, *supra*, 8-12. There are naturally-occurring fractures in the Marcellus caused by tectonic activities that created the Appalachian Mountains millions of years ago. *Id.* at 9.

MSC and PIOGA member companies have learned through trial and error that there are limited areas in Pennsylvania where Marcellus wells can be drilled economically. That is, no two wells are exactly alike. The variation in natural fractures and geology of the Marcellus shale make it impossible to predict the exact gas volumes a well will produce.[4]

In addition, the naturally-occurring fractures and other geological features in the shales run for miles, occur at macro and micro scales that cannot be detected, and transcend property boundaries and county lines.

[4] The variation in gas volumes produced from Marcellus wells is reflected in well production reports submitted by production companies to DEP. *See* PADEP, OIL AND GAS REPORTS, *available here and also available at* http://www.depreportingservices.state.pa.us/ReportServer/Pages/ReportViewer.aspx?%2fOil_Gas%2fOil_Gas_Well_Production (last visited Jan. 30, 2019).

Id. at 9-10. That means the subsurface geology does not fit neatly into property boundary lines. Without being able to pool dozens or more of leased properties together to support long-enough horizontal wellbores to produce significant gas volumes from wells, the substantial drilling costs incurred by MSC and PIOGA member companies cannot be justified.

Just as lessors have every right to use and enjoy the entire extent of their property, *Hague v. Wheeler*, 27 A. 714, 719 (Pa. 1893), so do their lessees under an oil and gas lease. It would be imprudent and wasteful from an economic and environmental standpoint to locate wells in a way that minimizes opportunities to recover natural resources from the leased property or unit. Consequently, production companies locate and drill wells (including the vertical and horizontal portion of the wellbore) within the lease or unit boundaries in ways that maximize production efforts and, in turn, maximize royalty opportunities for their lessors.

C. The Superior Court's decision.

The Superior Court in this case abrogated the rule of capture when hydraulic fracturing is involved based solely on the mere possibility that fractures thousands of feet below the surface of the earth *might* cross subsurface boundaries and *might* result in some drainage from an

adjacent, unleased property. The Superior Court held that this activity – undertaken within the boundaries of the leased premises – creates an actionable trespass such that unleased landowners may pursue damages for drainage rather than exercising their rights such as pursuing a lease authorizing the same activity on their property. *See* Slip Op. at 20-23.

IV. ARGUMENT

The MSC, PIOGA, and the Royalty Owners write to urge the Court to avoid the considerable chaos and uncertainty engendered by abrogating the rule of capture. If the Superior Court's decision stands, it will have a chilling effect on future operations in this Commonwealth. Consequently, the decision may cause production companies to divert capital investments in Pennsylvania to other states and, in turn, impair the ability of Pennsylvania landowners to develop their natural resources and receive royalty income through leases.

A. The rule of capture is a bedrock tenet of property law in the Commonwealth that promotes the development of natural resources.

The rule of capture provides that if a lessee drills a well within the boundaries of the leased premises, the lessee is not liable to an adjacent landowner for the value of alleged drainage from a common source of

supply underlying both properties. *Westmoreland & Cambria Natural Gas Co. v. De Witt*, 130 Pa. 235 (1889) ("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."); *Jones v. Forest Oil Co.*, 194 Pa. 379 (1900); *Barnard v. Monongahela Natural Gas Co.*, 65 A. 801 (Pa. 1907).

The rule allows lessees to plan their operations, determine the surface location of wells, and drill horizontal portions of the wellbore within the confines of leased properties without fear of liability to adjacent unleased landowners if production operations happen to drain a common source of supply underlying the properties. As long as the wellbore and productive length of the lateral respect the boundary line, whatever happens in the subsurface during stimulation activities of any kind is irrelevant. The lessee is immune from suit.

The rationale for the rule is straightforward. If a production company drills a well within the boundaries of the leased premises and then engages in stimulation activities of whatever kind that originate within those boundaries, the rule of capture precludes liability for drainage even if fractures or fluids happen to extend into the neighbor's

subsurface. *See, e.g.*, *Jones, supra*. The rule applies if fractures or fluids never extend into the neighbor's subsurface yet some drainage occurs.

