Dear fellow members of the Shale Energy Law Committee:

As you may be aware, on April 2, 2018, the Pennsylvania Supreme Court rendered its decision in Briggs v. Southwestern Energy Production Company. In this decision, the Superior Court held that the rule of capture does not preclude liability for trespass due to hydraulic fracturing. A summary of the case is included in the Case Summaries, and the full text of the decision is attached. In addition, Ross Pifer, Esq., clinical professor at Penn State's Dickinson School of Law, has provided us with an article on the decision.

We encourage all of you to provide us with articles for the newsletter. The articles only improve our newsletter. We hope that you enjoy this newsletter.

Best regards.

Paul R. Yagelski  Brian Pulito

New PBA Officers Begin Terms May 11

The PBA leadership for 2018-19 will take office at the conclusion of the Annual Meeting, May 11, in Hershey.

Charles Eppolito III, president
Anne N. John, president-elect
David E. Schwager, vice president
Sharon R. López, immediate past president

Michael J. McDonald, secretary
Terry D. Weiler, treasurer
Alaina Koltash, YLD chair
Jennifer Menichini, YLD chair-elect
Jonathan D. Koltash, YLD immediate past chair

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The PBA Shale Energy Law Committee will meet on Thursday, May 10
11:00 a.m. - 12:30 p.m.
at The Hershey Lodge
as part of PBA Committee/Section Day
Register at www.pabar.org

Upcoming PBA Events

The PBA Commission on Women in the Profession Annual Conference is May 9 at The Hershey Lodge, Hershey.

The PBA Annual Meeting is May 9-11 at The Hershey Lodge, Hershey.

The PBA Environmental and Energy Law Section Meet & Greet Reception on “Issues Facing Municipal Separate Storm Sewer Systems” with Lee Murphy, Environmental Group Manager, Bureau of Clean Water, Pennsylvania DEP, is May 17 in Harrisburg.

Details at www.pabar.org

Background: Vowed religious order and its members brought action alleging the Federal Energy Regulatory Commission (FERC) order authorizing defendant gas pipeline company to forcibly take and use land owned by the plaintiffs as part of an interstate fossil fuel pipeline violated Religious Freedom Restoration Act (RFRA) and that pipeline company’s condemnation of plaintiffs’ property violated RFRA. Plaintiffs moved for preliminary injunction, and defendants moved to dismiss for lack of subject matter jurisdiction. Defendants’ motion granted, and plaintiffs’ motion denied.

Holdings: Vowed religious order, and its members, who failed to present to FERC their Religious Freedom Restoration Act claims relating to FERC order that authorized condemnation of their property as part of interstate fossil fuel pipeline, and ultimately to the appropriate Court of Appeals, was barred under the Natural Gas Act’s exclusivity provision from seeking what effectively amounted to a collateral review of FERC’s order before the District Court.


Background: Adam Briggs, Paul Briggs, Joshua Briggs and Sarah Briggs (collectively, “Briggs”) appealed from an order granting Southwestern Energy Production Company’s (“Southwestern”) Motion for Summary Judgment, denying Briggs’ Motion for Partial Summary Judgment and denying as moot Briggs’ Motion to Compel. The Superior Court reversed and remanded.

Briggs 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 Briggs’ property. Since 2011, Southwestern continuously operated gas wells, known as the Innes Gas Unit and the Folger Gas Unit, respectively, on the property adjacent to Briggs’ property. Southwestern engaged in hydraulic fracturing to extract natural gas from the Marcellus Shale formation through wellbores located on the Innes and Folger Gas Units. Southwestern does not have an oil and gas lease concerning Briggs’ property.

On Nov. 5, 2015, Briggs filed a complaint, asserting claims of trespass and conversion and requesting punitive damages. Briggs alleged that Southwestern, in its operation of drilling units located on the adjoining property, unlawfully extracted natural gas from beneath Briggs’ property. Briggs also alleged that Southwestern’s actions constitute a past and continuing trespass.

Southwestern filed an answer and new matter asserting, inter alia, that Briggs’ claims were barred by the rule of capture. Southwestern also filed a counterclaim for declaratory relief, requesting that the trial court confirm that Southwestern did not trespass on Briggs’ property. Southwestern filed a motion for summary judgment and brief in support thereof asserting, inter alia, that Briggs’ trespass claim must fail because Southwestern had not entered Briggs’ 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 declaratory judgment. The trial court agreed with Southwestern that, as a matter of law, the rule of capture precluded recovery by Briggs.

On appeal to the Superior Court, Briggs argued that the extraction of natural gas from beneath their property is a trespass, despite the lack of physical intrusion by Southwestern. Briggs pointed 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 . . . .” Briggs argued 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. Briggs asserted that natural gas contained in shale formations would remain trapped there forever if not for the “forced extraction” through hydraulic fracturing. According to Briggs, it is possible to measure the source of natural gas obtained through hydraulic fracturing, and therefore, the rule of capture should not apply.

Southwestern argued that it cannot be held liable for trespass

CONTINUED ON PAGE 3
because it has never entered or drilled any gas wells on Briggs’ property. Southwestern also contended that Briggs’ trespass claim is precluded by the rule of capture. Southwestern asserted that the rule of capture should be applied to natural gas obtained through hydraulic fracturing, which it described as a mechanical method of increasing the permeability of rock, and thus increasing the amount of oil and gas produced from it.

The Superior Court reviewed the history of the rule of capture as it has been applied in the context of conventional oil and gas extraction. The Superior Court noted that 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. Based upon its review of the relevant case law and the principles underlying oil and gas extraction, the Superior Court concluded that hydraulic fracturing is distinguishable from conventional methods of oil and gas extraction. Traditionally, the rule of capture assumes that oil and gas originates in subsurface reservoirs or pools and can migrate freely within the reservoir and across property lines, according to changes in pressure. Unlike oil and gas originating in a common reservoir, natural gas, when trapped in a shale formation, is non-migratory in nature. Shale gas does not merely “escape” to adjoining land absent the application of external force. 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 channels.”

The Superior Court was not persuaded that a landowner can adequately protect his interest by drilling his own well to prevent drainage to an adjoining property. Hydraulic fracturing is a costly and highly specialized endeavor, and the traditional recourse to “go and do likewise” is not necessarily available for an average landowner.

In light of the distinctions between hydraulic fracturing and conventional gas drilling, the Superior Court held that the rule of capture did 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 of 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.

The Superior Court concluded that Briggs’ allegations were sufficient to raise an issue as to whether there was a trespass, and thus, the entry of summary judgment in favor of Southwestern was premature. It therefore reversed the summary judgment order and remanded the case to the trial court for further proceedings. On remand, Briggs was to be afforded the opportunity to fully develop their trespass claim. Moreover, the Superior Court directed that because the trial court concluded that Briggs’ conversion claim was precluded by the rule of capture, Briggs must also be afforded the opportunity to develop their conversion claim on remand.

The full Superior Court opinion is on page 17.


Background: Limited Liability Company (LLC) petitioned for review of an adjudication of the Environmental Hearing Board that dismissed the LLC’s appeal of the Department of Environmental Protection Administrative Order regarding the LLC’s failure to plug abandoned oil and gas wells. Reversed and remanded.

Holding: A corporate or LLC officer can be held personally liable under participation theory for intentional and knowing refusal to act.

For a forward discussion of this opinion, see Regulatory Section.

