

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 1351 MDA 2017

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

Appellants,

v.

SOUTHWESTERN ENERGY PRODUCTION COMPANY,
Appellee.

**APPLICATION OF APPELLEE SOUTHWESTERN ENERGY
PRODUCTION COMPANY FOR REARGUMENT *EN BANC***

Appeal from the Order of the Court of Common Pleas of Susquehanna
County, Entered August 8, 2017, at Docket No. 2015-01253

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APPLICATION FOR REARGUMENT *EN BANC*

I. INTRODUCTION

Hydraulic fracturing is not new in Pennsylvania. It has been utilized in the vast majority of the more than 75,000 conventional and unconventional wells drilled in this state over the past 50 years. Improvements to this widely used method to extract oil and gas, coupled with another long-existing method, horizontal drilling, have allowed Pennsylvania to become the second largest natural gas producing state in the country. Conducted under permits granted by the Pennsylvania Department of Environmental Protection, it not the kind of activity that should be subject to a new type of tort liability. Yet the panel's decision creates a new type of tort liability for hydrofracturing without a principled basis for breaking with established Pennsylvania law, which, for more than 100 years, has encouraged the efficient use of the Commonwealth's natural resources and rightly limited liability for oil and gas extraction.

The exploration of Pennsylvania's vast oil and gas reserves is a major industry of great national importance. This industry has placed our Commonwealth at the vanguard of creating national energy independence, while also creating jobs and significant new income to rural property owners in Pennsylvania. The two-judge panel's decision, representing the views of only one commissioned judge, threatens to set back this industry and is contrary to

settled Pennsylvania Supreme Court precedent. This case merits reargument *en banc*.

II. ORDER IN QUESTION

The panel's April 2, 2018 Order reversed the trial court's August 8, 2017 Order granting summary judgment for Southwestern on the Briggs' claims for trespass, conversion, and punitive damages relating to the alleged seepage of gas from the Briggs' property allegedly caused by Southwestern's hydrofracturing activity on adjacent property. The panel concluded that the rule of capture does not preclude trespass liability for the seepage of oil and gas resulting from hydrofracturing activity. The Opinion and Order are appended under Tab A.

III. POINTS OVERLOOKED OR MISAPPREHENDED BY THE PANEL

A. The panel relied upon out-of-state dissenting and vacated opinions to break with established Pennsylvania law.

The panel's decision breaks with established Pennsylvania law, and in so doing, it relies upon out-of-state cases that do not support its decision. A long line of Pennsylvania cases establishes that the rule of capture precludes trespass liability for the seepage of oil and gas resulting from extraction activities on one's own property. *See Westmoreland & Cambria Natural Gas Co. v. De Witt*, 18 A. 724 (Pa. 1889); *Barnard v. Monongahela Natural Gas Co.*, 65 A. 801 (Pa. 1907); *see also Minard Run Oil Co. v. U.S. Forest Service*, 670 F.3d 236, 256 (3d Cir. 2011).

Without convincingly distinguishing these controlling Pennsylvania cases, the panel overturned their application to hydrofracturing in reliance on a ***dissenting opinion*** in *Coastal Oil & Gas Corp. v. Garza Energy Trust*, 268 S.W.3d 1 (Tex. 2008), and a ***vacated opinion***¹ in *Stone v. Chesapeake Appalachia, LLC*, No. 5:12-CV-102, 2013 WL 2097397 (N.D.W.Va. Apr. 10, 2013), *order vacated*, 2013 WL 7863861 (N.D.W.Va. July 30, 2013).

B. The panel misapprehended material facts.

1. Hydrofracturing is not a new activity that requires the application of new legal principles.

The panel conducted its own, outside-the-record investigation about hydrofracturing, and incorrectly concluded that this is a new method of oil and gas extraction, requiring the application of new legal principles. Contrary to what the panel concluded, hydrofracturing was first introduced nearly 70 years ago, and it is the principal method of oil and gas production in Pennsylvania. *See United States Steel Corporation v. Hoge*, 468 A.2d 1380 (Pa. 1983); *Humberston v. Chevron U.S.A., Inc.*, 75 A.3d 504, 510-11 (Pa. Super. 2013); *Coastal Oil*, 268 S.W.3d at 6 (“First used commercially in 1949, fracing is now essential to economic production of oil and gas commonly used throughout Texas, the

¹ Because vacated opinions are not reviewable, they should not “spawn[] any legal consequences.” *United States v. Munsingwear, Inc.*, 340 U.S. 36, 41 (1950).

United States, and the world.”).² Hydrofracturing is not limited to horizontal wells for the exploration of shale gas. Many of the conventional vertical wells that have been drilled since the 1970s also were completed using hydrofracturing.³

The well-established legal principles that first developed when vertical drilling was the norm have naturally and easily applied to hydrofracturing for multiple decades. Although Pennsylvania courts have not expressly decided the issue in this case, landowners and oil and gas extractors have organized their affairs under the assumption that the rule of capture applies to hydrofracturing as a natural extension of cases such as *Barnard* and *Jones v. Forest Oil Co.*, 44 A. 1074 (Pa. 1900).⁴

² See also David E. Pierce, *Developing a Common Law of Hydraulic Fracturing*, 72 U. Pitt. L. Rev. 685 (2011).

³ See Tanya J. Gallegos & Brian A. Varela, USGS, *Trends in Hydraulic Fracturing Distributions and Treatment Fluids, Additives, Proppants, and Water Volumes Applied to Wells Drilled in the United States from 1947 through 2010—Data Analysis and Comparison to the Literature* (2015), <https://pubs.usgs.gov/sir/2014/5131/pdf/sir2014-5131.pdf#>.

⁴ The panel’s statement 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,” does not appreciate that the existing capture-rule cases naturally extend to hydrofracturing. Opinion at 11-12. The panel’s statement also goes beyond the facts alleged. The complaint nowhere alleges that Southwestern’s hydrofracturing fluid flowed underneath the Briggs’ property. (R. 2a-5a).

2. **Regardless of location, the nature of gas is the same, and it moves when humans intervene.**

The panel based its decision largely on its determination that the rule of capture only applies to fugacious substances and that oil and gas within the shale formation is *not* fugacious, while oil and gas in a reservoir closer to the surface *is* fugacious. However, the nature of the oil and gas is the same in both contexts. See *Westmoreland & Cambria Natural Gas*, 18 A. at 725 (noting that gas “is a mineral with peculiar attributes”). Their properties do not change based on location. Regardless of whether gas is in a reservoir near the surface or farther below the surface in the shale formation, the only thing keeping it in its location is the earth around it, and the only thing that triggers its movement is human intervention. Gas is gas, and it will flow when humans intervene. See *Barnard*, 65 A. at 801 (“[O]il and gas are fugitive in their nature and will by reason of inherent pressure seek any opening from the earth’s surface that may reach the sand where they are confined.”); *Jones*, 44 A. 1074 (concluding that trespass liability should not attach to seepage caused by vacuum pumps and noting that it is lawful to produce oil by the “exercise of all the skill and invention of which [humankind] is capable”).

In conventional oil and gas exploration, the human intervention is a drill tapping into a reservoir. Hydrofracturing simply adds another form of human intervention—namely, the injection of fluid and proppant into a well, which

then moves through the natural cracks in the earth. *See Coastal Oil*, 268 S.W.3d at 6-7. The rule of capture protects human intervention with the natural containment of a fugacious substance when the human activity occurs within the actor's property—regardless of what may naturally result from that activity. Hydrofracturing is just another type of intervention. (R. 2a-5a, R. 105a). Thus, the distinction the panel drew to support its decision is neither logical nor legally significant.

3. The drilling activity in this case occurred solely on Southwestern's leased property.

The panel also overlooked that this case does not involve drilling under and across a property line of a neighboring landowner, which would be actionable as a trespass, nor does it involve anything that would constitute an actionable private nuisance, such as vibrations that cause damage to adjoining property. The Briggs only alleged that Southwestern has been extracting gas from wells *on property that Southwestern leases*. (R. 3a) (“SWN has been and continues to extract natural gas . . . by way of wells located in . . . units” “owned and operated by SWN.”); (R. 105a) (“[T]he boreholes of [SWN's wells] . . . are located on land in SWN units.”). They have not alleged that Southwestern has drilled under and across their property line, nor have they alleged that Southwestern's activity on its leased property has resulted in vibrations, odors, noise, or other effects that interfere with their enjoyment of

their property. (R. 2a-5a). Indeed, the Briggs have not even pleaded that the subsurface fractures or fracturing fluid from Southwestern’s hydrofracturing activities crossed over their property line. *Id.*

As such, this case solely involves the alleged flow of gas as the result of activity conducted on Southwestern’s property—which are the same facts involved in conventional drilling, and which are protected by the core rule of capture. By failing to appreciate these factual similarities, the opinion does not provide any persuasive explanation for why the nature of hydrofracturing should require a different analysis from the conventional drilling capture-rule cases. *See Westmoreland & Cambria*, 18 A. 724; *Jones*, 44 A. 1074; *Barnard*, 65 A. 801.