In this way, the rule of capture is a rule that promotes clarity. It creates a bright-line rule for courts to apply to preclude otherwise endless disputes over drainage claims that courts are ill-equipped to resolve. *See, e.g.*, *Coastal Oil & Gas Corp. v. Garza Energy Trust*, 268 S.W.3d 1 (Tex. 2008) ("[D]etermining the value of oil and gas drained by hydraulic fracturing is the kind of issue the litigation process is least equipped to handle. One difficulty is that the material facts are hidden below miles of rock, making it difficult to ascertain what might have happened. Such difficulty in proof is one of the justifications for the rule of capture.").

In turn, the rule encourages diligence in developing natural resources by protecting lessees from lawsuits initiated by neighboring landowners who have equal rights to engage in the same activity on their own property through a lease to protect their interests even if they elect not to do so. *Barnard*, *supra*.

The courts in this Commonwealth have never changed the rule since its inception. When this Court first articulated the rule of capture in the late 1800s, the industry had already developed and used

techniques to increase the permeability of oil and gas reservoirs by "artificial" means: "Modern hydraulic 'fracking' can trace its roots to April 1865, when Civil War Union veteran Lt. Col. Edward A. L. Roberts received the first of his many patents for an 'exploding torpedo.'" *See Shooters: A "Fracking" History*, American Oil and Gas Historical Society, *available here and at* https://aoghs.org/technology/hydraulic-fracturing (last visited Jan. 30, 2019); *see also Kepple v. Pennsylvania Torpedo Co.*, 7 Pa. Super. 620, 621 (1898) (describing the torpedo-fracture process).

Since its inception, the case law in Pennsylvania has authorized activities that *increase* the risk of a possible subsurface trespass during well-stimulation activities by acknowledging the right to place wells as near as possible to the boundary of a neighboring tract without fear of liability for drainage, *see Barnard*, *supra*, and endorsing the right to use any and all available methods to increase production near boundary lines, even if it means depleting the resources underlying the neighbor's property faster. *See Jones, supra* (advent of gas pump equipment to increase oil production did not justify departure from the rule).

The rule did not change with the advent of hydraulic fracturing techniques more than 70 years ago. The industry developed the more

modernized form of hydraulic fracturing in the late 1940s. *U.S. Steel Corporation v. Hoge*, 468 A.2d 1380 (Pa. 1983) (Flaherty, J. dissenting); 58 P.S. § 34 (enacted in 1979 and acknowledging "hydraulic fracturing" as a well-stimulation activity); 58 P.S. § 402(12)(i)(B) (excluding hydraulic fracturing from the definition of "waste"). Because well-stimulation techniques have prevailed in the Commonwealth for more than a century and pre-date the establishment of the rule of capture, nothing has changed, including the advent of hydraulic fracturing in the interim, that would call for the creation of a new or different law than the longstanding rules on which lessors and their lessees have relied.

The history is significant. A possible risk of a subsurface trespass by propagation of fractures or fluids has existed since the mid-1800s when well operators first used "artificial" methods of increasing permeability in reservoir rocks. That risk did not prevent this Court from adopting the rule of capture then, and courts have never departed from the rule of capture since it was established as Pennsylvania law more than a century ago despite decades of technological advances (including hydraulic fracturing) in natural gas development.

Given this background, the courts have at least implicitly acknowledged that any incidental subsurface trespass by a fracture that propagates during the production process or by fluids traversing subsurface boundaries is a technical foul for which there should be no right to recovery. This type of immunity is not a new concept.

This immunity is consistent with the Court's longstanding precedent that there are some alleged injuries for which the law does not afford a remedy. *Collins v. Chartiers Val. Gas Co.*, 18 A. 1012, 1013 (Pa. 1890) ("Every man has the right to the natural use and enjoyment of his own property; and if, while lawfully in such use and enjoyment, without negligence or malice on his part, an unavoidable loss occurs to his neighbor, it is *damnum absque injuria*[.]").

This rule is particularly applicable to fracture-stimulation activities that take place thousands of feet beneath the surface of the Earth. *See, e.g.*, *Garza*, 268 S.W.3d at 34 (Willett, J., concurring) ("Creating a fracture is itself a geological and engineering marvel; controlling its length and direction (in three dimensions) is simply beyond present capabilities.").