Delaware Riverkeeper Network v. Secretary of Pennsylvania, Department of Environmental Protection, 870 F.3d 171 (3d Cir. 2017)

Background: Environmental organization and member filed a petition for review of the Pennsylvania Department of Environmental Protection’s (PADEP) order approving pipeline company’s application to build interstate pipeline project. The pipeline company intervened. Petition denied.

Holdings: (1) PADEP’s order was final administrative order over which Court of Appeals had jurisdiction; (2) petition was timely; (3) PADEP’s determination that project was “water dependent” was not arbitrary and capricious; and (4) PADEP
did not arbitrarily or capriciously disregard compression alternative.


**Background:** Objectors to a below-ground-level pipeline for natural gas liquids that was going to be parallel to an existing pipeline brought action against a pipeline company based on an allegation that the township's zoning ordinance prohibited the pipeline's construction in residential districts, and the objectors later sought injunctive relief. The Court of Common Pleas of Chester County dismissed. The objectors appealed. Affirmed.

**Holdings:** (1) the pipeline company was a public utility corporation; (2) the General Assembly intended the Public Utility Code to occupy the field of public utility regulation in the absence of the express grant of authority to the contrary; (3) conflict preemption precluded the township's zoning ordinance from prohibiting the pipeline; and (4) the objectors’ argument that the pipeline’s placement in residential districts rendered the zoning district’s irrational and unconstitutional was not a viable substantive-due-process claim.


**Background:** Operator of natural gas wells filed action seeking declaration that calculation of civil penalties under Clean Streams Law proposed by the Department of Environmental Protection (DEP) was unlawful. The Commonwealth Court dismissed the complaint. The operator appealed. The Supreme Court reversed and remanded. The operator filed an application for summary relief, challenging the DEP’s interpretation of the Clean Streams Law. The Commonwealth Court granted the application, and the DEP appealed. The Supreme Court affirmed in part and vacated in part.

**Holdings:** (1) evidence supported the Board of View’s finding that opening of a private road over the western neighbor’s property for property owners to access their property was “necessary” under the Private Road Act, as required for a grant of private road petition, though the neighbor asserted that the property owners could access eastern part of their parcel from a dirt road that connected to the logging trail. Evidence was presented that the property was mountainous, that the road accessing eastern portion was inhospitable, that the road accessing western portion was built, paved and maintained by natural-gas drilling company, and that construction of a new road on eastern portion up an incline of over 1,000 feet at an estimated cost of over $100,000 was cost-prohibitive, rendering property owners effectively landlocked; and (2) evidence supported the Board of View’s finding that opening of a private road over the western neighbor’s property for property owners to access their property was for overriding public purposes of allowing a natural-gas drilling company to supply natural gas to the public for the benefit of hunters, rather than a private purpose, though property owners’ use of roadway would allow them to construct seasonable homes. Evidence was presented that the road was built and maintained by an energy company, that transportation and supply of natural gas constituted public use, and that property owners entered into a public-access agreement with the Game Commission allow-
ing hunters access to the property by vehicle.


Background: The operator of a proposed natural gas compressor station sought review of the decision of the township zoning hearing board’s denial of an application for special exception to operate station. The Court of Common Pleas of Washington County affirmed. Owner appealed. The Commonwealth Court affirmed in part and reversed in part. Following remand, the operator appealed the board’s grant of special exception subject to conditions. The Court of Common Pleas affirmed. The operator appealed. Affirmed in part and reversed in part.

Holdings: (1) a condition requiring the operator to retain a third-party consultant to test water in wells and springs was not a reasonable condition; (2) the condition requiring the operator to hire a consultant to measure noise level at the compressor station was not a reasonable condition; (3) the condition requiring the operator to install video surveillance monitoring equipment at the site for security purposes was not a reasonable condition; (4) the condition limiting the operator to installation of no more than five electric or eight gas compressor engines was not a reasonable condition; (5) the condition requiring the operator of a proposed natural gas compressor station to locate compressor engines no closer than 750 feet away from residences was not a reasonable condition; (6) the condition requiring the operator to place control technology on all condensate tanks at the facility was a reasonable condition; and (7) a condition requiring the operator to limit heavy truck traffic accessing the site was not a reasonable condition.

For a fuller discussion, see Regulatory Section.

Norfolk Southern Railway Company v. Pittsburgh & West Virginia Railroad, 870 F.3d 244 (3d Cir. 2017)

Background: Lessee and sublessee of mainline railroad and branch lines sued lessor and its parent real estate investment trust (REIT) of which lessor was wholly-owned subsidiary following reverse triangular merger, alleging breach of contract and fraud, and seeking injunctive relief and monetary damages related to alleged loss of use of proceeds from proposed sale of branch rail line, loss of use of oil and gas royalty payments, and devaluation of lease by creation of REIT in attempt to escape lease restrictions. Lessee also sought declaratory judgment that it was not in default of lease agreement due to its subletting of rights purportedly covered under lease. Lessee moved for summary judgment on its claim for declaratory judgment. The United States District Court for the Western District of Pennsylvania granted the motion. After a bench trial, the District Court determined that REIT was not liable, that lessor was liable for breach of contract and fraud, and that lessee, but not sublessee, was entitled to nominal damages. Defendants appealed. Affirmed.

Holdings: (1) lease conveyed disputed rights to lessee; (2) sublessee was not a disposition of demised property for purposes of lessee’s indebtedness to lessor; (3) limit on lessee's indebtedness to lessor no longer applied; (4) fraud claim was not barred by “gist of the action” doctrine; and (5) lessee was entitled to nominal damages.


Background: Operator of natural gas pipelines filed complaint in condemnation for both temporary and permanent easements against property owner and his land. United States District Court for the Middle District of Pennsylvania granted operator’s motion for partial summary judgment and preliminary injunction for immediate possession of rights of way. The owner appealed. Affirmed.

Holdings: Court of Appeals lacked jurisdiction over the District Court’s Order granting partial summary judgment. The operator of natural gas pipelines seeking preliminary injunction for immediate possession of rights of way had substantial likelihood of success on the merits of condemnation claim seeking to automatically acquire rights of way through eminent domain pursuant to the Natural Gas Act, where the operator was granted a certificate of public convenience and necessity by the Federal Energy Regulatory Commission (“FERC”) authorizing it to construct a natural gas pipeline. The operator was unable to acquire rights of way by contract with the property owner, the value of the property interest as claimed by the owner was more than $3,000 and the owner had received the process he was due, in that he received notice and opportunity to respond in FERC proceedings and would have validity on the merits of condemnation claim.

CONTINUED ON PAGE 6
have an opportunity to litigate just compensation in the District Court. The operator would likely suffer irreparable monetary and contractual harm in absence of the preliminary injunction. The balance of hardships favored a preliminary injunction. The public interest supported grant of a preliminary injunction.


Background: Owner of property in Delaware river basin brought action against Delaware River Basin Commission seeking declaration that commission lacked authority under the Delaware River Basin Compact, an agreement entered into by the United States, New York, Pennsylvania, New Jersey and Delaware, to require owner to apply for and obtain project approval for natural gas well pad, a gas well, and related facilities and associated hydraulic fracturing activities for natural gas development on owner’s property. Commission moved to dismiss for lack of subject matter jurisdiction on standing and ripeness grounds and for failure to state a claim. Motion granted.