IV. REASONS RELIED UPON FOR ALLOWANCE OF REARGUMENT *EN BANC*

A. The decision will hamper oil and gas production.

If not revisited, the panel’s decision will hamper oil and gas production in Pennsylvania, negatively affecting the economy and the supply of oil and gas. *See Ely v. Cabot Oil & Gas Corp.*, 38 F. Supp. 3d 518, 533-34 (M.D. Pa. 2014) (discussing the “various economic benefits that have been shown to flow from natural gas drilling”).⁵ Oil and gas extractors who engage in hydrofracturing

⁵ A report prepared for the American Petroleum Institute concluded that in 2015, the oil and gas industry supported nearly 322,600 jobs in Pennsylvania, provided nearly \$23 million in wages, and contributed nearly \$44.5 to the state’s

cannot control the extent or direction of the fractures. Rather, “[h]ydraulically-injected fluids will follow a path pre-ordained by nature through those portions of reservoir rock most susceptible to fracturing.”⁶

In holding that oil and gas extractors are not immunized from the natural, uncontrollable results of a commonly used and well-accepted means of producing oil and gas, the decision creates a new type of tort liability that stands to unleash a torrent of speculative lawsuits that could result in harm to Pennsylvania citizens who receive royalty payments or work in the oil and gas industry. Oil and gas producers will face an uncertain quandary regarding the thousands of existing wells that currently contribute to the economic viability of this Commonwealth, as well as future wells that may never be drilled.

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

⁶ Owen L. Anderson, *Subsurface Trespass After Coastal v. Garza*, 60 Inst. on Oil & Gas L. & Taxation 65, 94 (2009) (“To maximize recovery of hydrocarbons to prevent underground waste, frac operations must extend throughout the unit—meaning that fractures must extend beyond the property lines. The extent of the fractures cannot be controlled. Hydraulically-injected fluids will follow a path pre-ordained by nature through those portions of reservoir rock most susceptible to fracturing. Because the fractured reservoir rock is thousands of feet below the surface, the precise location and extent of the fractures cannot be predicted beforehand and can only be indirectly estimated through microseismic surveying conducted during the frac.”).

Pennsylvania's prominence among the country's gas-producing states will be in doubt.

The rule of capture is a recognition that these kinds of accepted, economically and socially beneficial activities should be immunized from tort liability, because if they are not, then few members of society will risk engaging in those activities. *See, e.g., Barnard*, 65 A. at 801 (concluding that the rule of capture should apply because a neighboring owner whose oil or gas may be drained “certainly ought not to be allowed to stop his neighbor from developing his own farm”). This rationale applies equally now when the accepted and beneficial means of oil and gas production is hydrofracturing, rather than conventional drilling. The panel's decision removes this necessary limitation on liability, without appreciating the consequences of the holding.⁷

B. The decision will require courts and juries to undertake the fool's errand of resolving speculative factual questions regarding the location of underground fluids.

The panel's decision will also require courts and juries to engage in speculative, complex fact-finding. The rule of capture is “a rule of necessity

⁷ Leading property law and oil and gas scholars have similarly concluded that the seepage from hydrofracturing should not result in trespass liability. *See* Owen L. Anderson, *Subsurface Trespass: A Man's Subsurface Is Not His Castle*, 49 Washburn L.J. 247 (2010); Christopher S. Kulander & R. Jordan Shaw, *Comparing Subsurface Trespass Jurisprudence—Geophysical Surveying and Hydraulic Fracturing*, 46 N.M. L. Rev. 67, 110-16 (2016).

caused by the inability to determine the ownership of natural gas or oil located in an underground pool.” Opinion at 7 (quoting Appellants’ Brief at 11). Oil and gas are fluids, and determining their location and movement miles below the surface of the earth is speculative. If trespass claims for hydrofracturing are actionable, then courts and juries will have to determine where hydrofracturing fluids flow. But trying to sort out where hydrofracturing fluid flows is the same fool’s errand that the Supreme Court has refused to allow trial courts and juries to undertake since it first applied the rule of capture to oil and gas in the 1800s. *See Westmoreland & Cambria Natural Gas Co.*, 18 A. 724; *see also Coastal Oil*, 268 S.W.3d at 16.

C. The decision will upend property rights.

Not only will the panel’s decision hamper oil and gas production in a way that will negatively affect Pennsylvania’s economy and access to valuable resources, but it will also upend property rights. The decision prevents property owners from using any portion of their property for hydrofracturing activities that might result in seepage of oil and gas from neighboring property, without facing liability for trespass. Even though conventional drilling is allowed at property lines, *Barnard*, 65 A. 801, property owners will not be able to use the edges of their property for unconventional drilling. They also will not be able to use any other area of their property if the fluid and proppant that they inject down into a well located on their own property might follow the

natural cracks of the earth over an adjacent property line.⁸ Property owners cannot control and do not know where those cracks are and where the fluids might flow, and they will choose not to risk liability by using wide swaths of their property for purposes that are expressly authorized at the state and local level.⁹

In addition to upending the producers' property rights, the decision will also upend the rights of landowners who have entered into leases to allow drilling on their property. To avoid trespass liability, producers will either have to stop drilling, which will result in no production and no royalty payments to landowners, or they will have to add all neighboring landowners from under whose property oil and gas might possibly seep into the royalty pool. This will dilute the interests of the landowners from whose property the oil and gas is actually being produced.

⁸ "Because it is not possible to control the precise location of fissures created by the fracturing process, imposing liability for fissures that cross property boundaries would cause operators to limit their use of hydraulic fracturing and may, ultimately, cause them to abandon the process altogether—which would mean abandoning development of most shale formations." Pierce, *supra* note 2 at 686.

⁹ Pursuant to statutory authority, the Pennsylvania Department of Environmental Protection regulates the location and operation of hydrofracturing activity and requires producers to obtain permits before engaging in this activity. See 25 Pa. Code § 78a.1 *et seq.* Municipalities also may regulate the location of hydrofracturing activities under their zoning ordinances pursuant to the Municipalities Planning Code, 53 P.S. § 10101 *et seq.*

D. The decision is of national significance.

The panel's decision does not only affect Pennsylvania. Because hydrofracturing is the most economic and commonly used method of producing oil and gas across the country, and because Pennsylvania is the second largest natural gas producing state, this Court's decision unsettles the legal landscape for the entire industry. *See Coastal Oil*, 268 S.W.3d at 6. Numerous publications across the country have commented on the opinion—many of them critically. Copies of some of these publications are appended under Tab C. These sources express concern that the only other court that has issued a precedential decision regarding the application of the rule of capture to hydrofracturing (the Texas Supreme Court in *Coastal Oil*) reached the opposite conclusion as this Court.

E. This significant decision reflects the view of only one commissioned judge.

The panel's decision to break with controlling precedent and hold that longstanding Supreme Court decisions adopting the capture rule have no application to hydrofracturing is of revolutionary significance, yet the decision represents the view of only one commissioned judge. Senior Judge Musmanno authored the opinion, and President Judge Gantman joined in the decision. Judge Murray did not participate. While the significance of the decision alone merits reargument *en banc*, institutional concerns also counsel that a

precedential decision making such a radical and significant change should reflect the views of more than one commissioned judge.

V. CONCLUSION

Because the panel's decision breaks from accepted tort law standards without a principled basis, and because such a sea change will upset long-settled expectations in the oil and gas industry, Appellee Southwestern Energy Production Company requests that the Court grant reargument *en banc*.

Respectfully submitted,

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April 16, 2018

CERTIFICATE OF COMPLIANCE WITH WORD LIMIT

I certify that this Brief complies with the word limit in Pa.R.A.P. 2544
because it contains 2,945 words.