The settled framework above has set the expectation of lessors, lessees, and neighboring property owners for more than a century. Although it may be imperfect, the rule of capture creates certainty:

- Lessees know where oil and natural gas activities can take place on and under the leased property without fear of liability for possible drainage of a common source of natural gas supply;
- Lessees know how to avoid a trespass claim by locating the part of the wellbore planned for production within the boundary lines of property leased for oil and gas development;
- Lessees may use any and all available techniques to maximize efficiencies and ultimately maximize recovery of valuable natural resources;
- The rule encourages development of a private resource that is vital to individual wealth of landowners and the economies of local and state governments;
- The rule eliminates the risk of a lawsuit even if some part of fractures, sands, or fluids crosses a subsurface boundary and/or some drainage occurs; and
- The rule maintains the full and equal opportunity of neighboring landowners or their lessees to engage in the very same activity to realize value of the underlying natural resources.

Accordingly, the rule of capture encourages the orderly development of oil and natural gas resources throughout the Commonwealth and preserves the property rights of all stakeholders.

B. The Superior Court abrogated the rule as applied to hydraulic fracturing in favor of a new theory of tort liability that this Court should not adopt.

The Superior Court's decision departed from the settled framework outlined above and concluded that the rule of capture should no longer preclude an action claiming damages from drainage when hydraulic fracturing is involved because of the risk that subsurface cracks or fluids may extend through rock, thousands of feet below the surface, and cross subsurface boundaries into unleased properties. Slip Op. at 20-23. This Court should reverse and reinstate the rule.

1. Lessors and lessees have long relied on the rule of capture.

As this Court has held, courts are loath to alter longstanding property rules that have shaped how parties have conducted their affairs for many years. *See Butler v. Charles Powers Estate*, 65 A.3d 885 (Pa. 2013) ("[N]either the Superior Court nor Appellees have provided any justification for overruling or limiting the *Dunham* Rule and its longstanding progeny that have formed the bedrock for innumerable private, real property transactions for nearly two centuries."); *Smith v. Glen Alden Coal Co.*, 32 A.2d 227 (Pa. 1943) ("A rule of property long

acquiesced in should not be overthrown except for compelling reasons of public policy or the imperative demands of justice.").

Here, the Superior Court's departure from the longstanding rule of capture lacks a compelling justification. The court suggested that the rule of capture should not apply because hydraulic fracturing is involved in natural gas development targeting shale formations. However, the court overlooked precedent demonstrating a reluctance to change settled rules of law, even when production companies target new strata, use longstanding techniques in different ways to target different strata, or use enhanced technologies to produce gas. To illustrate:

- When litigants asked that a different rule regarding the reasonable use of surface estates (itself more than 100 years old) should apply when owners of oil and gas pursue shale-gas development underlying public lands, this Court declined. *Belden & Blake v. DCNR*, 969 A.2d 528 (Pa. 2009).

- When litigants asked that the "*Dunham* Rule" (also more than 100 years old) be changed because shale gas is somehow "different" than gas from more conventional reservoirs or requires hydraulic fracturing for production, this Court declined. *Butler*, *supra*.

- When litigants asked the Superior Court to hold that a large freshwater impoundment on leased property used in connection with hydraulic fracturing exceeded surface rights and constituted a trespass, based on the theory that the lease did not contemplate hydraulic fracturing, the court declined. *Humberston v. Chevron U.S.A. Inc.*, 75 A.3d 504 (Pa. Super. 2013).

Therefore, the rule of capture should not be different merely because hydraulic fracturing or any other type of well stimulation is involved. The rule should apply to all methods of hydrocarbon capture.

2. The interests of unleased landowners must yield to the interests of adjacent lessors and lessees exercising their property rights.

The Superior Court's decision invites a relatively small group of landowners in Pennsylvania to potentially prevent natural gas development on many neighboring properties and deny many others the benefit of enjoying the right to develop their oil and gas. The public policy running through this Court's precedent compels a different conclusion.

For example, the courts have long held that oil and gas owners and their lessees have implicit rights by law to use the overlying surface estate as reasonably necessary without fear of liability to the surface owner for incidental surface disturbances. *Chartiers Block Coal Co. v. Mellon*, 25 A. 597, 598 (Pa. 1893). In those situations, the law requires that the individual surface owners' interests must yield to the owner/lessee of the oil and gas to foster orderly natural gas development.