Holdings: (1) owner had Article III standing; (2) owner and commission had adversity of interests, as would support finding of ripeness; (3) owner sought conclusive legal judgment, rather than mere advisory opinion, as would support ripeness finding; (4) a declaratory judgment would have utility, as would support ripeness finding; (5) absence of final agency action did not prevent owner from proving essential element of claim; (6) compact did not require a putative plaintiff to exhaust his or her administrative remedies prior to bringing a challenge to the commission’s jurisdiction; and (7) under compact, owner proposed natural gas development “project” subject to review by the commission.
Oil & Gas Legislative Update: Regular Session 2017-18

PENDING LEGISLATION

House Bill 91
Short Title: An act amending the act of July 11, 2006 (P.L. 1134, No. 115), known as the Dormant Oil and Gas Act, further providing for purpose, for definitions and for creation of trust for unknown owners.
Prime Sponsor: Representative GODSHALL
Last Action: Referred to ENVIRONMENTAL RESOURCES AND ENERGY, Jan. 23, 2017 [House]
Memo: Former HB 70 Dormant Oil and Gas Act
Printer’s No.: 74

House Bill 557
Short Title: An act amending the act of July 20, 1979 (P.L.183, No.60), known as the Oil and Gas Lease Act, further providing for definitions; and providing for minimum royalty for unconventional oil or gas well production and for remedy for failure to pay the minimum royalty on unconventional oil or gas wells.
Prime Sponsor: Representative EVERETT
Last Action: Resolution to discharge committee from further consideration of this bill presented, June 28, 2017 [House]
Memo: Guaranteed Minimum Royalty Act (Act 60 of 1979)
Printer’s No.: 580

House Bill 1350
Short Title: An act amending the act of July 20, 1979 (P.L.183, No.60), known as the Oil and Gas Lease Act, further providing for definitions.
Prime Sponsor: Representative DUSH
Last Action: Referred to ENVIRONMENTAL RESOURCES AND ENERGY, May 8, 2017 [House]
Memo: Defining Royalties and Wellheads
Printer’s No.: 1675

House Bill 1530
Short Title: An act amending the act of July 11, 2006 (P.L.1134, No.115), known as the Dormant Oil and Gas Act, providing for oil and gas estate abandonment, for preservation of interests in oil and gas and for applicability
Prime Sponsor: Representative EVERETT
Last Action: Referred to ENVIRONMENTAL RESOURCES AND ENERGY, June 12, 2017 [House]
Memo: Preservation of Interests in Oil and Gas (former HB 67 of 2015-16)

House Bill 1708
Short Title: An act amending the act of July 20, 1979 (P.L.183, No.60), known as the Oil and Gas Lease Act, further providing for definitions and for royalty guaranteed; and providing for written summary of unconventional gas well deductions and for inspection of records for unconventional gas wells.
Prime Sponsor: Representative ORTITAY
Last Action: Referred to ENVIRONMENTAL RESOURCES AND ENERGY, Aug. 16, 2017 [House]
Memo: The Landowner Protection Act
Printer’s No.: 2293

House Bill 2154
Short Title: An act relating to conventional wells and the development of oil, gas and coal; imposing powers and duties on the Department of Environmental Protection; and providing for preliminary provisions, for general requirements, for underground gas storage, for enforcement and remedies, for related funds, parties and activities and for miscellaneous provisions.
Prime Sponsor: Representative CAUSER
Last Action: Referred to ENVIRONMENTAL RESOURCES AND ENERGY, March 19, 2018 [House]
Memo: Conventional Oil and Gas Act
Printer’s No.: 3187

Senate Bill 138
Short Title: An act amending the act of July 20, 1979 (P.L.183, No.60), known as the Oil and Gas Lease Act, further providing for definitions, for payment information to interest owners, for accumulation of proceeds from production and for conflicts and providing for joint ventures and for inspection of records.
Prime Sponsor: Senator YAW
Last Action: Referred to ENVIRONMENTAL RESOURCES AND ENERGY, Feb. 2, 2017 [House]
Memo: Oil and Gas Lease Protection Package
Printer’s No.: 92

Senate Bill 142
Short Title: An act amending Title 58 (Oil and Gas) of the Pennsylvania Consolidated Statutes, in utilization, providing for unconventional oil and gas conservation by consolidating the Oil and Gas Conservation Law with modifications relating

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to definitions, standard unit order, process, administration, standard of review, hearings and appeals, establishment of units, integration of various interests, lease extension and scope, providing for gas and hazardous liquids pipelines; and making a related repeal.

**Prime Sponsor:** Senator YAW  
**Last Action:** Referred to ENVIRONMENTAL RESOURCES AND ENERGY, Jan. 20, 2017 [Senate]  
**Memo:** Company to Company Integration  
**Printer's No.:** 119

**Senate Bill 835**  
**Short Title:** An act amending the act of February 19, 1980 (P.L.15, No.9), known as the Real Estate Licensing and Registration Act, in definitions, further providing for definitions; in application of act and penalties, further providing it unlawful to conduct business without license or registration certificate, for criminal penalties and for exclusions; in powers and duties of the State Real Estate Commission in general, further providing for administration and enforcement; adding provisions relating to land agent registration certificates; and, in duties of licensees, further providing for prohibited acts.

**Prime Sponsor:** Senator DINNIMAN  
**Last Action:** Referred to CONSUMER PROTECTION AND PROFESSIONAL LICENSURE, Aug. 29, 2017 [Senate]  
**Memo:** Legislation to Regulate Pipeline Land Agents  
**Printer's No.:** 1130

**Senate Bill 1088**  
**Short Title:** An act relating to conventional wells and the development of oil, gas and coal; imposing powers and duties on the Department of Environmental Protection; and providing for preliminary provisions, for general requirements, for underground gas storage, for enforcement and remedies, for related funds, parties and activities and for miscellaneous provisions.

**Prime Sponsor:** Senator HUTCHINSON  
**Last Action:** Referred to ENVIRONMENTAL RESOURCES AND ENERGY, March 19, 2018 [Senate]  
**Memo:** Oil and Gas Act Redraft  
**Printer's No.:** 1546

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**PBA Calendar of Events**

The **PBA Commission on Women in the Profession Annual Conference** is May 9 at the Hershey Lodge, Hershey.

The **PBA Annual Meeting** is May 9-11 at the Hershey Lodge, Hershey. **Committee/Section Day** is May 10.

The **PBA Environmental and Energy Law Section Meet & Greet Reception on Issues Facing Municipal Separate Storm Sewer Systems (MS4s)** with Lee Murphy, Environmental Group Manager, Bureau of Clean Water, Pennsylvania DEP, is May 17 in Harrisburg.

The **PBA Civil Litigation Section Regional Dinner** with guest speaker Judge Thomas Michael Hardiman of the U.S. Court of Appeals for the Third Circuit is May 22 in Pittsburgh.

The **PBA Criminal Law Symposium** is June 7-8 at the Harrisburg Hilton, Harrisburg.

The **PBA Board of Governors Annual Retreat** is June 20-22 at Nemacolin Woodlands, Farmington.

The **PBA Family Law Section Summer Meeting** is July 12-15 at The Hotel Hershey, Hershey.

The **PBA Young Lawyer Division Summer Summit** is July 18-20 at The Penn Stater Hotel and Conference Center, State College.

The **PBA 21st Elder Law Institute** is July 19-20 at the Hilton Hotel, Harrisburg.

