SUPREME COURT OF PENNSYLVANIA

No. 63 MAP 2018

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

Appellees,

vs.

SOUTHWESTERN ENERGY PRODUCTION COMPANY,

Appellant.

REPLY BRIEF

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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REPLY BRIEF

The Briggses and their *amici* colorfully invoke the rhetoric of property rights to argue that hydraulic fracturing should be removed from the rule of capture, but they fail to meaningfully address:

> ***Longstanding precedent*** that sanctions, under the rule of capture, the production of oil and gas using methods similar to hydraulic fracturing, including explosives and vacuum pumps;
>
> ***Practical realities*** that distinguish hydraulic fracturing from slant drilling and that limit a surface owner's interest in the oil and gas underneath her property; and
>
> ***Policy concerns*** that would be impacted by removing hydraulic fracturing from the rule of capture, including negative effects on the Commonwealth's economy and an unwarranted adjustment of settled property interests.

By turning a blind eye to precedent, practical realities, and policy, the Briggses and their *amici* advance flawed arguments that contradict how courts for over a century have defined and applied property rights deep below the earth's surface.

1. This case is controlled by longstanding precedent.

Contrary to what the Briggses and their *amici* state, this case involves a straightforward application of the rule of capture, not a broadening of it.

A. Capture occurs when oil and gas enter the wellbore.

The rule of capture is simple: The person who "captures" oil or gas owns it, regardless of its origin. Since the 1800s, Pennsylvania courts have held that "capture" occurs at the location where oil and gas come within a person's control. *See Jones v. Forest Oil Co.*, 44 A. 1074 (Pa. 1900); *Westmoreland & Cambria Natural Gas Co. v. DeWitt*, 18 A. 724 (Pa. 1889). This control is exerted when oil and gas are within the operator's wellbore, because the wellbore brings the oil and gas up to the surface and into the operator's possession. (Brief of *Amicus Curiae* Professor Terry Engelder at 20) ("[T]he flow of gas to a well always involves the rule of capture, regardless of whether or not crossing a property boundary is involved in the flow of gas to the wellhead."); (Brief of *Amicus Curiae* Thomas D. Gillespie, P.G. at 10-12) (describing the process of oil and gas production); (Brief of *Amici Curiae* Marcellus Shale Coalition *et al.* at 11) (same).

Prior to their movement into the wellbore, oil and gas are not ascending to the surface and they are not within the operator's—or the neighbor's—control. Correspondingly, production activities that merely facilitate movement of oil and gas into the wellbore are not "capture" as defined by precedent. *See Jones*, 44 A. at 1075-76; *Westmoreland & Cambria Natural Gas Co.*, 18 A. at 725.

The Briggses fail to acknowledge or distinguish this precedent. They claim only that SWN's production activities facilitated the flow of oil and gas to SWN's wellbore, but they do not claim that SWN "captured" gas on their property under the established definition of "capture." (R. 113a, R. 127a, R. 270a, R. 273a, R. 275a ("Admitted that SWN has not drilled any gas wells on the Subject Property, meaning any boreholes drilled."), R. 277a, R. 283a, 291a, 315a ("I do believe that [SWN's] well bore is close enough to my property to be extracting gas out from under my property.")).

B. <u>The rule of capture has always applied to enhanced recovery methods</u>.

The Briggses and their *amici* also ignore that the rule of capture has always applied to methods of production that enhance the well's flow, including methods that impact

neighboring property. For example, this Court held in *Jones v. Forest Oil Co.* that using vacuum pumps on one's own land to draw oil and gas into a well creates no liability to a neighboring landowner from whose property oil and gas may have flowed, despite its obvious physical and mechanical effect beneath the neighboring property. 44 A. at 1074 (describing the pumps as being "used by oil operators for the purpose of withdrawing gas from the wells by suction, thereby increasing the well's production of oil").

Fracturing rock with explosives—which is almost identical to the situation here—was also a common method of producing oil and gas at the time this Court first articulated the rule of capture. (SWN's Opening Brief at 23-25). In discussing the use of explosives to enhance production, neither this Court nor any other court in the Commonwealth or elsewhere ever qualified an operator's right to the oil or gas captured on its property based on whether the operator fractured rock underneath neighboring land.