Similarly, co-tenants have co-equal rights to develop their oil and gas estates without the consent, and even over the objection of, other co-

tenants. *McIntosh v. Ropp*, 82 A. 949, 955 (Pa. 1912). In that situation, the law provides that the individual interests of some co-tenants should not preclude other co-tenants from realizing the value of the underlying oil and gas estate.

These cases stand for the proposition that a few third parties cannot dictate whether or not development of natural resources may take place. This is so even where the development activities happen to impact the property interests of those third parties. As in these cases, the third-party surface owners maintain an interest in the surface estate and the co-tenants maintain an interest in the oil and gas estate, yet their interests yielded to the interests of others pursuing their right to extract natural gas from the property.

That concept should apply here. Unleased landowners have no rights or interests in oil and gas activities taking place on neighboring properties and stand in an even less tenable legal position than the complaining third parties in the examples above. Yet the Superior Court's decision invites unleased neighbors to sue for the value of alleged drainage from neighboring operations taking place wholly within the leased premises or unit based *on a mere allegation* that those activities

could be too close to the adjacent boundary line and fractures/fluids might cross subsurface boundary lines thousands of feet below the surface of the earth. This result is inconsistent with this Court's precedent.

3. The rule of capture creates an immunity for drainage, not a license to steal.

The Superior Court abrogated the rule of capture based on a rationale expressed by one federal judge in West Virginia who decided (in a now vacated opinion) that the rule of capture should not preclude a trespass-by-fracture cause of action because the rule somehow encourages "stealing" natural resources from beneath the property of an adjacent landowner. *See* Slip Op. at 20-23. That premise is flawed.

The rule of capture is a property right held by all landowners and their lessees that removes liability for engaging in activities that happen to deplete natural resources underlying multiple adjacent properties. If unleased landowners choose not to pursue natural gas development, that is their right. But they cannot sit on their rights and thereafter seek compensation through a lawsuit when oil and gas activities on adjacent properties might result in some drainage of natural gas that underlies adjoining tracts.

4. An unleased landowner always has the option to seek compensation through a lease, rather than through a tort lawsuit.

The Superior Court stated that the rule of capture should no longer protect lessees engaged in hydraulic fracturing operations on the leased premises because unleased landowners cannot afford to drill offset wells. *See* Slip Op. at 20-23. Again, the premise is flawed.

If unleased landowners wish to seek compensation for oil and gas underlying their property, they can do so by entering into a lease as opposed to filing a lawsuit. Landowners do not have to contribute financially to drilling offset wells if they execute leases with production companies. It is incorrect to suggest that the longstanding self-help remedy for adjacent landowners is unavailable to them merely on the theory that developing wells is an expensive proposition; landowners never have to contribute one cent to the upstream costs of production when they lease to production companies.

The Superior Court's decision encourages lengthy and disruptive lawsuits that ultimately may yield no net benefit to unleased landowners. As a policy matter, this Court should not authorize a compensation scheme whereby lawsuits are used as substitutes for contracts.

5. The General Assembly, not tort plaintiffs, should dictate any departure from the rule of capture.

If the Court believes there exists some justification to depart from the rule of capture, the Court should defer to the General Assembly. In many states, including in Pennsylvania for certain production activities targeting formations deeper than the Marcellus, *see* 58 P.S. §§ 401-419, the state legislatures, not the courts, have modified the rule of capture by enacting conservation laws based on their police powers. *Hunter Co. v. McHugh*, 320 U.S. 222, 227 (1943); Owen L. Anderson, *Foreword: The Evolution of Oil & Gas Conservation Law and the Rise of Unconventional Hydrocarbon Production*, 68 ARK. L. REV. 231, 242 (2015).

Conservation laws modify the common-law rule of capture in a way that still promotes maximum production efforts, as the rule of capture promotes, while (a) regulating (for example) the size of units, the number of wells in units, and the rates of production based on the technical aspects of natural gas development; and (b) preventing "holdout" landowners from impeding development efforts by integrating their interests and allocating production among all stakeholders in a unit accordingly. Anderson, *supra*, at 242. By enacting conservation laws, states have avoided the considerable chaos and uncertainty engendered

by abrogating the rule of capture in its entirety with no statutory framework in place.