The **PBA Solo and Small Firm Section Conference** is July 25-27 at the Omni Bedford Springs Resort, Bedford.

The **PBA Real Property Probate and Trust Law Section Annual Meeting** is Aug. 8-10 at the Wyndham Gettysburgh, Gettysburg.

For details on these events and more, go to [www.pabar.org](http://www.pabar.org).
A. Proposed “Conventional Oil and Gas Wells Act”
A bill before the Senate Environmental Resources and Energy Committee would create a separate statute addressing conventional oil and gas operations in the commonwealth. Senate Bill 1088 and similar legislation introduced in the House are aimed at regulating the conventional side of Pennsylvania’s oil and gas industry. Conventional operators have voiced opposition to what they view as a “one size fits all” regulatory scheme created by the 2012 Oil and Gas Act and the proposed Chapter 78 regulations intended to enforce the act. In a memorandum to his Senate colleagues, Senator Scott Hutchinson, who introduced the bill, explained his reasons for re-enacting the Oil and Gas Act of 1984 with new language “designed to update or clarify oil provisions where needed” as follows:

The conventional oil and gas industry has been in Pennsylvania and contributing to our economy for more than a century and a half. With the Marcellus Shale boom and the proliferation of advanced drilling methods, a new type of oil and gas industry developed in Pennsylvania. As a result, Act 13 of 2012 was passed to address some of the concerns and issues that were specific to this new unconventional industry. Although it was intended to address new issues with the unconventional industry, Act 13 also placed an unbearable burden on the much smaller conventional producers and over time has brought the conventional industry to near collapse.

Memorandum from Sen. Scott E. Hutchinson to All Senate Members (Jan. 24, 2018).

Both the House and the Senate Bills may go through significant changes or may never be passed into law, but a few notable provisions in the current drafts address legacy wells in the commonwealth, local governmental regulation and the interaction between the Solid Waste Management Act and the Conventional Oil and Gas Wells Act. For the purposes of this update, the introductions of both bills bear mentioning for the promise of future debate.

B. Local Regulation of Oil and Gas Activities and the Environmental Rights Amendment
A number of notable decisions have been filed since the Fall Update involving municipal regulation of oil and gas operations. While we are awaiting the Supreme Court of Pennsylvania to decide Gorsline, a few recent decisions analyze issues involving preemption and the role of the Environmental Rights Amendment (“ERA”) in the wake of Robinson Township v. Commonwealth, 80 A.3d 901 (Pa. 2013) and Pennsylvania Environmental Defense Foundation v. Commonwealth, 161 A.3d 911 (Pa. 2017) (PEDF). See Gorsline v. Bd. of Supervisors of Fairfield Twp., 123 A.3d 1142 (Pa. Commw. Ct. 2015) (noting the township zoning ordinance allowed for mineral extraction in certain districts but concluding that a well pad was similar to public service facilities expressly allowed by in all zoning districts) appeal granted, 139 A.3d 178 (Pa. 2016). The first noted below is Delaware Riverkeeper Network v. Sunoco Pipeline L.P., 179 A.3d 670 (Pa. Commw. Ct. Feb. 20, 2018), which focused on issues of preemption and substantive due process, but also analyzed how the fiduciary duties of the ERA are imposed upon different governmental entities. The second decision, MarkWest Liberty Midstream and Resources LLC v. Cecil Twp. Zoning Hearing Bd., No. 1809 C.D. 2016, -- A.3d --, 2018 WL 1440892 (Pa. Commw. Ct. Mar. 23, 2018), briefly analyzes the Commonwealth Court’s interpretation of the reasonableness of conditions attached to an application for a special exception under a township’s unified development ordinance.

Before the Commonwealth Court in Delaware Riverkeeper Network v. Sunoco Pipeline L.P. was the appeal of a trial court order dismissing appellants’ complaint and denying petitions for injunctive relief against appellee, Sunoco Pipeline L.P., to enjoin Sunoco’s construction of a portion of the Mariner East 2 (“ME2”) pipeline project. 179 A.3d at 673–74. Appellants sought to stop construction arguing Sunoco’s construction activities violated the West Goshen Township Zoning Ordinance (the “Ordinance”). Id. The trial court sustained preliminary objections to the complaint raised by Sunoco alleging (i) lack of subject matter jurisdiction and a lack of authority to regulate; (ii) lack of authority to regulate based on federal law (sustained as moot); and (iii) that Plaintiffs failed to establish a claim based on substantive due process. The trial court dismissed the complaint with prejudice. Id. at 676.

On appeal, the Appellants argued, among other things, that Sunoco is not a public utility, ME2 pipeline facility is not a public utility facility, and that the township’s ordinance was not preempted by Pennsylvania’s Public Utility Commission (“PUC”) because PUC does not regulate the siting of pipe-
line facilities. *Id.* at 680. The Commonwealth Court affirmed, holding that because Sunoco is a public utility regulated by PUC and is a public utility corporation, the township lacked authority to regulate the location of the pipeline facility. The court rested on its *en banc* decision in *In re Sunoco Pipeline L.P.*, 143 A.3d 1000 (Pa. Commw. Ct. 2016) (*Sunoco I*), to dismiss Appellants’ challenge to ME2’s status as a public utility. *Id.* at 682.

Once the court found Sunoco to be a public utility corporation, the siting of the pipeline is a part of the “reasonableness and safety of [ME2 that are] matters committed to the expertise of the PUC by express statutory language.” *Id.* (citing 66 Pa. Cons. Stat. § 1505). The court analyzed the township’s actions under the principals of both field preemption and conflict preemption.

Holding that the township’s attempt to regulate ME2 is preempted by the Public Utility Code, the court found that the General Assembly intended the Public Utility Code to occupy the entire field of public utility regulation. *Id.* at 692. Moreover, the court concluded that conflict preemption barred the township from enacting an ordinance prohibiting the pipeline because the ordinance acted as an obstacle to the execution of the full purpose of the Public Utilities Code. *Id.*

Appellants also raised an argument related to recent decisions made by the Supreme Court of Pennsylvania in *Robinson Township v. Commonwealth* and *Pennsylvania Environmental Defense Foundation v. Commonwealth* stating the court “set forth clear limitations on the General Assembly’s authority ‘to remove a political subdivisions implicitly necessary authority to carry into effect its constitutional duties.’” Delaware Riverkeeper Network, 179 A.3d at 683, (citing *Robinson Twp. II* and PEDF). Those decisions recognized limitations imposed by Article 1, Section 27 of the Pennsylvania Constitution (the ERA) on the General Assembly’s power to legislate. Specifically, the ERA places a fiduciary duty upon the commonwealth, as trustee, to conserve and maintain Pennsylvania’s public resources for all people, including “generations yet to come.” Pa. Const. Art. 1, § 27. Appellants argued that local governments, such as the township, shared that fiduciary duty with “all commonwealth agencies and entities.” Delaware Riverkeeper Network, 179 A.3d at 684. Therefore, Appellants maintained that “as to the public trust provisions of the ERA Amendment, the General Assembly can neither offer political subdivisions purported relief from obligations under the [ERA], nor can it remove necessary and reasonable authority from local governments to carry out these constitutional duties.” *Id.* (citing *Robinson Twp. II*, 83 A.3d at 977). As such, the Appellants argued that the trial court improperly removed the township’s ability to carry out its constitutionally mandated duties by finding the ordinance was preempted by the PUC’s authority.