To the contrary, in a companion case to *People's Gas Co. v. Tyner*, 31 N.E. 59 (Ind. 1892) (cited in SWN's Opening Brief at 24-25), the Indiana Supreme Court acknowledged that the

creation of fissures that extend into neighboring property to facilitate drainage is protected by the rule of capture. *Tyner v. People's Gas Co.*, 31 N.E. 61 (Ind. 1892). There, an operator used nitroglycerin to "shoot" its well, and an adjacent landowner asserted that the act of "shooting" the well "opened the crevices and fissures" in the surrounding rock "for a distance of 200 feet in all directions from [the operator's] well, and thereby caused a large quantity of [the plaintiff's] gas to escape from said rock and flow into said well continuously." *Id.* at 61-62. Significantly, the plaintiff's property line was alleged to be located only 43 feet from the well, meaning that the 200-foot fissures would have extended into the property line. *Id.* at 61. The court affirmed the sustaining of the operator's demurrer to the plaintiff's claim, concluding that because the operator "had the right to explode nitroglycerin in [its] well **for the purpose of increasing the flow of gas**," no liability could attach. *Id.* at 62 (emphasis added).

Just as the explosion of nitroglycerin creates "crevices and fissures" to "increase[e] the flow of gas" from surrounding rock, *id.*, hydraulic fracturing creates fractures and employs the use of fluids and proppants to facilitate and increase the flow of

gas into the operator's wellhead. (Brief of *Amicus Curiae* Thomas D. Gillespie, P.G. at 11-12, 19-21) (noting that the gas produced by hydraulic fracturing "derives from unfractured zones horizontally adjacent to, and outside of, the fracture envelope"); (Brief of *Amicus Curiae* Professor Terry Engelder at 18) (noting that "gas shales like the Marcellus contain a network of cracks and fractures" that are present naturally, and that this network "gives a gas shale a natural permeability that hydraulic fracturing seeks to tap into"); (Brief of *Amici Curiae* Marcellus Shale Coalition *et al.* at 12-13) (same).

Both well shooting and hydraulic fracturing have the unpredictable potential to propel substances from the operator's land underneath the neighbor's land—in one case exploded rock and surrounding water, in the other frac fluids and proppants. Thus, the subsurface effects of 21st century hydraulic fracturing are no different from the subsurface effects of well shooting over a century ago, and the fractures and proppants used in hydraulic fracturing are merely another means of facilitating drainage protected by the rule of capture. The settled expectations that have developed around these methods should not be disturbed by removing hydraulic

fracturing from the rule of capture. *See Butler v. Charles Powers Estate*, 65 A.3d 885, 891-92 (Pa. 2013) ("[A] rule of property long acquiesced in should not be overthrown except for compelling reasons of public policy or the imperative demands of justice."); *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 . . . .").

2. Hydraulic fracturing is critically different from slant drilling.

Throughout their briefs, the Briggses and their *amici* equate hydraulic fracturing with slant drilling. But the two differ in critical ways that support the application of the rule of capture to one (hydraulic fracturing) while removing its protection from liability from the other (slant drilling).

As then-Justice Willett noted in his concurrence in *Coastal Oil & Gas Corp. v. Garza Energy Trust*, hydraulic fracturing is meaningfully distinct from slant drilling in that hydraulic fracturing "is highly unpredictable," because a "fracture's direction cannot be determined or controlled," and its length cannot "be precisely measured." 268 S.W.3d 1, 38 (Tex. 2008). In contrast, a slant driller "exerts absolute control" and knows

with "GPS-like precision *exactly* where the drillbit is and where it's going." *Id.*

As then-Justice Willett's description accurately highlights, the activities in which an operator engages during slant drilling occur on neighboring property, because the operator actively drills into and places well casing on neighboring property. In contrast, during hydraulic fracturing, the operator's activities take place only on the operator's own property. (R. 21a, R. 113a, R. 270a, 273a, 275a, 277a, 291a) (acknowledging that SWN has not drilled into the Briggses's property). The operator drills a well on its own property and injects fluids and proppants on its own property. Although the fractures that form after the operator drills the well and injects fluids may—or may not—extend into neighboring property (thereby facilitating the movement of proppants into that neighboring property), the operator never takes any action on or into the neighboring property. (Brief of *Amicus Curiae* Professor Terry Engelder at 18-20) (noting that operators "cannot control how and where hydraulic fractures interconnect with natural fractures"). Rather, all of the operator's actions are completed on its own

property, just as was the case with "shooting wells" with nitroglycerin. *See Tyner*, 31 N.E. at 61-62.