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April 16, 2018

**CERTIFICATE OF COMPLIANCE WITH PUBLIC ACCESS POLICY
OF THE UNIFIED JUDICIAL SYSTEM OF PENNSYLVANIA**

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

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April 16, 2018

TAB A

April 2, 2018 Opinion & Order

2018 PA Super 79

ADAM BRIGGS, PAULA BRIGGS, HIS : IN THE SUPERIOR COURT OF
WIFE, JOSHUA BRIGGS AND SARAH : PENNSYLVANIA
BRIGGS, :

Appellants :

v. :

SOUTHWESTERN ENERGY :
PRODUCTION COMPANY :

No. 1351 MDA 2017

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

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

OPINION BY MUSMANNO, J.:

FILED APRIL 02, 2018

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

denying as moot Appellants' Motion to Compel.¹ 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.

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

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

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

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

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

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

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).

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

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

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

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

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

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

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

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

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

³ The Order was docketed on August 21, 2017.

Brief for Appellants at 2 (quotation marks omitted).⁴

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

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

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

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

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 separate discussion of their conversion claim, **see** Pa.R.A.P. 2119(a), we will limit our discussion to Appellants' trespass claim. Additionally, we observe that Appellants set forth only one claim in their Concise Statement. **See** Pa.R.A.P. 1925(b)(4)(vii) (providing that "[i]ssues not included in the Statement ... are waived."). Because both of Appellants' claims present substantially the same issue, we decline to find waiver on this basis, and will address the claims simultaneously.

Southwestern. Brief for Appellants at 5-6. Appellants point to the differences between hydraulic fracturing and the “conventional process of tapping into a pool or reservoir of fluids that flow according only to high and low pressure....” **Id.** at 8. Appellants argue that, in the context of conventional oil and gas extraction, “the rule of capture is a rule of necessity caused by the inability to determine the ownership of natural gas or oil located in an underground pool....” **Id.** at 11. Appellants claim that this case is analogous to **Young v. Ethyl Corp.**, 521 F.2d 771 (8th Cir. 1975).⁵ 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

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.**

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

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

"In Pennsylvania, a person is subject to liability for trespass on land in accordance with the dictates of Restatement (Second) of Torts § 158."

Gavin v. Loeffelbein, 161 A.3d 340, 355 (Pa. Super. 2017).

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

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

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

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

Id., cmt. i.

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

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

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

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

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

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

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

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

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

trespass. In fact, our extensive research reveals only two cases⁶ which have considered whether the rule of capture applies to hydraulic fracturing, and we look to those jurisdictions for guidance. However, we first find it necessary to examine the process of hydraulic fracturing.

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

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

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

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

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

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

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

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

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

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

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

In a concurring and dissenting Opinion joined by two additional justices, Justice Phil Johnson⁷ considered the rationale for the rule of capture, and pointed out that "[t]he gas at issue ... did not migrate to Coastal's well because of naturally occurring pressure changes in the reservoir." **Coastal Oil**, 268 S.W.3d at 42 (Johnson, J., dissenting). Justice Johnson stated that he "would not apply the rule [of capture] to a situation ... in which a party effectively enters another's lease without consent, drains minerals by means of an artificially created channel or device, and then 'captures' the minerals on the trespasser's lease." **Coastal Oil**, 268 S.W.3d at 43 (Johnson, J., dissenting). Justice Johnson also opined that the majority had prematurely addressed the issue of damages before determining whether hydraulic fractures that extend across lease lines constitute a trespass. **Id.** at 42; **see also id.** at 43 (stating that "[u]ntil the

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."

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***.⁸ In ***Stone***, the plaintiffs were the owners of a

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).

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.**⁹ 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.

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.**

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

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

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

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

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

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

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

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

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

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

In the instant case, it is unclear from the record before us¹⁰ 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

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.

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

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

President Judge Gantman joins the opinion.

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

Judgment Entered.

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

Joseph D. Seletyn, Esq.
Prothonotary

Date: 4/2/2018

TAB B

Trial Court's August 8, 2017 Opinion
& Order

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

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

Plaintiffs, :

v. :

SOUTHWESTERN ENERGY :
PRODUCTION COMPANY, :

Defendant. :

No. 2015-1253 CIVIL

Motions for Summary Judgment

ORDER

AND NOW, this 8th day of August, 2017 upon consideration of Defendant Southwestern Energy Production Company's Motion for Summary Judgment and brief in support thereof, Plaintiff's response in opposition and brief in support thereof, oral argument held thereon and a review of the entire record, it is **ORDERED** that the Defendant's Motion for Summary Judgment is **GRANTED**.

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

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

8/22/17 TS copy Amy Kelly, Malack

FILED
SUSQUEHANNA COUNTY
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PROthonotary

I. BACKGROUND

Plaintiffs, Adam Briggs, Paula Briggs, his wife, Joshua Biggs, and Sarah H. Briggs (“Plaintiffs”) are the owners of a 11.7 acre parcel in Harford Township, Susquehanna County, Pennsylvania. Defendant Southwestern Energy Production Company (“Defendant”) is the leasee of oil and gas rights on property adjacent to Plaintiffs’ parcel and since 2011 Defendant has continuously operated gas wells using hydraulic fracturing¹ on the adjacent property. Defendant has no lease for the oil and gas rights associated with Plaintiffs’ property.

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

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

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

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

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

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

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

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

II. DISCUSSION

Standard of Review for Summary Judgment

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

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

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

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

As Rule 1035.2 and the relevant case law clearly indicate, a motion for Summary Judgment may only be granted when there is no dispute of material fact and no evidence sufficient to permit a jury to find a fact essential to the cause of action or defense. In fact, summary judgment is to be entered ~~only in the~~ clearest of cases where there is not the slightest doubt as to the absence of triable ~~issue~~ of fact. *Cercone v. Cercone*, 386 A.2d 1 (Pa. Super. 1978). All doubts as to ~~whether a~~ genuine issue of material fact exists are to be resolved against the movant. *Thompson Coal Co. v. Pike Coal Co.*, 412 A.2d 466, 469 (Pa. 1979).

Standard for the Rule of Capture and Basic Title Concepts

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

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

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

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

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

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

b. Hydrofracturing and the Rule of Capture

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

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

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

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

“is done by pumping fluid down a well at high pressure so that it is forced out into [a] formation². 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. Fracing in effect increases the well’s exposure to the formation, allowing greater production. First used commercially in 1949, fracing is now essential to economic production of oil and gas commonly used throughout Texas, the United States, and the world.

Engineers design a fracing 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 fracing 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 fracing operation will actually improve production. Estimates of these distances are dependent on available data and are at best imprecise. Clues about the direction in which fractures are likely to run horizontally from the well may be derived from seismic and other data, but virtually nothing can be done to control direction; the fracture will follow Mother Nature’s fault line in the formation. The vertical dimension of the fracing pattern is confined by barriers – in this case, shale – or other lithological changes above and below the reservoir. *Id.*

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

² The formation in *Coastal Oil* is the Vicksburg T, which like the Marcellus Shale (at issue here) is a “tight” sandstone formation, so the mechanics of the hydrofracturing process are the same. See U.S. Energy Information Administration, *Marcellus Shale Play: Geology Review* (January 2017), https://www.eia.gov/maps/pdf/MarcellusPlayUpdate_Jan2017.pdf

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

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

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

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

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

property.

b. Conversion and Punitive Damage Claims

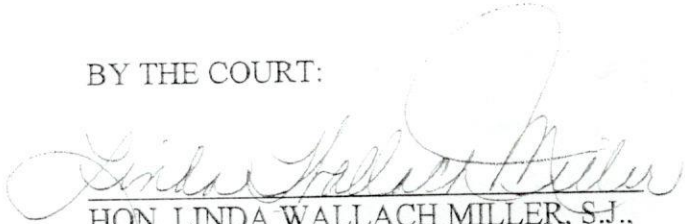
Plaintiffs' remaining claims rest on the removal of gas from under their property by Defendant. Because, as explained above, the gas was removed by Defendant through legal and permissible means, Plaintiffs cannot sustain their trespass claim, and by extension, they cannot sustain their claims for conversion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

III. CONCLUSION

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

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

BY THE COURT:


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

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

RJF

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

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

Plaintiffs, :

v. :

SOUTHWESTERN ENERGY :
PRODUCTION COMPANY, :

Defendant. :

2015-1253 CIVIL

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FILED
SUSQUEHANNA COUNTY

10/17/17 Attorney Kelly M. Moore

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

AND NOW, this 4th day of October, 2017, after careful review of the record and of Appellant's Concise Statement of Matters Complained of on Appeal, this Court continues to stand by its decision in the above-captioned matter and respectfully requests the Superior Court uphold this Court's Order of August 8, 2017. This Court would like to add, pursuant to Pennsylvania Rule of Appellate Procedure 1925, the following:

I. FACTUAL AND PROCEDURAL HISTORY.

Plaintiffs, Adam Briggs, Paula Briggs, his wife, Joshua Briggs, and Sarah H. Briggs ("Appellants") are the owners of an 11.7 acre parcel in Harford Township, Susquehanna County, Pennsylvania. Defendant Southwestern Energy Production Company ("Appellee") is the lessee of oil and gas rights on property adjacent to Appellants' parcel and has continuously operated gas wells using hydraulic fracturing¹ on the adjacent

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

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

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

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

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

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

II. STANDARD OF REVIEW.

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

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

III. DISCUSSION.

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

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

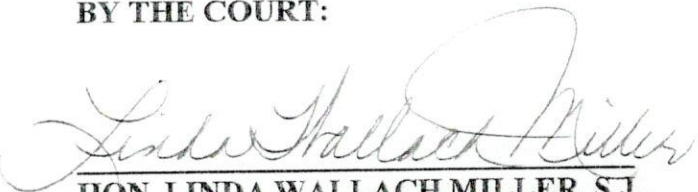
but his.” *Id.* Control of land does not automatically impart control of the gas below it. *Id.*

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

IV. CONCLUSION.

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

BY THE COURT:



HON. LINDA WALLACH MILLER, S.J.,

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

JC

TAB C

Publications Discussing the April 2,
2018 Opinion

LIST OF PUBLICATIONS ATTACHED UNDER TAB C

American Agriculturist, *Pennsylvania "Rule of Capture" Ruling Stuns Marcellus Drillers* (Apr. 12, 2018), <http://www.americanagriculturist.com/regulatory/pennsylvania-rule-capture-ruling-stuns-marcellus-drillers>

BakerHostetler, *Alerts: Trespass by Frac'ing? Pennsylvania Weighs In* (Apr. 11, 2018), <https://www.bakerlaw.com/alerts/trespass-by-fracing-pennsylvania-weighs-in>

Thomas G. Ciarlone, Jr., *Energy Law Today, Pennsylvania Departs from Texas on Trespass by Hydraulic Fracturing* (Apr. 6, 2018), <https://energylawtoday.com/2018/04/06/pennsylvania-departs-texas-trespass-hydraulic-fracturing/>

Marcellus Drilling News, *PA "Rule of Capture" Case Has Power to Limit Marcellus Drilling* (Apr. 4, 2018), <https://marcellusdrilling.com/2018/04/pa-rule-of-capture-case-has-power-to-limit-marcellus-drilling/>

Laura Legere, *Pittsburgh Post-Gazette, Pa. Court Redefines Some Fracking As Trespassing* (Apr. 5, 2018), <http://www.post-gazette.com/powersource/policy-powersource/2018/04/05/fracking-trespassing-rule-of-capture-Briggs-Southwestern-Energy/stories/201804040139>

Kristina Marusic, *Environmental Health News, Pennsylvania Superior Court Rules that Fracking Natural Gas from a Neighboring Property Is Trespassing* (Apr. 5, 2018), <http://www.ehn.org/pennsylvania-fracking-trespassing-2555983611.html>

McGuire Woods, *PA Court: Rule of Capture Does Not Apply to Hydraulic Fracturing* (Apr. 9, 2018), <https://www.mcguirewoods.com/Client-Resources/Alerts/2018/4/PA-Court-Rule-of-Capture-Does-Not-Apply-to-Hydraulic-Fracturing.aspx>

Meyer Unkovic Scott, *Client Alert: Energy, Utilities & Mineral Rights* (Apr. 9, 2018), <http://muslaw.com/client-alert-energy-utilities-mineral-rights/>

Terrie Morgan-Besecker, *The Morning Call, In Landmark Ruling, Pennsylvania Superior Court Opens Door to Trespass Claims Against Fracking Companies* (Apr. 4, 2018), <http://www.mcall.com/news/nationworld/pennsylvania/mc-nws-fracking-pennsylvania-court-ruling-trespass-20180404-story.html>



GOT MY GAS? Natural gas drawn from unleased “frack zone” land may, according to this court decision, may be eligible for compensation.

REGULATORY

Pennsylvania 'rule of capture' ruling stuns Marcellus drillers

Court ruled that a fracked natural gas well trespassed on Brigg's unleased land.

Apr 12, 2018

Last week, the Pennsylvania Superior Court handed down a decision that could greatly restrict, even stop, Marcellus drilling in the Keystone State. The court

decision disallows using the age-old "rule of capture."

Underground oil and gas deposits are in pools that may exist beneath multiple properties. Whoever gets there and sucks the oil or gas out first wins. That's the rule of capture. Conventional drillers and those with lease rights can't be held responsible for oil and gas moving from one place to another as it's extracted.

Not so for hydraulically fractured wells, according to the Superior Court. The justices ruled that gas (and oil) trapped in shale rock doesn't freely move from one place to another as it does in a pool. The judges say the gas would "stay forever" where it is without fracking.

In the case of *Briggs v. Southwestern Energy*, the Briggs family (in Susquehanna County, Pa.) alleged that when Southwestern drilled and fracked on the property of Briggs' neighbor, the fracking was done close to their property. The suit alleges that some of the gas located under their unleased property was extracted through Southwestern's well — a "trespass".

Southwestern countered that if such a trespass took place, it falls under the rule of capture. The ultimate issue is this: How far do fractures extend from a lateral well?

Currently, there's a 350-foot setback from the edge of a boundary for drilling shale wells. Most fractures extend more than 350 feet, sometimes as far as 3,000 feet. Clues about the direction 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. Fractures follow Mother Nature's fault lines in the formation.

The Superior Court opinion stated: "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." The case goes back to a lower court, which will rule on whether the Briggs are entitled to compensation from Southwestern for taking natural gas without a lease.

Huge potential impacts

"This potentially has big ramifications for both drilling companies and property owners," insists David Hess, director of policy and communications for Harrisburg-based law firm Crisci Associates and former secretary of the Pennsylvania Department of Environmental Protection.

- **Bring on ambulance-chasing trial lawyers.** Anyone within the "zone of fracking" may have a claim on the value of the gas extracted from a nearby well. "If on remand," Hess says, "the case requires compensation of the adjacent landowner for trespass as defined in the court decision, this could open the door to hundreds of potential similar trespass lawsuits filed all across Pennsylvania where unconventional gas well drilling occurs."
- **Rule of capture may be redefined.** Hess also speculates that before this ruling changes the way hydraulic fracturing operates in the state, there'll likely be an attempt to clarify the law. "If people perceive this as a threat to the industry, we'll soon see legislative attempts to redefine the rule of capture in Pennsylvania."
- **Drillers may have to change the way they drill wells.** That would greatly restrict where wells can go due to concerns over the zone of fracking. If drillers become gun-shy, it could significantly affect the industry's economics.

"This is going to be an important decision," Hess says. "People will be chewing on this opinion for a long time to fully understand what it means."

Source: Marcellus Drilling News

Source URL: <http://www.americanagriculturist.com/regulatory/pennsylvania-rule-capture-ruling-stuns-marcellus-drillers>

Alerts

Trespass by Frac'ing? Pennsylvania Weighs in

Alerts / April 11, 2018

Reversing an order granting Southwestern Energy Company's (SWN) Motion for Summary Judgment, the Superior Court of Pennsylvania held in a published decision on April 2, 2018, that trespass and conversion claims arising from hydraulic fracturing by SWN are not precluded by the rule of capture. *Briggs v. Southwestern Energy Production Company*, 2018 PA Super 79 (Apr. 2, 2018).

SWN holds a valid oil and gas lease and operates shale gas wells on property adjacent to the Briggs' tract, on which no oil and gas lease is in effect. The Briggs alleged that SWN's wells were unlawfully draining gas from beneath their land as a result of fissures induced by hydraulic fracturing. SWN countered that the Briggs' claims were barred by the rule of capture: the concept that there is no liability for capturing oil and gas that drains from another's land. The trial court ruled for SWN on summary judgment, holding that the rule of capture precluded the Briggs' claims as a matter of law.

The Briggs argued in their appeal that the rule of capture addresses concerns with conventional development and does not apply to gas extracted from shale formations through hydraulic fracturing. SWN urged the court to follow the Supreme Court of Texas' decision in *Coastal Oil & Gas Corp. v. Garza Energy Trust*, 268 S.W.3d 1 (Tex. 2008), which held that damages for drainage by hydraulic fracturing are precluded by the rule of capture. Like Texas, Pennsylvania has long followed the rule of capture. See *Barnard v. Monongahela Natural Gas Co.*, 65 A. 801, 802 (Pa. 1907) (a 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). A reasonable and prudent Pennsylvania operator could therefore feel confident in the propriety of its location and completion strategy.