Sunoco countered, arguing that “despite [Appellants’] contentions, the ERA does not grant regulatory power to municipalities where that power is preempted or otherwise prohibited.” Delaware Riverkeeper Network, 179 A.3d at 687. Sunoco noted that the timing of the municipality’s action is key to their duties under the ERA, which Sunoco argued, “requires municipalities to make decisions and take actions they are already empowered to take, in a manner that satisfies their duty to act as trustee of Pennsylvania’s public natural resources for the benefit of the people.” *Id.* (emphasis added). Sunoco added that the PUC and the Department of Environmental Protection are empowered to exercise ERA duties over the ME2 pipeline and, in fact, had done so. *Id.* at 687–88.

The court declined to adopt Appellants argument on the township’s constitutional duties under the ERA for three reasons: first, both *Robinson Twp. II* and PEDF were distinguishable from the present facts because neither dealt with public utility services or facilities regulated by PUC. Delaware Riverkeeper Network, 179 A.3d at 695–96. Second, the court found that Appellants’ “do not explain how the [ERA] impacts long-standing, pre-existing law involving regulation of public utilities, without expressly referring to the topic.” *Id.* at 696 (Emphasis supplied). Noting that *Robinson Twp. II* and PEDF dealt with very recent enactments by the General Assembly, the court found that Appellants “ignore the comparative timing of the onset of legal duties, although such timing is usually a matter of significant legal analysis.” Delaware Riverkeeper Network, 179 A.3d at 696. Finally, the court did not find that Appellants showed how the ordinance furthered the township’s ERA trustee duties or related to conserving public natural resources. *Id.* As such, the court did not find that the ERA protected or shielded the ordinance from the preemption arguments advanced by Sunoco.

Rather than the considering preemption or the ERA, in *MarkWest Liberty Midstream and Resources LLC v. Cecil Township Zoning Hearing Board*, the Commonwealth Court considered MarkWest Liberty Midstream and Resources LLC’s (“MarkWest”) appeal of a trial court order affirming the Cecil Township (“Township”) Zoning Hearing Board’s (“Board”) decision granting MarkWest’s application for special exception
subject to 26 conditions (“Conditions”). MarkWest purchased a property upon which it planned to construct a natural gas compressor station. Id. at *2. MarkWest’s proposed use of the property was allowed by the Township’s Unified Development Ordinance (“UDO”) as a special exception. MarkWest applied to the board for a special exception under the UDO in 2010. The board denied the request, which MarkWest appealed to the trial court who upheld the board’s denial. Id. The Commonwealth Court reversed and remanded with the direction to grant MarkWest’s special exception application. Id. The board granted the special exception on remand, but attached the conditions to the approval. Id. at *3. MarkWest appealed to the trial court. The trial court affirmed the board and MarkWest appealed to the Commonwealth Court.

The court considered four issues on appeal: (1) whether the board-imposed conditions exceed the board’s authority under the Pennsylvania Municipalities Planning Code (“MPC”) and the UDO; (2) whether the board is authorized to impose standards separate and apart from the UDO regarding where a particular use may be located; (3) whether the board’s conditions are unduly restrictive and result in disparate treatment of MarkWest’s proposed use without a reasonable basis; and, (4) whether certain of the board’s conditions are preempted. Affirming in-part and reversing in-part, the court held that the township exceeded its authority by imposing excessive conditions on MarkWest’s application for special exception.

The court reversed the trial court’s upholding of the conditions. The UDO allows the board to “attach reasonable conditions and safeguards necessary to protect public health, safety, and welfare.” Id. at *4. The board’s power in this regard is derived from the MPC. Notably, however, the board lacks the authority to amend the zoning ordinance. Id. at *6. Here, the UDO expressly allowed natural gas compressor stations as a special exception in the location of the proposed facility. The court determined that the board failed to make any findings that the compressor station would detrimentally impact the health and safety of the community. Without such findings, the board lacked the authority to impose the conditions.

Furthermore, the court found that the conditions were an attempt to dictate MarkWest’s specific business operations on the site “under the guise of zoning regulation,” which is prohibited by the MPC. Id. at *6. “Based on the foregoing, regardless of the board’s best intentions, those conditions not borne from the UDO/MPC and the record are unreasonable and, therefore, are an abuse of the board’s discretion. With this legal underpinning, the court will proceed to review the board’s conditions.” Id. at *7.

The court did not reach the issues related to preemption, instead holding the conditions subject to those arguments were unreasonable.

C. Regulatory Enforcement: Testing the Boundaries of Penalty Assessment and Liability

The two decisions included in this section deal with different aspects of regulatory enforcement. In the first, EQT Production Company v. DEP, No. 6 MAP 2017, --- A.3d ---, 2018 WL 1516385 (Pa. Mar. 28, 2018), the Supreme Court of Pennsylvania disagreed with DEP’s broad interpretation of the scope of a civil penalty assessment under the Clean Streams Law. In the second, the Commonwealth Court agreed with the Environmental Hearing Board’s (“EHB”) imposition of personal liability on the managing member of a limited liability company under a participation theory, but the court reversed and remanded back to EHB to determine the extent of that individual liability. B & R Resources LLC v. DEP, No. 1234 C.D. 2017, --- A.3d ---, 2018 WL 1320232, (Pa. Commw. Ct. Mar. 15, 2018).

The events leading to EQT Production Company v. DEP began in 2012 when EQT Production Company (“EQT”) notified DEP that an impoundment containing flowback water from gas well development leaked. Id. at *1. DEP sought to assess penalties on EQT for the “continuing violation” under the Clean Stream Law resulting from “passive migration of contaminants from soil to [waters of the commonwealth].” Id. This became known as the “soil-to-water” theory. The Clean Streams Law subjects violators to as much as $10,000 per day in civil penalties for each violation. DEP sought to collect civil penalties for “each day that a contaminant deriving from the impoundment continue[d] to be present in any waters of the commonwealth.” Id. at *2 (internal quotations omitted). Under that interpretation of the Clean Streams Law, DEP sought $4,532,296 in penalties from EQT. Id.

EQT filed a complaint for declaratory relief seeking court intervention to declare DEP’s interpretation of the Clean Streams Law invalid. EQT argued that “[s]ections 301, 307 and 401, in conjunction with section 605 of the Clean Streams Law, 35 P.S. § 691.605 (establishing civil penalty amounts for violations) grant DEP authority to assess a civil penalty only for the days that pollutants were actually discharged from the [impoundment]” but should not be continually accruing “any days that previously released constituents passively migrate
through the environment into groundwater or surface water.” Id.

DEP then clarified its legal theory on penalty assessment:

[I]ndustrial waste from the company’s impoundment remained in bedrock and soil beneath the impoundment’s liner for a period of time longer than EQT contemplated in its portrayal of an “actual discharge”; industrial waste can bind to the soil or perch above an aquifer, “continually polluting new groundwater as groundwater flows through the column of bound or perched industrial waste”; EQT’s “plume of pollution … progressively and over time moved into regions of uncontaminated areas of surface and groundwater”; and this would continue for months or years.

Id. at *3.

EQT countered, arguing “[u]nder the express text of the [Clean Streams Law], there is no violation for days on which an industrial waste or a substance resulting in pollution, after having previously been discharged into a water of the commonwealth, continues to be present in that water.” Id.