Thus, the use of proppant in hydraulic fracturing to facilitate drainage is not the same as drilling a fixed well pipe into neighboring property. The application of the rule of capture to hydraulic fracturing is no extension of the rule, but rather a straightforward application of the rule to 21st century technology.

3. The Briggses and their *amici* overstate the nature and extent of subsurface property rights.

A. <u>Oil and gas rights are not absolute, but are subject to divesture</u>.

The Briggses and their *amici* argue for greater rights to oil and gas under one's property than Pennsylvania courts have ever recognized. To the contrary, oil and gas rights are not absolute. Rather, "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.

Although surface owners have a generalized ownership interest in oil and gas that may lie under their property (which they may sell, lease, or otherwise encumber), they have no vested right to any particular molecules of oil and gas until

those molecules are reduced to possession. *See Hamilton v. Foster*, 116 A. 50, 52 (Pa. 1922) (stating that oil and gas belong to the owner "so long as they remain part of the property," and that the owner has "an ownership which he can sell and which otherwise he will lose only by their leaving the property"). Because oil and gas are fugacious, they may move across property lines. When they move away, the surface owner no longer has any right to that oil and gas. *See id.*; *Jones*, 44 A. at 1075. As the Superior Court aptly described in *Pennsylvania Power & Light Co. v. Public Service Commission*, 193 A. 427 (Pa. Super. 1937):

> Natural gas in the earth "is not the subject of property except while in actual occupancy" . . . and has the power and tendency to escape from the land of one person to that of another. **The land owner has no ownership in it except for such time as it is in his land and under his control. The result is a scramble between adjoining owners to reduce the gas to possession.** It is also frequently the case that when a new field is opened, as here, the pioneer is not able to tie up a solid block of land, and small lots are secured by individuals. In such case one may from an acre lot or less secure the proportion of gas naturally underlying many acres.

Id. at 434 (emphasis added).

Thus, in Pennsylvania, ownership of oil and gas is not an indefeasibly vested right. Until individual molecules of oil and gas are produced and reduced to possession, ownership may be divested by its movement. *See Hamilton*, 116 A. at 53 ("In the present case the title to the gas as between plaintiffs and defendant was vested in him by the lease, subject only to be divested through the action of natural laws . . . ."); *see also Ohio Oil Co. v. Indiana*, 177 U.S. 190, 209 (1900) ("[T]he owner may not follow the natural gas when it shifts from beneath his own to the property of some one else within the gas field. . . . [P]roprietorship does not take being until the particular subjects of the right become property by being reduced to actual possession.").[1]

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[1] Understood in this way, oil and gas ownership is similar to a fee simple determinable estate, which is an estate that is subject to automatic expiration upon the occurrence of a specified event. *See T.W. Phillips Gas & Oil Co. v. Jedlicka*, 42 A.3d 261, 267 (Pa. 2012). The event that causes ownership of oil and gas to "expire" is the movement of oil and gas out from under the surface owner's property. When it so moves, the ownership of that property interest immediately ceases.

In fact, although oil and gas estates have not been specifically described as fee simple determinable estates in Pennsylvania, oil and gas leases have been described in this way, because the ownership interest in the oil and gas granted to the lessee may revert to the lessor. *See id.* (stating that at the time of entry into an oil and gas lease, the property interest is inchoate, and it ripens into fruition once any production of oil or gas

Because the Briggses have not produced any of the natural gas they claim used to underlie their property, they have no absolute, indefeasibly vested ownership interest in that natural gas. Instead, the Briggses were divested of their interest in any natural gas that may have been under their property when (if at all) it flowed into SWN's wellbore on SWN's property and SWN reduced it to possession (thereby vesting SWN with title). The Briggses may not, through a trespass action, retransfer to themselves title to the oil and gas that left their property and that SWN has reduced to possession.