For now, that confidence has been shaken. The court was not persuaded and sided with the Briggs, declining to follow *Garza*. It concluded that "[i]n light of the distinctions between hydraulic fracturing and conventional gas drilling...the rule of capture does not preclude liability for trespass due to hydraulic fracturing." *Briggs* at 23.

The court offered three reasons for its decision:

- (1) The rule of capture assumes that oil and gas are capable of migrating freely within a reservoir according to changes in pressure and without regard to surface property lines, but due to the low permeability of shale formations shale gas is not capable of migrating to an adjoining tract absent the application of an artificial force.
- (2) Under the rule of capture, the traditional remedy for a landowner impacted by a neighbor's well was to drill an offsetting well to avoid drainage, to "go and do likewise." *Coastal Oil* at 14. Since hydraulic fracturing is a "costly and specialized endeavor" that the average landowner can't conduct, this is not a realistic remedy for the Briggs.
- (3) While the court acknowledged the evidentiary burden facing the Briggs and the difficulties in calculating damages for gas extracted through hydraulic fracturing, it did not believe that these difficulties were sufficient to preclude the Briggs' claims.

The court held "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." *Briggs* at 23.

Briggs raises questions which make it an unsettling precedent for oil and gas operators. First, the court quoted but did not apply the Pennsylvania standard for liability for trespass on land under the Restatement (Second) of Torts Section 158. While stating "[o]ne is subject to liability to another for trespass...if he intentionally...enters land in the possession of another or causes a thing...to do so," *Briggs* did not address SWN's intent for the hydraulically induced fractures to cross the boundary between the tract covered by their lease and the Briggs' property. If the operator did not intend the fracturing operation to reach the Briggs' land, will the Briggs' trespass claim fail?

Second, the court relied heavily on the apparent disparity of power between a well-financed operator, on the one hand, and a small landowner, on the other, who could not afford to drill his own well. *Briggs* at 21. But SWN's lessor, presumably also a small landowner, was presumably equally without the capital to drill and fracture a well. The two landowners would appear to have the same power of self-help: to issue oil and gas leases. Should the court have regarded the two landowners as the relevant point of comparison?

Third, the court reasoned that if it did not allow a trespass remedy to Briggs, then SWN would have little incentive to negotiate minerals leases with small property owners. *Briggs* at 22-23. But that would be true only if the formation SWN fractured were the only formation that could be developed and only if the fracturing opened up that formation throughout the area of the unleased land. Ordinarily, the fact that SWN completed a well so close to the Briggs' land would raise the value of that land for other potential lessees. SWN's well signals to the marketplace that the Briggs' land is more valuable for possible natural gas development than might have been supposed before the well was completed. The Briggs could likely receive a larger bonus for a lease after the fracturing than before. Is it reasonable to carve out an exception to the rule of capture if the activity benefits the supposed victim?

We will explore in a future article how well trespass law is equipped to deal with the problems and questions *Briggs* raises, if it is equipped at all. In the meantime, *Briggs* will give operators much to consider when designing a fracturing operation.

Authorship Credit: L. Poe Leggette and Jasper Mason.

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Related Professionals

- L. Poe Leggette
- Jasper Mason



Pennsylvania Departs from Texas on Trespass by Hydraulic Fracturing

👤 Posted by **Thomas G. Ciarlone, Jr.** on April 6, 2018 in **Energy Law, Mineral Trespass**

In Texas, the long-standing “rule of capture” controls claims for subsurface trespass predicated on hydraulic fracturing activities. The rule of capture is, of course, shorthand for the theory that landowners acquire title to the minerals they produce from wells on their land, even when some of the oil or gas migrates from adjoining tracts. Put another way, landowners may properly appropriate oil and gas that has flowed from adjacent lands—without their neighbors’ consent and without incurring liability to them for drainage.

In *Coastal Oil & Gas Corp. v. Garza Energy Trust*, 268 S.W.3d 1 (Tex. 2008), the Supreme Court of Texas held that trespass claims for drainage by hydraulic fracturing are barred by the rule of capture, when the only result of the drilling operations is that the minerals migrate more easily from one tract into another. As an aside, however, the *Garza* court emphasized that, if operations result in actual injuries—for example, damage to reservoirs or offsetting wells—liability may then attach.

But in *Briggs v. Southwestern Energy Production Company*, 2018 Pa. Super. 79 (2018), the Pennsylvania Superior Court split with Texas, holding that plaintiffs may sue for subsurface trespass from hydraulic fracturing, even in the absence of physical damages to reservoirs or offset wells. In reaching its decision, the Pennsylvania court specifically discussed the *Garza* opinion and rejected the notion that the rule of capture precludes these claims as a matter of law.

The basic reasoning in *Briggs* is as follows:

- Hydraulic fracturing aims to produce oil and gas that is, in its natural state, trapped in rock; in other words, minerals locked in shale formations do not migrate of their own accord.
- Operators must therefore forcibly create artificial fissures through which oil and gas can migrate into take points along a horizontal well bore.
- The essential premise of the rule of capture—the free and natural migration of minerals—is thus missing in the context of hydraulic fracturing.
- In short, according to the decision in *Briggs*, “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,” and this is sufficient to state a claim for subsurface trespass as a matter of law.

Briggs is a watershed case that could have a profound impact on the operations of exploration and production companies in Pennsylvania. Left unchecked, the decision could easily open the floodgates to a large volume of litigation against drillers and mineral owners alike. Additionally, E&Ps with a footprint in Pennsylvania may now have to review their drilling programs, either to ensure that their fracturing operations do not spill over into adjoining, unleased tracts or, at a minimum, to take a calculated risk and proceed with business as usual with eyes wide open—even if this means exposing themselves to potential liability under *Briggs*.

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Thomas G. Ciarlone, Jr., focuses his practice on oil-and-gas litigation and general commercial litigation and dispute resolution. Tom has over fifteen years of complex litigation experience in trial and appellate courts across the country, and his practice broadly reaches all forms of contentious business disputes. When royalties and other mineral...

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PA "Rule of Capture" Case has Power to Limit Marcellus Drilling

April 4, 2018 |

Energy Companies, Industrywide Issues, Litigation, Pennsylvania, Southwestern Energy, Statewide PA, Susquehanna County

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As we indicated in our post yesterday, the Pennsylvania Superior Court has handed down a decision that has the power to **greatly restrict, even stop, Marcellus drilling in PA** (see PA Superior Court

Overtuns "Rule of Capture" for Marcellus Well). This is a legal issue –and MDN is not written by a lawyer. Hence our earlier misreading of the importance and facts in the Superior Court decision. The issue, in brief, is that Monday's court decision disallows using an age-old principle called the rule of capture, which we previously described. The rule of capture works for conventional drilling where

underground deposits of oil and gas are in pools and the pool may exist underneath multiple surface property owners. Whoever gets there first and sucks the oil/gas out, wins. That's the rule of capture in a nutshell. And it makes sense. You can't be held responsible for oil and gas moving from one place to another as it's extracted. And who knows how much of the pool is located under your property, or your neighbor's property? The Superior Court justices ruled that the rule of capture doesn't work for hydraulic fracturing because gas (and oil) trapped in shale rock does not freely move from one place to another as it does in a pool. The judges say the gas would "stay forever" where it is without fracking. In the case of *Briggs v. Southwestern Energy*, the Briggs family (in Susquehanna County, PA) alleges that when Southwestern drilled and fracked on the Briggs' neighbor, the fracking was done close enough to their property that some of the gas located under their property (unleased) was released and extracted through the Southwestern well—a "trespass." Southwestern countered that IF such a "trespass" took place, it falls under the rule of capture. The ultimate issue boils down to this: How far do fractures extend from a lateral well? An expert energy attorney told MDN off the record that Monday's decision "could change the entire Pennsylvania shale industry" in two important ways...

Here are the two important ways this decision MAY (not necessarily will) affect Marcellus drilling in PA:

#1 – Ambulance-chasing trial lawyers will launch multiple (hundreds, thousands) of lawsuits against drillers claiming trespass on land neighboring a drilling unit. An absolute nightmare scenario. Anyone within "the zone of fracking" may have a claim on the value of the gas extracted from a nearby well.

#2 – Drillers may have to change the way they drill wells—greatly restricting where wells can go due to concerns over the zone of fracking. That is, drillers will become gun-shy, significantly affecting the economics of the industry in PA.

Currently there is a 350-foot setback from the edge of a unit boundary when drilling a shale well. The key question is, after you've

drilled the lateral and frack it, how far do the fractures extend out from the well? More than 350 feet? The answer is most likely "yes."