Given the great importance of natural gas development to the economy of Pennsylvania and the technical nature of regulating natural gas production efforts, any decision to depart from the rule of capture that affects the royalty owner community, their lessees, the public, and the economies of local and state governments should be driven by the legislative process, not the whims of a tort plaintiff.

C. The Superior Court's decision to abrogate the rule of capture will disrupt the natural gas industry to the detriment of royalty owners, their lessees, and the Commonwealth's citizens.

Having determined that the rule of capture has long promoted the development of oil and natural gas resources in the Commonwealth, the question becomes how the Superior Court's decision to abrogate the rule directly affects the interests of MSC, PIOGA, their members, and the Royalty Owners. The consequences are real and significant.

1. The Superior Court's decision will create uncertainty and inefficiency in the natural gas industry in the Commonwealth.

The member companies of the MSC and PIOGA have long relied on the rule of capture to conduct their affairs. Member companies have

invested billions of dollars acquiring oil and gas leases for the right to drill and fracture wells to the fullest extent within the boundaries of the leased premises and produce natural gas without fear of liability for alleged drainage damages from unleased neighbors. They have invested additional billions of dollars in drilling and hydraulically fracturing wells to produce natural gas for the benefit of the industry, their royalty owners, and the public. They have made (and continue to make) these investments based on an understanding of extant and settled Pennsylvania law, including the rule of capture.

The Superior Court's decision threatens those investments and the future stability of natural gas production in the Commonwealth. This is not hyperbole. The member companies of the MSC and PIOGA have real and identifiable concerns that the industry will no longer function if the Court does not reverse the Superior Court's decision.

By abrogating the rule of capture, the Superior Court's decision potentially calls into question tens of thousands of wells throughout the Commonwealth, targeting both conventional and unconventional formations, merely because the advent of horizontal drilling combined with hydraulic fracturing has enhanced and increased natural gas

production. Without the immunity afforded by the rule of capture, lessees may face lawsuits based on a mere allegation of drainage whether or not any drainage ever occurred or will ever occur. The threat of a lawsuit may compel lessees to curtail or even cease current drilling plans or operations or shut in producing wells.

The Superior Court's decision engenders concerns for future operations. Production companies cannot economically produce natural gas from shale formations in Pennsylvania without fracture-stimulation. The Superior Court's decision discourages the use of hydraulic fracturing by encouraging unleased landowners to sue for damages every time the activity takes place near their property (whether adjacent or not). If a lessee faces a trespass lawsuit each time it fracs a well, the industry cannot function.

There are no meaningful operational alternatives to fully mitigate the risk of lawsuits created by the Superior Court's decision. Before the Superior Court's decision, for example, production companies would be free to locate a well pad within the boundaries of a drilling unit and plan to drill multiple horizontal wells at sufficient lengths from one surface

location in a way that efficiently and economically produced gas underlying all the leased properties within the unit.

If there is an unleased tract anywhere in or within the vicinity of a unit boundary, no matter the size, lessees may need to locate wells and laterals in less than optimal locations on the leased premises or unit and may leave large swaths of natural gas in a given area leased but largely undeveloped. Alternatively, production companies may need to reduce or enlarge the size of their laterals or units in an attempt to account for every unleased landowner's possible trespass claim (which, in turn, shifts a royalty owner's share of production to unleased landowners to whom lessees owe no duty).

Without the certainty afforded by the rule of capture, a production company may be left with the Hobson's choice of either limiting the number of wells or laterals within a unit (forgoing maximum recovery opportunities), drilling many more vertical wells or more horizontal wells with shorter laterals (forgoing the environmental and economic benefits of fewer but longer horizontal wells), or abandoning hydraulic fracturing altogether (forgoing essentially all shale development and the economic

benefits flowing from it). None of these are viable options or desirable results.