B. Deep subsurface areas are less protected from intrusion than the surface.

The Briggses and their *amici* argue that liability for hydraulic fracturing must be imposed to protect the Briggses's subsurface property rights. But their argument starts from the false premise that property rights are the same miles below the earth's surface as they are on the surface. Even assuming that the Briggses had any vested property rights in the natural gas

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commences, becoming a fee simple determinable); *Snyder Brothers, Inc. v. Yohe*, 676 A.2d 1226, 1230 (Pa. Super. 1996), *allocatur denied*, 686 A.2d 1312 (Pa. 1996).

that moved into SWN's wellbore, the "law of trespass need no more be the same two miles below the surface than two miles above." *Coastal Oil*, 268 S.W.3d at 11 (referring to airplanes) (internal citations omitted). *Accord*, *Chance v. BP Chemicals, Inc.*, 670 N.E.2d 985, 992 (Ohio 1996) ("[S]ubsurface ownership rights are limited."); (SWN's Opening Brief at 48-49).

Most recently, the Sixth Circuit concluded that allowing a horizontally drilled well to go under a nonconsenting owner's property is not a taking. *Kerns v. Chesapeake Exploration, L.L.C.*, No. 18-3636, 2019 U.S. App. LEXIS 3450 (6th Cir. Feb. 4, 2019), *cert. denied*, No. 18-1278, 2019 U.S. LEXIS 3179 (May 13, 2019). The court held that even though the drilling would extend under the nonconsenting owner's property, landowners do not have "absolute ownership of everything below the surface of their properties" under Ohio law. *Id.* at *17 (quoting *Chance*, 670 N.E. 2d at 992). Instead, landowners' subsurface rights include only "the right to exclude invasions of the subsurface property that actually interfere with [their] reasonable and foreseeable use of the subsurface." *Id.* at *17-18 (quoting *Chance*, 670 N.E. 2d at 992). In the case before the court, the mere presence of a horizontally drilled well *on adjacent property*

was not alleged to cause any interference with the landowner's use of the subsurface.[2] *Id.*

As these cases demonstrate, intrusions into the deep subsurface of a neighbor's property are not necessarily a trespass, any more than flying an airplane thousands of feet over the property would be. Landowners like the Briggses do not have free and unfettered rights to the oil and gas under their property, and minor possible intrusions miles below the surface of the earth (including those caused by frac fluid or proppants) are non-actionable. *See, e.g.*, *Hunter Co. v. McHugh*, 320 U.S. 222, 227-28 (1943) (concluding that states may constitutionally enact legislation that authorizes the forced pooling and unitization of common oil and gas resources, even where owners do not wish for their oil and gas rights to be

[2] This case alleges only the possible creation of fractures and entry of frac fluids and proppants under the Briggses's property, an intrusion far less severe than the permanent placement of pipe discussed in *Kerns*. Thus, the Court need not go as far as the Sixth Circuit did in *Kerns* to hold that hydraulic fracturing is not an actionable intrusion or trespass. Regardless, *Kerns*'s holding that landowners must show that there is interference with their use of the deep subsurface to bring an actionable claim (which is a different standard from surface trespass) demonstrates the lack of judicial support for extending to the subsurface the same rights that exist on the surface.

pooled and unitized); *Chambers v. Chesapeake Appalachia, LLC*, 2019 U.S. Dist. LEXIS 6145, at *3 (M.D. Pa. Jan. 14, 2019) ("Even in the absence of an agreement between a landowner and a prospector, states can mandate unitization for 'securing a just distribution' of resources and 'preventing waste.'").

In short, the Briggses do not have the all-encompassing, inviolate "right to exclude unwanted interference" beneath their property that they and their *amici* claim. (Brief of Appellees at 9); (Brief of *Amicus Curiae* Protect PT at 18).

4. The Briggses's unsupported factual assertions should be disregarded.

The Briggses assert numerous "facts" in their brief without any citation to the record. These "facts" are not in the record, are mere unsupported speculation, and in many instances are contradicted by cases and academic articles.