DEP assessed ongoing penalties against EQT for water pollution based on its interpretation of the Clean Streams Law to mean that each day that contaminants migrated from one body of water to another body of water constituted a separate violation. Id. at *1. DEP was advancing what the court called the “water-to-water” theory of serial violations upon which DEP could assess a civil penalty for each violation. The court found that, because the Clean Streams Law did not expressly provide for this sort of “massive civil penalty exposure” for a strict liability offense, the DEP’s interpretation was “too unreasonable to afford deference.” Id. at *15. Instead, the court found EQT’s argument persuasive, that the violation of the Clean Streams Law is the discharge into the body of water and not the continued presence of contaminants.

The court noted that the application for summary relief filed by EQT requests confirmation “that the mere presence of contaminants in the environment does not, in and of itself, establish a violation, and that movement into water is a touchstone.” Id. at *4 (emphasis added). The court agreed, finding that it was most “reasonable to conclude the Legislature was focused on protecting the waters of the commonwealth with reference to the places of initial entry” under “the most natural reading of the statute.” Id. at *4 (emphasis added). Id. at *15. While appreciating the “critical need for protection to vindicate the constitutional entitlement of the citizenry to a clean environment” and recognizing that the “Clean Streams Law is designed as a mechanism to advance [that] objective,” the court did not agree with DEP’s expansive interpretation. Id.

Notably, the court did not address DEP’s similar soil-to-water theory of penalty assessment because EQT applied for summary relief only as to the water-to-water theory. Therefore, the Commonwealth Court will likely see arguments raised by the soil-to-water interpretation of Clean Streams Law penalties.

B & R Resources LLC v. DEP is an appeal of an order by the Environmental Hearing Board dismissing the appeal of B&R Resources LLC and Richard Campola of a DEP administrative order (“Administrative Order”). The Administrative Order held both B&R Resources LLC and Campola jointly and severally liable for an obligation to plug 47 abandoned oil and gas wells (the “Wells”). DEP imposed personal liability on Campola under a participation theory, stating he “personally participated” in B&R Resources, LLC’s failure to plug the wells. Id. *2. Relying on the Commonwealth Court’s decision in Kaites v. Department of Environmental Protection and its own decision in Whitemarsh Disposal Corp. v. Department of Environmental Protection, EHB held Campola personally liable under the participation theory because “he had knowledge of the violations, intentionally neglected to remedy the violations and had the authority and duty to address the violations.” Id. at *3 (citing Kaites, 529 A.2d 1148 (Pa. Commw. Ct. 1987) and Whitemarsh, EHB Docket No. 97-099-L, 2000 EHB 300, 2000 WL 305765 (Mar. 20, 2000)). Dismissing the appeal, EHB found Campola’s liability extended to all 47 wells because he intentionally neglected to direct B&R Resources to plug the Wells.

The Commonwealth Court reversed and remanded, finding that while Campola can be personally liable for intentionally neglecting B&R Resources’ obligations under the administrative order, his personal liability may extend only so far as he could have directed B&R Resources to remedy the violations. The court rejected Campola’s argument that he should not be liable for his failure to act because the participation theory only attaches where the individual made some affirmative, bad act to accomplish the wrong. “[A]doption of an absolute rule that intentional and knowing inaction cannot support participation theory liability could create the anomalous result of deterring compliance with statutory obligations.” Id. at *7. As a matter of public policy, Campola’s “argument that intentional CONTINUED ON PAGE 13
inaction can never support participation theory liability must be . . . rejected.” *Id.*

While the court upheld the imposition of individual liability under the participation theory, it reversed EHB’s ruling that Campola is liable for all 47 wells because EHB did not make a finding on how many of the wells B&R Resources could have plugged. *Id.* at *8. Failure to plug each well subject to the administrative order constitutes a discrete violation of the 2012 Oil and Gas Act. *Id.* Under *Kaites*, “a corporate or limited liability company officer is liable for a statutory violation under the participation theory only if there is a causal connection between his wrongful conduct and the violation.” *Id.* (citing *Kaites*, 529 A.2d at 1152). As such, Campola can only be personally liable for B&R Resources’ failure to plug the wells to the extent that B&R Resources had the ability to do so. *B & R Resources*, 2018 WL 1320232, at *8. Therefore, the court remanded to EHB “for additional findings of fact as to how many, if any, of the wells could have been plugged if [Campola] had caused B&R Resources to make reasonable efforts to plug the wells and for adjudication of [Campola’s] liability in accordance with those findings.” *Id.*

**PBA Launches New Website: A Few Pointers for Users**

The Pennsylvania Bar Association launched a newly designed website on April 30. Here are the top six things we think you’ll want to know.

1. The navigation for the new website is member-tested, which simply means that lawyers helped us design the site so that the information you want is easier to find. The former long lists of links on the home page have been replaced with a handful of links to larger categories of information.

2. Members should immediately look for the large blue Member Login box near the top left corner of the screen. By logging in, members have immediate access to nearly all PBA information on the site (the exceptions include some information about PBA sections that you have not joined).

3. You will notice small key icons next to some links. The keys indicate that the links go to members-only information. For PBA members, most of those keys will disappear after logging in. See number 2 about the “Member Login” box.

4. Like social media? There is now a live Twitter feed on the home page.

5. The new Calendar includes added features, including links to helpful details such as online registration forms, brochures, directions and registration deadlines.

**PBA Consolidates Administrative Functions to Ensure Continuation of PBI’s High-quality Educational Programming**

2017-18 PBA President Sharon R. López has issued the following statement to PBA members and the legal community:

“The Pennsylvania Bar Institute (PBI), the legal education arm of the PBA, has provided high quality CLE for more than 50 years. In order to assure that the exceptional CLE offerings under the PBI brand through its courses, yellow books and the like will continue and remain the benchmark for such offerings, the members of PBI voted on April 18 to take certain reorganization steps to make PBI more fiscally and organizationally efficient and effective.

We can assure you that the high quality of CLE you have come to expect and appreciate from PBI will continue uninterrupted.”

Questions and concerns should be directed to PBA Executive Director Barry M. Simpson at barry.simpson@pabar.org.
Pennsylvania Superior Court Rules that Claim of Trespass by Hydraulic Fracturing is Not Precluded by Rule of Capture

By Ross H. Pifer, Clinical Professor of Law and Director of the Center for Agricultural and Shale Law at Penn State Law

In a decision with significant practical and jurisprudential implications, the Pennsylvania Superior Court, on April 2, 2018, ruled that a claim of trespass by hydraulic fracturing is not foreclosed by application of the rule of capture. Briggs, et al. v. Southwestern Energy Production Company, 2018 PA Super 79, No. 1351 MDA 2017. After reviewing the scant national case law on this issue, the court concluded that a Pennsylvania landowner may present an actionable trespass claim where oil and gas are drained from his or her property as a result of “subsurface fractures, fracturing fluid and propellant” that extend onto the landowner’s subsurface property interest. In so ruling, the Briggs court rejected the reasoning of the Texas Supreme Court in the landmark case of Coastal Oil & Gas Corp. v. Garza Energy Trust, 268 S.W.3d 1 (Tex. 2008), which denied a claim of damages resulting from drainage due to hydraulic fracturing.