In the Superior Court decision (copy below, pages 12-13), the court cites a definition of the hydraulic fracturing process that was accepted and relied upon by the lower court whose decision the Superior Court overturned. In other words, this is something accepted into evidence and relied on by all parties. Here's part of the description for hydraulic fracturing (emphasis added):

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 paragraph above is problematic. If we're reading it right, it says that (a) nobody really knows exactly how far a fracture truly extends, that the best available data is "at best imprecise," and (b) some estimates say that fractures "sometimes" extend as far as 3,000 feet from a drilled well. That's more than a half mile. You can see where this may be a big, huge problem. Can you imagine anyone who lives within a half mile of a well launching a lawsuit claiming trespass? And

a driller having to hire armies of geologists (and lawyers) to figure out how far/where the fracks extend, and fend off these lawsuits? Total chaos.

Those who oppose drilling (and oppose the use of fossil fuels) are waking up to the fact they may have just been given a huge present by the Superior Court. Note this article from *Environmental Health News*:

Landmark ruling could open the door to "hundreds of trespass lawsuits"

On Monday the Pennsylvania Superior Court issued an opinion that could have major ramifications for the hydraulic fracturing industry in the state: It states a company trespassed on a family's land by extracting natural gas from beneath their property while operating a fracking well next door.

The Briggs family owns about 11 acres of land in Harford Township in Susquehanna County. When Southwestern Energy began operating an unconventional natural gas well on the adjacent property in 2011, the Briggs declined to lease their mineral rights to the company for development. In 2015, they filed a complaint that Southwestern was trespassing by extracting gas from beneath their property without a lease.

Southwestern didn't dispute they'd removed natural gas from beneath the Briggs' land, but argued they weren't trespassing due to the "rule of capture," which says the first person to "capture" a natural resource like groundwater, gas or oil owns it, regardless of property lines.

A lower court agreed with Southwestern and issued a summary judgment in their favor, but yesterday's Superior Court opinion overturns that decision, stating that the rule of capture shouldn't apply to unconventional natural gas drilling because of key differences in the method of extraction.

"Unlike oil and gas originating in a common reservoir, natural gas, when trapped in a shale formation, is non-migratory in nature," the opinion states. "Shale gas does not merely 'escape' to adjoining land absent the application of an 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 channel[s].'"

Ultimately, the Court said, "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."

The case has now been remanded to a lower court, which will rule on whether the Briggs are entitled to compensation from Southwestern Energy for trespassing on their property by taking natural gas without a lease. In the meantime, the family has been given the opportunity to further develop their trespass claim, including getting estimates of how far the subsurface fractures and fracking fluid crossed boundary lines into the subsurface of their property.

"I think this potentially has big ramifications for both drilling companies and property owners," said David E. Hess, the director of policy and communications for Harrisburg-based government affairs law firm Crisci Associates and former secretary of the Pennsylvania Department of Environmental Protection.

"If on remand the case requires compensation of the adjacent landowner for trespass as defined in the court decision, I think this could open the door to hundreds of potential similar trespass lawsuits filed all across Pennsylvania where unconventional gas well drilling occurs."

Hess pointed out it's hard to find an area in Pennsylvania's shale patch where existing natural gas extraction leases don't come up against property belonging to other landowners who didn't sell their mineral rights. He also speculated that before this ruling

changes the way hydraulic fracturing operates in the state, there would likely be an attempt to clarify the law.

"I think if people perceive this as a threat to the industry," Hess said, "we'll soon see legislative attempts to redefine the rule of capture in Pennsylvania."

Monday's Superior Court opinion differs from similar cases in other states.

Referencing a case in Texas where the fracking company won (Coastal Oil & Gas Corp. v. Garza Energy Trust), the Pennsylvania Superior Court noted in Monday's ruling, "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. 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."

The Court also noted that applying the rule of capture to hydraulic fracturing is problematic, since it would allow companies to extract natural gas from anywhere without the need for a lease as long as they could set up a fracking well on an adjacent property.

Hess noted that Pennsylvania's laws are unique, so what's happened with regard to the rule of capture and hydraulic fracturing in other states is unlikely to impact how things play out here.

"I think this is going to be an important decision," he said, "but I think people will be chewing on this opinion for a long time to fully understand what it means."*

**Environmental Health News* (Apr 3, 2018) – Pennsylvania Superior Court rules that fracking natural gas from a neighboring property is trespassing

What happens now?

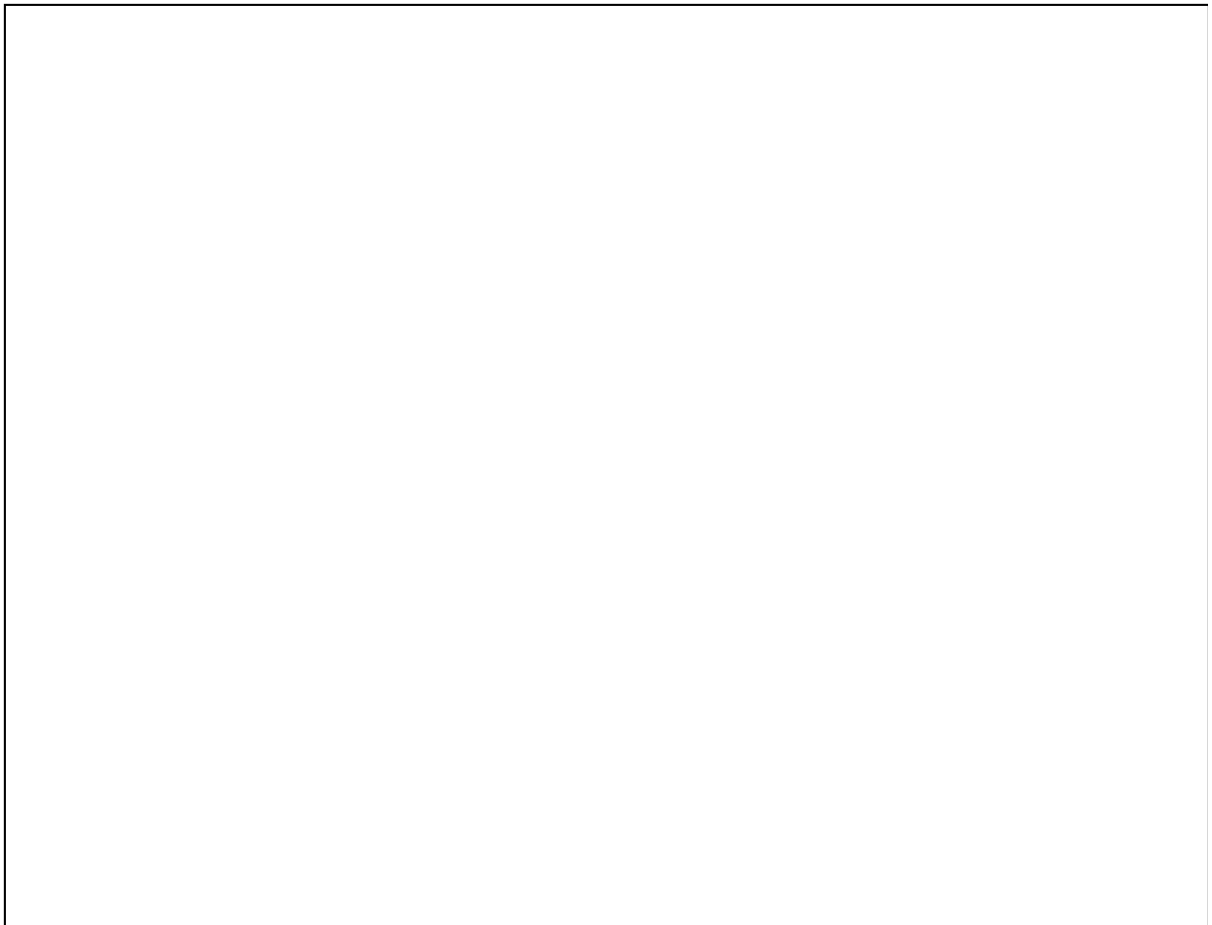
The Superior Court decision remands the case back to a lower court to do the dirty work. The Briggs family must now build their case for how much of their gas has been extracted by Southwestern, and how much they think they deserve to be paid for it.

As Mr. Hess (former DEP Secretary) says above, a distinct possibility is that the state legislature will try to remedy the situation, to avoid killing the Marcellus industry, by passing a law that says rule of capture *does* apply to shale drilling.

Finally, it would not surprise us if Southwestern appeals the case to the PA Supreme Court.