For instance, the Briggses state that "the origin of oil and gas extracted through the hydraulic fracturing process is totally known and ascertainable," and that the movement of proppants and natural gas during hydraulic fracturing is "sufficiently known and determinable." (Brief of Appellees at 19-20). They further assert that "the distance from the borehole within which natural gas is planned, intended and expected to

be extracted is known to the producer and the gas produced from that known and planned, intended and expected distance . . . can be reasonably accurately determined." *Id.* at 21, 26, 33. But the Briggses cite no authority to support these statements. Indeed, court opinions and academic articles state exactly the opposite. *See Coastal Oil*, 268 S.W.3d at 33 (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."); Owen L. Anderson, *Subsurface Trespass After* Coastal v. Garza, 60 Inst. on Oil & Gas L. & Taxation 65, 94 (2009); (Brief of *Amicus Curiae* Professor Terry Engelder at 18-20) ("[Operators] cannot control how and where hydraulic fractures interconnect with natural fractures."); Bruce M. Kramer, Coastal Oil & Gas Corp. v. Garza Energy Trust: *Some New Paradigms for the Rule of Capture and Implied Covenant Jurisprudence*, 30 Energy & Min. L. Inst. 11, 353 (2009) ("[There is a] lack of knowledge about exactly what is happening underground after any particular fracing operation. Just as the rule of capture was adopted in part due to the lack of understanding of the underground migration of hydrocarbons, imposing liability on operators who

engage in fracing operations because an expert may legitimately opine that either the hydraulic length, proppant length, or effective length may have crossed a property line would unnecessarily restrict the use of an effective tool that will lead to the production of more hydrocarbons").

The Briggses also assert, without any citation to authority, that operators like SWN are intending to use "modern techniques . . . [to] greatly reduce the number of acres that they have to lease and just drain natural gas from under whomever does not agree to their own Lease terms." *Id.* at 27. They additionally state that hydraulic fracturing "has not been conducted for anywhere near 'a century'; more likely for the past 15 years of significant activity." *Id.* at 38. Yet, again, the Briggses do not cite a single source to support these assertions, and, in fact, authorities state the opposite. *See T.W. Phillips Gas & Oil Co.*, 42 A.3d at 264 (noting that four wells at issue in the case had been produced through hydraulic fracturing in 1967); *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").

The Briggses's unsupported speculation should be

disregarded. *See Temple University v. Zoning Board of Adjustment*, 199 A.2d 415, 417-18 (Pa. 1964) (noting that an appellant had included facts in its brief that were not introduced below, and stating that "all facts not raised below . . . may not be introduced in argument").

5. The Briggses and their *amici* do not (and cannot) adequately address the policy concerns raised in SWN's opening brief.

A. <u>Applying the rule of capture to hydraulic fracturing promotes the development of a valuable resource</u>.

By conflating hydraulic fracturing with slant drilling, the Briggses and their *amici* attempt to undermine the public policy reasons SWN set forth in its opening brief for applying the rule of capture to this case. (SWN's Opening Brief at 31-50). Their argument is flawed, however, because it ignores that hydraulic fracturing has significant social utility. As Professor Bruce Kramer wrote in the same article that the Briggses's *amicus curiae* National Association of Royalty Owners Pennsylvania Chapter, Inc. ("NARO-PA") cites:

> [T]here are better rationales for allowing fracing across property lines [than allowing deviated wells (i.e., slant drilling)], namely practical necessity and

> common sense. **Deviated wells are clearly not necessary for the production of hydrocarbons. Hydraulic fracing, on the other hand, has become an important part of the primary production cycle from tight sands formations which are relatively impermeable**. . . . Common sense comes into play because of our lack of knowledge about exactly what is happening underground after any particular fracing operation. Just as the rule of capture was adopted in part due to the lack of understanding of the underground migration of hydrocarbons, imposing liability on operators who engage in fracing operations because an expert may legitimately opine that either the hydraulic length, proppant length, or effective length may have crossed a property line would unnecessarily restrict the use of an effective tool that will lead to the production of more hydrocarbons. Finding that fracing may lead to trespass liability would undoubtedly cause underground waste by leaving hydrocarbons in the ground that could otherwise have been produced.

Bruce M. Kramer, Coastal Oil & Gas Corp. v. Garza Energy Trust: *Some New Paradigms for the Rule of Capture and Implied Covenant Jurisprudence*, 30 Energy & Min. L. Inst. 11, 353 (2009) (emphasis added).[3]

[3] Contrary to what NARO-PA implies, Professor Kramer ultimately concludes that the majority decision in *Coastal Oil* reaches the correct result, stating: "Notwithstanding the similarities [between slant drilling and fracing beyond