Factual and Procedural Background

Adam Briggs, Paula Briggs, Joshua Briggs, and Sarah Briggs (collectively referred to as “the Briggs”) own an 11.07-acre parcel of real estate in Susquehanna County. Although the Superior Court opinion is silent on the extent of the subsurface property interest owned by the Briggs, it appears that the Briggs own the natural gas rights underlying the 11.07-acre parcel. According to the court, Southwestern Energy Production Company (“Southwestern”) holds a gas lease and operates gas wells on property that is adjacent to the Briggs property. Southwest does not hold a lease to the Briggs property, and the opinion does not indicate whether there were any attempts to negotiate an oil and gas lease on the property.

On Nov. 5, 2015, the Briggs filed a complaint against Southwestern asserting conversion and trespass claims due to the alleged drainage of natural gas from their property resulting from hydraulic fracturing activities conducted at Southwestern wells on adjacent property. Southwestern responded by arguing that the rule of capture barred the Briggs’ claims. Following some discovery activities and the filing of several motions, the Susquehanna County Court of Common Pleas granted Southwestern’s Motion for Summary Judgment, on Aug. 8, 2017, opining that the rule of capture did not allow for damages caused by drainage that occurs pursuant to hydraulic fracturing. The Briggs then appealed this ruling to the Pennsylvania Superior Court.

Prior Case Law Addressing Trespass by Hydraulic Fracturing

After reciting the arguments of the parties and briefly reviewing the application of the Rule of Capture in Pennsylvania, the Briggs court noted that it had discovered only two opinions nationally that had addressed the applicability of the rule of capture to hydraulic fracturing. The earliest of these court opinions is the Texas Supreme Court ruling in Coastal Oil & Gas Corp. v. Garza Energy Trust, 268 S.W.3d 1 (Tex. 2008). More recently, the United States District Court for the Northern District of West Virginia addressed this issue in Stone v. Chesapeake Appalachia, LLC, 2013 WL 2097397 (N.D.W.Va. Apr. 10, 2013). Stone is an unreported case that was subsequently vacated by agreement of the parties pursuant to a settlement. Stone v. Chesapeake Appalachia, LLC, 2013 WL 7863861 (N.D.W.Va. July 30, 2013). Nevertheless, the Briggs court placed great reliance upon the Stone opinion.

In Coastal Oil v. Garza, the Texas Supreme Court was presented with, but declined to address, the issue of whether hydraulic fracturing could form the basis of a trespass. Instead, the Coastal Oil court found that the rule of capture prevented plaintiff landowners from demonstrating the requisite injury necessary to prevail on their trespass claim. The Coastal Oil court relied upon four bases for its ruling: (1) available self-help remedies, such as drilling an offset well or enforcement of an implied covenant, are adequate; (2) the administrative agency overseeing oil and gas activities, the Texas Railroad Commission, is the preferred entity to address the relative rights between competing oil and gas interest owners; (3) litigation is a poor method for determining the value of hydrocarbons drained as a result of hydraulic fracturing; and (4) none of the groups involved with oil and gas development, including regulators and landowners, want to impose liability for drainage due to hydraulic fracturing.

The Coastal Oil v. Garza case generated three separate opinions with Justice Johnson authoring an opinion that dissented from the court’s decision on the issue of trespass. Justice Johnson and two other justices believed that, before determining whether the rule of capture prevented the imposition of liability, it was necessary to determine if a trespass had occurred. While Justice Johnson disagreed with “some of the four reasons” expressed by the Coastal Oil court, his dissenting opinion was based upon his belief that the court’s...
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opinion was changing the rule of capture as he believed that a trespass by hydraulic fracturing should be treated in the same manner as a trespass by a well bore.

The dissent of Justice Johnson was cited extensively by the federal district court in Stone v. Chesapeake Appalachia, LLC, which opined that the West Virginia Supreme Court would rule “that hydraulic fracturing under the land of a neighboring property owner without that party’s consent is not protected by the ‘rule of capture,’ but rather constitutes an actionable trespass.” Stone at *8. The Stone court disputed each of the four reasons provided by the Coastal Oil majority, but placed special emphasis upon the impact that precluding trespass liability would have upon small landowners who lack the resources to utilize self-help remedies and the leverage to negotiate a lease with an unfair or unwilling gas company.

Ruling of the Superior Court and Subsequent Proceedings
Just as the Stone court, the Briggs court found Justice John-son’s dissent in Coastal Oil to be persuasive. The Briggs court “conclude[d] that hydraulic fracturing is distinguishable from conventional methods of oil and gas extraction.” Briggs at *20. The court cited authority for the proposition that the rule of capture is based upon the rationale that hydrocarbons have a “fugitive nature,” while opining that shale gas was “non-migratory in nature.” Again, in conformity with the Stone court, the Briggs court opined that the average landowner could not use self-help remedies to protect his or her interest and that companies would have no incentive to negotiate with small landowners if trespass liability was precluded.

While once again noting “the distinctions between hydraulic fracturing and conventional gas drilling,” the Briggs court reached its ultimate conclusion that “the rule of capture does not preclude liability for trespass due to hydraulic fracturing.” Briggs at *23. As such, the court reversed the grant of summary judgment in favor of Southwestern and remanded the case for further consideration of both the trespass and conversion claims. The court noted that there was no evidence as to the distance that the fractures had traveled from Southwestern’s well, but it believed that a genuine issue had been raised as to whether a trespass had occurred.

On April 16, 2018, Southwestern filed an application seeking re-argument before the entire Superior Court. Additionally, a number of organizations and individuals, including the Pennsylvania Chamber of Business and Industry, Pennsylvania Independent Oil and Gas Association, Marcellus Shale Coalition, Independent Petroleum Association of America, American Petroleum Institute, and American Exploration and Production Council, have filed applications for leave to file an amicus brief in the action.

Questions Raised by the Superior Court Opinion
The Superior Court opinion in Briggs is based upon the court’s characterization of differences between modern shale oil and gas development and oil and gas development from an earlier time. The Briggs court places great emphasis on two such differences. First, the court repeatedly distinguishes hydraulic fracturing from conventional oil and gas development. Second, the Briggs court notes that the rule of capture has developed because of the “fugitive” nature of oil and gas while gas in shale formations lack this characteristic. Each of these characterizations of differences raises questions about the application of the Briggs opinion.

The Briggs court noted, in a passage quoted from the trial court opinion, that hydraulic fracturing has been used commercially since 1949. Briggs at *12. What is commonly referred to as unconventional oil and gas development did not begin until decades later. When hydraulic fracturing began to be used, it was done so in what we now refer to as conventional oil and gas development, and its use in conventional oil and gas development has continued to the present time. It simply is not accurate to distinguish hydraulic fracturing from conventional development because these two terms have significant overlap. The Briggs court’s repeated reference to this false dichotomy raises questions about its opinion, including what is intended to be the scope of the ruling. Does the rule of capture continue to apply for all conventional development or only to conventional development where hydraulic fracturing technology has not been used? If the action of hydraulic fracturing is what precludes application of the rule of capture, then is it relevant if hydraulic fracturing was utilized in any of the Pennsylvania rule of capture cases discussed in the Briggs opinion?