This one is far from over.

Copy of the Superior Court decision:



J-S01013-18

2018 PA Super 79

ADAM BRIGGS, PAULA BRIGGS, HIS
WIFE, JOSHUA BRIGGS AND SARAH
BRIGGS,

Appellants

v.

SOUTHWESTERN ENERGY
PRODUCTION COMPANY

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1351 MDA 2017

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

BEFORE: CANTMAN, D.J., MURRAY, J. and MUSMANNO, J.

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Pa. court redefines some fracking as trespassing

April 5, 2018 8:36 AM

By Laura Legere / Harrisburg Bureau

For more than a century, Pennsylvania law has allowed drilling companies to sink a well and then drain oil and gas from a neighboring property without paying the neighbor.

As early as the 1870s, Pennsylvania courts described oil's "fugitive and wandering existence" and established the legal idea that oil and gas in an underground reservoir belongs to whoever grabs it from his own land first.

But a Pennsylvania appeals court [upended that idea this week](#) when it said that the legal theory known as the "rule of capture" does not apply to hydraulic fracturing in tight rock formations, like the Marcellus Shale, where gas doesn't flow freely or generally escape without great effort.

The fractures that are created when high pressure fluid and sand are forced down a well can stretch as far as 3,000 feet from a well bore through the rock.

When those fractures cross boundaries and draw gas from under a neighboring property, it amounts to a form of trespass — even when a well bore itself does not cross under neighboring land, the state Superior Court decided earlier this week.

The decision is a departure from the common understanding that the rule of capture applies to the modern shale drilling era just as it did during decades of conventional oil and gas development.

Ross Pifer, a Penn State University law professor, said the ruling is flawed but if it stands, "It could have a big impact." That impact could be both in increasing the negotiating power of small landowners for gas leases and in influencing how far away from property lines companies decide to drill wells.

The rule of capture in the U.S. had its origins in fox hunting and courts have adopted the language of wild creatures to describe the idea ever since.

In 1907, the Pennsylvania Supreme Court said that when a driller puts a well right next to a property line, his neighbor's only remedy is to drill his own well. "He must protect his own oil and gas," the court wrote. "He knows it is wild and will run away if it finds an opening and it is his business to keep it at home."

The concept even had its [pop culture moment](#) in the 2007 film, "There Will Be Blood," when the ruthless prospector played by Daniel Day-Lewis reveals that he has drained the oil from under his rival's property from wells on surrounding land.

"I drink your milkshake," he says, and then makes an obnoxious sucking sound.

Fracking is different, the Superior Court concluded, because oil and gas in shale formations doesn't "migrate freely" as it does in conventional reservoirs.

Remarkably, the Superior Court found just two relevant cases from the shale era to draw from: a 2008 Texas case that upheld the rule of capture for hydraulic fracturing and a 2013 federal case out of West Virginia that rejected it.

The West Virginia decision — which found that applying the rule of capture to hydraulic fracturing "gives oil and gas operators a blank check to steal from the small landowner" — was vacated after the parties settled. But the Pennsylvania Superior Court found it compelling.

The federal district court described how company land agents use the rule to pressure landowners during lease negotiations: "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."

Another option under the rule, the federal court wrote, is that "a company may just take the gas without even contacting a small landowner."

A Susquehanna County case

In the current case — which was brought against Southwestern Energy Production Co. by the Briggs family in Susquehanna County — the Superior Court did not rule on whether Southwestern

actually trespassed under the 11-acre Briggs property. It sent the case back to the Susquehanna County Court of Common Pleas to determine the facts.

The decision could also be appealed to the state Supreme Court.

Mr. Pifer said two crucial flaws make it difficult to discern a precise standard in the Superior Court's decision.

One is that the court draws a firm distinction between hydraulic fracturing and conventional gas drilling, when in fact nearly every well in Pennsylvania — both conventional and unconventional — is fracked.

The other flaw is that the court calls shale gas “non-migratory in nature,” but gas from the Marcellus Shale does naturally escape and gather in shallower rock formations over eons.

“It would be easier if they were more clear in terms of what exactly this applies to,” he said. Does it apply to unconventional shale wells or does it apply to all wells that use hydraulic fracturing, even those targeting conventional oil and gas reserves?

David Overstreet, an attorney who represents natural gas companies, said, “Potentially it is a very significant decision, depending on what happens next” but “there are layers of questions presented even if this particular ruling stands.”

“Until we have a conclusive ruling on the questions of Pennsylvania law that are embedded here, I think it is difficult to predict precisely where we're going to wind up,” he said.

“The best thing we can do as counsel for the industry is just take a deep breath.”

Laura Legere: llegere@post-gazette.com.

First Published April 5, 2018 7:37 AM

Lamont-Doherty Earth Observatory

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Pennsylvania Superior Court rules that fracking natural gas from a neighboring property is trespassing

Landmark ruling could open the door to "hundreds of trespass lawsuits"

On Monday the Pennsylvania Superior Court issued an opinion (<http://www.pacourts.us/assets/opinions/Superior/out/Opinion%20%20ReversedRemanded%20%2011cb=1>), that could have major ramifications for the hydraulic fracturing industry in the state: It states a company trespassed on a family's land by extracting natural gas from beneath their property while operating a fracking well next door.

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owns it, regardless of property lines.

A lower court agreed with Southwestern and issued a summary judgment in their favor, but yesterday's Superior Court opinion overturns that decision, stating that the rule of capture shouldn't apply to unconventional natural gas drilling because of key differences in the method of extraction.

"Unlike oil and gas originating in a common reservoir, natural gas, when trapped in a shale formation, is non-migratory in nature," the opinion states. "Shale gas does not merely 'escape' to adjoining land absent the application of an 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 channel[s].'"

Ultimately, the Court said, "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."

The case has now been remanded to a lower court, which will rule on whether the Briggs are entitled to compensation from Southwestern Energy for trespassing on their property by taking natural gas without a lease. In the meantime, the family has been given the opportunity to further develop their trespass claim, including getting estimates of how far the subsurface fractures and fracking fluid crossed boundary lines into the subsurface of their property.

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Legal Insights | April 14, 2018

PA Court: Rule of Capture Does Not Apply to Hydraulic Fracturing

On April 2, the Pennsylvania Superior Court held that hydraulic fracturing that results in the extraction of natural gas from adjoining land may constitute a claim for trespass.

In *Briggs v. Southwestern Energy Production Company*, 2018 PA Super 79 (Apr. 2, 2018), Defendant Southwestern Energy Production Company utilized the hydraulic fracturing method to extract natural gas through a well on land adjacent to the Plaintiffs' property, for which the company did not have a lease. As a result, the Briggs family filed a complaint asserting claims of trespass and conversion. Cross-motions for summary judgment eventually were filed, and the trial court granted Southwestern's motion, agreeing that the rule of capture applied and precluded recovery by the Plaintiff-landowners. The case turned on whether fracturing fluid and proppant crosses the imaginary horizontal plane of the subsurface of a property boundary.

On appeal, the Superior Court reiterated Pennsylvania's recognition of the rule of capture, but acknowledged that the rule's application to hydraulic fracturing was an issue of first impression in the commonwealth. For guidance, the court looked to the only other cases to have addressed this issue, *Coastal Oil & Gas Corp. v. Garza Energy Trust*, 268 S.W.3d 1 (Tex. 2008), and *Stone v. Chesapeake Appalachia, LLC*, No. 5:12-CV-102, 2013 WL 2097397 (N.D.W.Va. Apr. 10, 2013), *order vacated*, 2013 WL 7863861 (N.D.W.Va. July 30, 2013). The Pennsylvania court agreed with the rationale in the *Stone* decision and *Coastal's* dissent that, given the practical differences between conventional methods of extraction and hydraulic fracturing and between the respective positions of oil and gas producers and landowners, the rule of capture did not protect oil and gas producers employing the hydraulic fracturing method.

Adopting this line of reasoning, the Superior Court held that, in Pennsylvania, “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.” The court remanded the case to determine whether Southwestern’s operations had in fact resulted in a subsurface trespass to the Plaintiffs’ property.

Trespass litigation likely will increase with the *Briggs* decision, as an issue once framed for summary judgment based on the rule of capture is now fodder for fact-intensive discovery and expert opinions regarding the subsurface migration of fracturing fluid and proppant.