Not only do practical necessity and common sense support hydraulic fracturing (even where it results in fractures across property lines), but, as SWN discussed in its opening brief, significant commercial and societal benefits result from hydraulic fracturing. (SWN's Opening Brief at 35, 39-41). These benefits include maximizing the recovery of valuable resources that fuel society and bolster the economy. (Brief of *Amici Curiae* Pennsylvania Chamber of Business and Industry *et al.* at 5-11, 15-18) (describing the benefits that hydraulic fracturing provides and stating that curtailing the recovery of natural gas through hydraulic fracturing will restrict Pennsylvania's labor work force, leasehold royalties to Pennsylvania landowners, business growth, the benefits derived from significantly lower energy pricing, and the environmental benefits of increased natural gas use); (Brief of *Amicus Curiae* Washington County at 3-4) (noting the significant beneficial impact hydraulic fracturing has had on the local economy in Washington County, including the generation of impact fees, jobs, and royalty revenue); (Brief of *Amici Curiae*

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boundary lines], I would still favor the result reached by the majority because of the ramifications of attaching liability to cross-boundary fracing operations." *Id.* at 362.

Marcellus Shale Coalition *et al.* at 28-35) (noting that hydraulic fracturing enables the production of valuable resources, generates billions in GDP for the Commonwealth's economy, creates jobs, and generates royalty income for landowners).

The significant social utility of hydraulic fracturing separates it from slant drilling and supports its inclusion within the rule of capture. Rather than meaningfully challenging the social utility of hydraulic fracturing, the Briggses advance rhetoric about the lack of "social utility" of trespass and conversion. (Brief of Appellees at 30-31). They also complain that a "license to plunder" would arise if the Court were to rule in SWN's favor, but their argument is based on a rigid misapplication of surface legal principles to the deep subsurface. *Id.*

B. The Briggses and their *amici* do not address impacts on other beneficial subsurface activity.

SWN identified several other beneficial activities that could be dramatically constrained if surface trespass principles were applied slavishly to the deep subsurface. These range from carbon sequestration projects to gas storage. (SWN's Opening Brief at 45-49); *see also* Owen L. Anderson, *Subsurface Trespass: A Man's Subsurface Is Not His Castle*, 49 Washburn L.J.

247 (2010). The Briggses respond solely by saying that the potential effects on these other subsurface activities "can hardly be taken seriously." (Brief of Appellees at 34). That is no answer.

C. The Briggses assert, without explanation, that their position will not pit landowner against landowner.

The Briggses respond to SWN's argument that this litigation really is about landowners' rights vis-à-vis one another simply by saying that only SWN and the Briggses are parties to this particular lawsuit. (Brief of Appellees at 33). The Briggses miss the point. If hydraulic fracturing is removed from the rule of capture and SWN owes the Briggses for extraction of natural gas that originated underneath their property, then SWN owes *less* to the Briggses's neighbors who have entered into leases with SWN. The same amount of natural gas was and will be produced; the royalties just must be spread among a larger group.

A ruling for the Briggses means that SWN and others like it will be reducing royalties to existing lessors to pay unleased neighbors who prove (if they can) that the natural gas originated under their property. Those neighbors—who have

rights in the underlying natural gas—very well may join in litigation over who shares from a particular well. Indeed, they may be indispensable parties. The Briggses have said nothing that undermines this very real possibility.

D. The Briggses's alleged inability to lease their oil and gas rights is not a reason to disregard the rule of capture.

The Briggses's assertion that they are unable to lease their oil and gas rights is not a reason to disregard the rule of capture. (Brief of Appellees at 24, 39). Even if it were true, the Briggses do not have a right to have their property leased, and they cannot force either SWN or any other operator to lease their property against the operators' wishes. The Briggses only have the right to enter into a lease with a willing lessee, but if no such willing lessees exist, the Briggses have no remedy; they are in the same position as any landowner whose property is not attractive to the market.

The hypothetical situation that *amicus curiae* NARO-PA posits in its brief does not change this analysis. NARO-PA describes a situation where an operator leases multiple adjacent properties and pools them into a single unit for oil and gas production, and at the end of the lease, there is no production

of oil and gas from the unit. (Brief of *Amicus Curiae* NARO-PA at 22-23). NARO-PA posits that the operator might refuse to renew a landowner's lease in order to avoid paying the landowner for future oil and gas production. But, as a practical matter, this situation would never occur.