The Briggs opinion also relies on the proposition that gas in conventional reservoirs migrates freely across property lines while gas in shale formations is locked in place. While gas in shale formations does not move as freely as does gas in conventional formations, gas does migrate within and out of shale formations. The fact that shale formations historically have been referred to as source rock for many conventional formations demonstrates this ability to migrate. What the Briggs court is doing is essentially establishing a standard where the application of the rule of capture is based upon the permeability of the geologic formation in which the gas is presently located. In Butler v. Powers Estate, 65 A.3d 885 (Pa. 2013), the Pennsylvania Supreme Court applied Dun-
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The Briggs court spent little time addressing the policy implications of limiting the application of the rule of capture as it did. The court focused its attention on the leasing impacts upon small landowners, opining that these landowners are harmed by the application of the rule of capture. The court, however, did not address the broader policy considerations impacting all participants – including royalty owners – in oil and gas development as well as the interest that the general public has in advancing the efficient extraction of oil and gas. In addressing a well-established principle of oil and gas law that is largely based upon public policy considerations, one can question whether the Briggs court fully considered the appropriate public policy considerations and the likely impacts of its decision. It is noteworthy that in its expression of the fourth reason to apply the rule of capture to this issue, the Coastal Oil court considered the impacts upon “every corner of the industry – regulators, landowners, royalty owners, operators, and hydraulic fracturing service providers.”

Practical Impacts of the Superior Court Opinion

Facing the potential of trespass liability, oil and gas operators are likely to reconsider their well siting practices as well as their leasing strategies. If an operator wants to minimize the likelihood of hydraulically fracturing across a property line, then that operator will need to position the well bore a sufficient distance from that property line to avoid a trespass. As the Briggs court noted, in a passage quoted from the trial court opinion, estimates of the distance that hydraulic fracturing fluid will travel is “at best imprecise.” Briggs at *13. Accordingly, well operators may choose to increase their distance from property lines to account for the uncertainties of the process. In so doing, operators will be creating buffer zones around the perimeters of properties where gas will be stranded. This will act to the disadvantage of well operators as well as the royalty owners who will receive no benefit from this unextracted gas.

Companies also may seek to acquire lease holdings across a broader range of land to provide for a buffer zone off of the leasehold or drilling unit where development is taking place. This will be to the benefit of those landowners whose property otherwise may not be of interest to oil and gas companies. There will be a problem of stranded gas and uncollected royalties upon these parcels, but the landowners at least will receive lease bonuses or delay rentals.

Another impact of the ruling may be a likely increase in trespass litigation owing to the uncertainties in the hydraulic fracturing process. On a case by case basis, expert evidence will be required on both sides to reach a conclusion as to the source of the gas extracted.

Additionally, as policy discussions take place as to how to protect the interests of all of the relevant parties – including small unleased landowners – perhaps the topic of compulsory pooling and integration will be considered in a manner that recognizes that there can be broad benefits in a well-considered process.

Ethics Opinions for Members

Ethics opinions are issued by the PBA Legal Ethics and Professional Responsibility Committee.

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Contact Information

Any PBA member with an ethical question concerning his or her own prospective conduct may call the PBA Ethics Hotline at 800-932-0311, ext. 2214, or 717-238-6715. The PBA Ethics Hotline is not available to non-PBA members or members of the public.

Go to www.pabar.org
2018 WL 1572729, 2018 PA Super 79

2018 WL 1572729
Superior Court of Pennsylvania.

Adam BRIGGS, Paula Briggs, his wife,
Joshua Briggs and Sarah Briggs, Appellants
v.
SOUTHWESTERN ENERGY
PRODUCTION COMPANY

No. 1351 MDA 2017
| Submitted January 16, 2018
| Filed April 02, 2018

Synopsis
Background: Landowners brought action against energy company on adjoining property for trespass due to hydraulic fracturing. The Court of Common Pleas, Susquehanna County, Civil Division, No: 2015–01253, Linda Wallach Miller, J., granted summary judgment in favor energy company and denied landowners’ motion for partial summary judgment. Landowners appealed.

Holdings: The Superior Court, 1351 MDA 2017, Musmanno, J., held that:

[1] as matter of first impression, rule of capture does not preclude liability for trespass due to hydraulic fracturing, and

[2] genuine issue of material fact existed as to whether energy company’s operations resulted in trespass.

Reversed and remanded.

West Headnotes (7)

[1] Appeal and Error
Nature and Scope of Decision
Trial court’s order granting summary judgment in favor of energy company was final and appealable in trespass action, where order resolved all claims presented in action.

Cases that cite this headnote

Existence or non-existence of fact issue
Only when the facts are so clear that reasonable minds could not differ can a trial court properly enter summary judgment.

Cases that cite this headnote

Discretion of lower court; abuse of discretion
Appeal and Error
Review for correctness or error
Trial court’s order regarding summary judgment will be reversed only where it is established that the court committed an error of law or abused its discretion.

Cases that cite this headnote

Trespass to Real Property
A person is subject to liability for trespass on land in accordance with the dictates of Restatement (Second) of Torts section governing liability for intentional intrusions on land. Restatement (Second) of Torts § 158.

Cases that cite this headnote

Particular Cases
Genuine issue of material fact existed as to whether energy company’s hydraulic fracturing operations resulted in subsurface trespass to adjoining property, precluding summary judgment in trespass and conversion action.

Cases that cite this headnote

Recovery for Trespass or Conversion

Cases that cite this headnote
Rule of capture does not preclude liability for trespass due to hydraulic fracturing.

Cases that cite this headnote


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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.

Cases that cite this headnote

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

Attorneys and Law Firms

Laurence M. Kelly, Montrose, for appellants.

Jeffrey J. Malak, Wilkes-Barre, for appellee.

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

Opinion

OPINION BY MUSMAMNO, J:

*1 [1] 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. 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.

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. Southwestern also filed a counterclaim for declaratory relief, requesting that the trial court confirm that Southwestern did not trespass on Appellants' property.

*2 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, 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 obduracy[,]” 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, 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.


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 hydraulic 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 hydraulic 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?


Appellants argue that the extraction of natural gas from beneath their property is a trespass, despite the lack of physical intrusion by 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). 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 the source of natural gas obtained through hydraulic fracturing, and therefore, the rule of capture should not apply. Id. at 11.

*4 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.


    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, 130 Pa. 235, 18 A. 724 (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, 15 S.Ct. 245, 39 L.Ed. 304 (1895) (citing Vandergrift and Westmoreland, acknowledging the “peculiar character” of oil and gas, and reiterating the Westmoreland rule).

In Jones v. Forest Oil Co., 194 Pa. 379, 44 A. 1074 (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.*

*5 The Pennsylvania Supreme Court reaffirmed the rule of capture in *Barnard v. Monongahela Natural Gas Co.*, 216 Pa. 362, 65 A. 801 (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 *6* 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*, 620 Pa. 1, 65 A.3d 885, 894 (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 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.

*6* 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/uoog/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 possessor 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.

*7 In a concurring and dissenting Opinion joined by two additional justices, Justice Phil Johnson 7 considered the rationale for the rule of capture, and pointed out that “[a]s 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 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. In Stone, the plaintiffs were the owners of a 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. 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.

*8 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 "[i]t sees no reason why the desires of the industry should override 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 "[f]ound 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.

[5] 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 894. 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).

*9 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.

[6] [7] 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 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 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.

*10 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.

All Citations

--- A.3d ----, 2018 WL 1572729, 2018 PA Super 79

Footnotes

1 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 Order granting 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 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).

2 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).

3 The Order was docketed on August 21, 2017.

4 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 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.

5 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.


7  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."

8  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).

9  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.

10  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.