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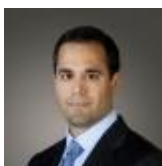


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RULE OF CAPTURE DOES NOT PRECLUDE SUBSURFACE TRESPASS CLAIMS IN PENNSYLVANIA

In a case of first impression, the Pennsylvania Superior Court ruled on April 2, 2018, that the “rule of capture” principle does not preclude property owners from pursuing subsurface trespass claims resulting from the hydraulic fracturing of unconventional wells on neighboring properties. This holding in *Briggs v. Southwestern Energy Production Company* contradicts a decade of Pennsylvania precedent refusing to recognize such claims in the context of conventional oil and gas extraction. A copy of the opinion can be found [here](#).

In *Briggs*, the owners of 11.07 acres of unleased land in Susquehanna County, Pennsylvania (the “Briggs”) filed a complaint against Southwestern Energy Production Company (“Southwestern”) for claims of trespass and conversion, arguing that Southwestern’s hydraulic fracturing on adjacent land resulted in the unauthorized drainage of oil and gas from the property.^[1] Southwestern argued that the rule of capture barred the Briggs’ claims.^[2] The trial court agreed with Southwestern and granted its motion for summary judgment, holding that the rule of capture precludes subsurface trespass and conversion claims based on hydraulic fracturing originating from adjacent land.^[3] As stated by the court, “the rule of capture is a longstanding ‘principle of oil and gas law holding that there is no liability for drainage of oil and gas from the lands of another so long as there has been no trespass and all relevant statutes and regulations have been observed.’”

On appeal to the Superior Court, the Briggs questioned whether the rule of capture precludes trespass claims where oil and gas is extracted from property through hydraulic fracturing.^[5] The Pennsylvania Superior Court answered in the negative, concluding that the rule of capture does not preclude liability for trespass due to hydraulic fracturing.^[6] In its decision, the Superior Court analyzed the jurisprudence on the rule of capture,^[7] the process of hydraulic fracturing,^[8] and two decisions from other jurisdictions addressing claims of trespass for hydraulic fracturing: *Coastal Oil & Gas Corporation v. Energy Trust*, 268 S.W.3d 1 (Tex. 2008); and *Stone v. Chesapeake Appalachia, LLC.*, Civil Action No. 5:12-CV-102, 2013 LEXIS 71121 (N.D.W. Va. Apr. 10, 2013).^[9]

The Superior Court based its decision on the underlying purpose of the rule of capture and the fundamental difference between conventional mineral extraction and hydraulic fracturing.^[10] The Court explained that the rule of capture traditionally applies to the conventional extraction of oil and gas from subsurface reservoirs in which oil and gas migrate across property lines according to changes in pressure.^[11] Hydraulic fracturing, on the other hand, targets non-migrating oil and gas trapped inside shale formations.^[12] The Court concluded that the rule of capture should only preclude liability for oil and gas drained from a neighboring property to the extent such flow occurs naturally, not for drainage caused by artificial means such as hydraulic fracturing.^[13] The Superior Court noted 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 gas from beneath the unleased adjoining property.^[14]

In its opinion, the Superior Court refused to follow the majority opinion in *Coastal Oil* which held the rule of capture precluded hydraulic fracturing trespass claims. Instead, the Superior Court found the dissenting opinion more convincing. Like the majority, the Court agreed with the holding in *Stone*, which distinguished hydraulic fracturing from conventional production and concluded that hydraulic fracturing beneath neighboring property without consent to be an actionable trespass.^[15]

While the Superior Court has ruled hydraulic fracturing may give way to claims for subsurface trespass, a plaintiff must prove (i) that fracturing fluid or other materials entered the plaintiff's property and (ii) the value of any oil and gas captured from the property because of the subsurface trespass.^[16] Both requirements present significant evidentiary difficulties for the plaintiff. Nonetheless, the Superior Court's ruling in *Briggs* represents a new risk for energy companies seeking to navigate the ever-evolving legal landscape in Pennsylvania.

^[1] *Briggs v. Sw. Energy Prod. Co.*, No. 1351 MDA 2017, 2018 Pa. Super. LEXIS 299, *1 (Pa. Super. Ct. April 2, 2018).

^[2] *Id.* at *2.

^[3] *Id.* at *4.

^[4] *Id.* (quoting *Rule of Capture*, Black's Law Dictionary (10th ed. 2014)).

[5] *Id.* at *4-5

[6] *Id.* at *25.

[7] *Id.* at *8-10.

[8] *Id.* at *11-14.

[9] *Id.* at *14-21.

[10] *Id.* at *21-25.

[11] *Id.* at *21.

[12] *Id.* at *22.

[13] *Id.* at *23.

[14] *Id.* at *24-25.

[15] *Id.* at *14-21.

[16] *Id.* at *26.

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In landmark ruling, Pennsylvania Superior Court opens door to trespass claims against fracking companies



In landmark ruling, Pennsylvania Superior Court opens door to trespass claims against fracking companies. Decision negates a legal principle that allows companies to siphon natural resources from beneath land they don't own. (Spencer Platt / Getty Images)

By **TERRIE MORGAN-BESECKER**
Scranton Times-Tribune

APRIL 4, 2018, 3:00 PM

A Susquehanna County family can proceed with a lawsuit against an energy company that extracted natural gas from beneath their land using wells on an adjacent property, the state Superior Court ruled in a potentially precedent-setting decision.

The **ruling** in the suit Adam Briggs and his two siblings filed against Southwestern Energy Production Co. is important because it negates a legal principle in oil and gas law that allows companies to siphon natural resources from beneath land they do not own without compensating the landowner.

Briggs filed suit in 2015 against Southwestern relating to an 11-acre property he, his brother, Joshua Briggs, and his sister, Sarah Briggs, own in Harford Township.

“

Now it's crystal clear Pennsylvania law will not apply the rule of capture to fracking fissures that migrate under unleased acres.

— Robert Burnett, a Pittsburgh attorney who represents landowners in oil and gas disputes

The suit alleges Southwestern operated two wells to extract natural gas from a Marcellus Shale formation under the Briggs' property since 2011. The Briggs were never compensated for the gas, however, because the wells are on a neighbor's land. Southwestern has a lease with the neighbor but not the Briggs family.

A Susquehanna County judge dismissed the lawsuit in August, after finding Southwestern was not required to pay the Briggs family based on a legal principle known as the “rule of capture.” The rule allows companies to drain a natural resource, including oil, gas or water, from beneath property they do not own as long as they do not trespass on the land.

In its ruling, the Superior Court noted the rule is based on the idea that ownership of underground pools of gas or oil cannot be determined because the resource naturally migrates between property lines.

Multiple appellate courts have found the rule means one property owner can drill a well a short distance from a neighbor and use it to extract oil or gas from the neighbor's property without paying them. If that neighbor objects, the only recourse would be to “go and do likewise” by drilling their own well to siphon off the other person's land.

In his appeal, the Briggs' attorney, Laurence Kelly, of Montrose, argued the rule should not apply to natural gas extracted through hydraulic fracturing because the gas contained in Marcellus Shale does not freely migrate. It is only freed by the fracking process.

The Superior Court agreed.

“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,” the court said. “Unlike oil and

gas originating in a common reservoir, natural gas, when trapped in a shale formation, is nonmigratory in nature.”

The court noted concerns cited by other appellate courts that the rule of capture negatively impacts owners of small land tracts who do not have a lease with a gas driller.

The court said the rule gives a gas driller no incentive to negotiate with small property owners because it 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.”

The court’s decision overturns the ruling, dismissing the Briggs’ case and returning it to Susquehanna County Court for further proceedings.

It’s not know if Southwestern will appeal the decision. Attempts to reach Jeffrey Malak, attorney for Southwestern, and other company officials were unsuccessful Tuesday.

If no appeal is filed, the ruling would set a precedent that would impact other similar disputes between landowners and oil and gas companies, Kelly said.

Robert Burnett, a Pittsburgh attorney who represents landowners in oil and gas disputes, applauded the ruling because it will help protect landowners’ rights. Burnett is not involved in the Briggs’ case, but has argued against the rule of capture in other cases.

“This is a significant decision from the Superior Court,” Burnett said. “Now it’s crystal clear Pennsylvania law will not apply the rule of capture to fracking fissures that migrate under unleased acres.”

Attempts to reach officials with the Marcellus Shale Coalition, a lobbying group for the natural gas drillers, were unsuccessful Tuesday.

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LIST OF ADDITIONAL PUBLICATIONS DISCUSSING THE PANEL OPINION

Matt Fair, Law360, *Pa. Panel Revives Trespass Claims Over Fracking Well* (Apr. 2, 2018), <https://www.law360.com/energy/articles/1028989>

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<https://www.lexology.com/library/detail.aspx?g=d03dbb2e-b877-41fa-a972-6404b6e26106>