Production companies faced with any of the "alternatives" above in order to avoid a costly trespass-by-frac claim may lose the efficiencies gained by a typical unit operation with laterals of sufficient length to justify the capital investment such that no production company would pursue them. Production companies may be compelled to shift resources to other states where there is no risk of trespass-by-frac claims. In short, production companies may be unable to drill wells in Pennsylvania, stranding billions of cubic feet of natural gas, costing the Commonwealth's economy billions in GDP and revenue, and costing the lessor community in Pennsylvania hundreds of millions in royalties.

2. The Superior Court's decision takes royalty income away from lessors.

The negative effects of the Superior Court's decision flow directly to lessors/royalty owners. Royalty-owner members of PIOGA and the Royalty Owners joining this brief include lessors who conveyed their oil and gas rights or acquired royalty interests in exchange for royalty opportunities upon production. Individual royalty owners often rely on royalties as income to invest in their businesses, farms, or properties;

send their children to college; pay bills; save for retirement; leave behind income for their heirs; buy food; or otherwise fully realize the economic benefits of the natural resources underlying their property.

Royalty income is directly tied to production. If production companies are constrained to drill fewer wells or curtail production to avoid a trespass-by-frac claim, royalties will go down. For example:

- If the risk of a trespass-by-frac claim is too great and production companies forgo production efforts, their lessors receive nothing.
- If production companies curtail production, their lessors lose royalties.
- If production companies drill fewer wells, their lessors lose royalties.
- If production companies are forced to drill a commensurate number of vertical wells within a unit to somehow recreate the production levels achieved by horizontal wells, more (or all) of their lessors' tracts may be burdened by additional surface activities and additional environmental impact.
- If production companies enlarge a unit to account for an unleased landowner's share of production as a precautionary measure, the lessors' proportionate share in the unit decreases, as does their royalty income.
- If production companies decrease a unit, many lessors will be left out and receive nothing.

In the end, the effect of the Superior Court's decision is problematic for all royalty owners throughout Pennsylvania. If lessees face tort

liability when engaging in hydraulic fracturing, they will likely drill and fracture fewer wells, and lessors throughout the Commonwealth who exercised their right to lease their oil and gas interests will lose hundreds of millions of dollars in royalty income.

3. The Superior Court's decision threatens an industry that generates jobs, individual wealth, and revenues for local and state governments.

The natural gas industry is critical to the continued economic prosperity and energy independence of the Commonwealth and the nation. The natural gas industry in Pennsylvania alone supports 178,000 direct, indirect, and induced jobs and has contributed $24.5 billion to the state's economy alongside a revenue stream for state and local government nearing $1.5 billion since 2011 and more than 600 grants that fund critical community projects in all 67 counties throughout the Commonwealth.[5]

The Superior Court's decision places these benefits at risk with the threat of a new form of tort liability. Trespass-by-frac lawsuits will create significant, costly, and time-consuming litigation, which will burden the

[5] AMERICAN PETROLEUM INSTITUTE, BENEFITS AND OPPORTUNITIES OF NATURAL GAS USE, TRANSPORTATION & PRODUCTION (June 2017), *available here and at* https://www.api.org/~/media/Files/Policy/Natural-Gas-Solutions/API-Natural-Gas-Industry-Impact-Report.pdf (last visited Jan. 30, 2019).

courts and could cripple the industry. The considerable chaos engendered by the threat of new tort liability for a longstanding and proven method of natural gas production would negatively impair natural gas development and could result in an industry shut down. Lost will be the jobs, stimulated economy, income for royalty owners, and impact fees for local and state governments.

The effect of the Superior Court's decision on the economy is troubling and counsels in favor of restoring the rule of capture in order to maintain legal certainty and foster the continued growth of the natural gas industry and the economy in Pennsylvania.

V. CONCLUSION

WHEREFORE, the Court should reverse the Superior Court's opinion and order.

January 30, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

/s George A. Bibikos
George A. Bibikos

WORD-COUNT CERTIFICATION

In accordance with Pa.R.A.P. 531(b)(3), I certify that the attached contains 6,967 words, excluding the portions identified in the rules that do not count towards the word limitation, as calculated by the word-count feature of Microsoft Word.

/s George A. Bibikos
George A. Bibikos

CERTIFICATE OF SERVICE

I hereby certify that on January 30, 2019, I caused a copy of the foregoing to be served on the parties in the manner specified, which service satisfies the requirements of Pa.R.A.P. 121:

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