Instead, if unit production had not yet occurred at the end of the initial term of the lease but was on the near horizon (such as when a horizontal well had been drilled but there was no production yet), the lease would not expire under the terms that are commonly included in oil and gas leases. *See* 3 Williams & Meyers, Oil and Gas Law §§ 601-602, 611 (describing the provisions typically contained in oil and gas leases, including provisions preventing against termination where "[a]t the expiration of the primary term the lessee is engaged in drilling operations which, at that moment, had not resulted in commercial production of minerals"); *T.W. Phillips Gas & Oil Co. v. Jedlicka*, 42 A.3d 261, 267-268 (Pa. 2012) (analyzing the "key provisions" that are typically contained oil and gas leases). Rather, the typical oil and gas lease terms provide for renewal in such situations. *See, e.g., T.W. Phillips Gas & Oil Co.*, 42 A.3d at 268, 277 (discussing the provisions in

typical oil and leases that govern their duration for the protection of both parties).

Even if the lease did expire when oil and gas was about to be produced, SWN posits (for the sake of countering NARO-PA's speculation), that the operator would never practically refuse to renew the lease. If the operator refused to renew the lease, another operator could lease the property from the landowner and drill a competing well, thereby decreasing the first operator's production. As a matter of prudent business operation (i.e., if it were economically wise to do so), the operator would avoid this situation by renewing the lease.

In any event, the solution to the Briggses's and their *amici*'s leasing concerns is not judicial, but legislative—namely, the enactment by the General Assembly of pooling and unitization legislation, as SWN discussed in its opening brief. (SWN's Opening Brief at 55-60).

E. Requiring an operator to obtain the consent of neighboring property owners before engaging in hydraulic fracturing on the operator's own property would create a holdout problem.

The Briggses's *amicus curiae* Protect PT argues that operators must obtain the consent of and pay remuneration to

their neighbors before engaging in hydraulic fracturing. (Brief of *Amicus Curiae* Protect PT at 1-3, 10, 12-14, 18, 25-26) (objecting to hydraulic fracturing on the grounds that it is undertaken "without consent or remuneration"). But if consent from (or remuneration to) neighbors were required for a landowner to explore for oil and gas on its own property, there would be a holdout problem. If one neighbor refused to give consent or accept remuneration, the landowner would not be able to produce oil and gas by the only viable method[4] without being exposed to liability.

The rule of capture ensures that such a holdout problem will not occur, maximizing the production of valuable resources. *See Barnard v. Monongahela Natural Gas Co.*, 65 A. 801, 802 (Pa. 1907) ("[An adjoining landowner] certainly ought not to be allowed to stop his neighbor from developing his own farm."); *Coastal Oil*, 268 S.W.3d at 29 (Willett, J., concurring) ("Open-ended liability threatens to inflict grave and unmitigable harm, ensuring that much of our State's undeveloped energy supplies would stay that way—

[4] *See* SWN's Opening Brief at page 3 and pages 35 to 36 for a discussion of the need to use hydraulic fracturing to produce oil and gas in commercial quantities.

undeveloped."). Any adjustment to this rule (and any corresponding adjustment of interests as between neighboring landowners) is a task for the General Assembly, not the courts. (*See* SWN's Opening Brief at 55-60).

Protect PT asserts that no such holdout problem will occur because removing hydraulic fracturing from the rule of capture would only mean that companies "must lease what they intend to, or might reasonably have to, develop." (Brief of *Amicus Curiae* Protect PT at 26). But neighboring owners will not always agree to grant the necessary leases. And operators cannot always tell in advance what they might "reasonably" develop during their hydraulic fracturing operations. (SWN's Opening Brief at 21, 37-38).

Moreover, adopting Protect PT's position would create a "reasonableness" standard for imposing trespass liability, requiring courts to decide whether an operator "reasonably" should have known that its hydraulic fracturing activity would develop oil and gas from neighboring property. But trespass is an intentional tort. *See Kopka v. Bell Telephone* Co., 91 A.2d 232, 235 (Pa. 1952). Protect PT's argument for liability is thus inconsistent and unworkable, illuminating the precise problems

with seeking to remove hydraulic fracturing from the rule of capture.

CONCLUSION

Precedent, practical realities, and policy all support the application of the rule of capture to hydraulic fracturing. 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.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH WORD LIMIT

I certify that this Brief complies with the word limit in Pa.R.A.P. 2135(a) because it contains 5,564 words.

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