

IN THE SUPREME COURT OF PENNSYLVANIA

No. 63 MAP 2018

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

v.

SOUTHWESTERN ENERGY PRODUCTION COMPANY,
Appellants

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

**BRIEF OF AMICI CURIAE, THE PENNSYLVANIA CHAMBER OF
BUSINESS AND INDUSTRY, CHAMBER OF COMMERCE OF THE
UNITED STATES OF AMERICA, AND THE WASHINGTON COUNTY
CHAMBER OF COMMERCE, IN SUPPORT OF SOUTHWESTERN
ENERGY PRODUCTION COMPANY'S
APPEAL FROM THE APRIL 2, 2018 ORDER OF THE SUPERIOR COURT**

POST & SCHELL, P.C.
Terry R. Bossert, Esquire (PA ID 17670)
James J. Kutz, Esquire (PA ID 21589)
Ryan M. Logan, Esquire (PA ID 320720)
17 North 2nd Street, 12th Floor
Harrisburg, PA 17101
Telephone: 717-731-1970
Facsimile: 717-731-1985
Email: jkutz@postschell.com
tbossert@postschell.com
rlogan@postschell.com

Date: January 30, 2019

*Counsel for The Pennsylvania Chamber of
Business and Industry, Chamber of
Commerce of the United States of America,
and Washington County Chamber of Commerce*

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. INTERESTS OF AMICI CURIAE.....1

II. SUMMARY OF ARGUMENT.....4

III. ARGUMENT.....6

A. BACKGROUND.....6

B. THE PANEL DECISION, IF ALLOWED TO STAND, WILL HAVE SIGNIFICANT CONSEQUENCES FOR PENNSYLVANIA’S INDUSTRY AND ECONOMY6

C. THE PANEL DECISION, IF ALLOWED TO STAND, WILL CREATE SPECULATIVE AND UNWIELDY LITIGATION....11

D. THE PANEL DECISION, IF ALLOWED TO STAND, INHIBITS INNOVATION AND GROWTH15

IV. CONCLUSION18

TABLE OF AUTHORITIES

Cases

Barnard v. Monongahela Natural Gas Co., 65 A. 801 (Pa. 1907)..... 13, 15

Coastal Oil & Gas Corp. v. Garza Energy Trust, 268 S.W.3d 1 (Tex. 2008)11, 16

Jones v. Forrest Oil Co., 44 A. 1074 (Pa. 1900).....12, 13, 17

Westmoreland and Cambria Natural Gas Co. v. DeWitt,
18 A. 724 (Pa. 1889).....12, 13, 17

Other Authorities

American Gas Association, Cleaner Energy, accessed January 14, 2019.
<https://www.aga.org/natural-gas/clean-energy/> 10

Appalachia markets itself as global energy hub, accessed January 14, 2019.
<https://www.cnbc.com/2018/04/23/appalachia-markets-itself-as-global-energy-hub.html>8

Consumer Energy Alliance, Everyday Energy for Pennsylvania, accessed January 14, 2019. <https://consumerenergyalliance.org/cms/wp-content/uploads/2018/08/CEA-Pennsylvania-Report.pdf>.8, 9

Dr. Robert Bruno & Michael Cornfield, *Study of Construction Employment in Marcellus Shale Related Oil and Gas Industry 2008-2014*, University of Illinois, August 2014. http://ler-illinois.us-east-2.elasticbeanstalk.com/wp-content/uploads/2015/01/Marcellusjobsstudy_FINAL.pdf7

Impacts of the Natural Gas and Oil Industry on the US Economy in 2015, accessed January 14, 2019. <https://www.api.org/~media/Files/Policy/Jobs/Oil-and-Gas-2015-Economic-Impacts-Final-Cover-07-17-2017.pdf>.....7

Jennifer Beahm, *Cracker will help boost Washington County, panelists say*, Pittsburgh Business Times, August 25, 20162

Pa. Pub. Util. Comm’n, *Act 13 County/Municipal Reporting*, available at:
[https://www.act13-reporting.puc.pa.gov/Modules/PublicReporting/
Governments.aspx](https://www.act13-reporting.puc.pa.gov/Modules/PublicReporting/Governments.aspx).....2

Pennsylvania’s Gas Decade: Insights into Consumer Pricing Impacts from Shale
Gas (2007- 2016), Kleinman Center for Energy Policy, accessed April 14, 2018,
<https://kleinmanenergy.upenn.edu/paper/pennsylvanias-gas-decade>.....10

Purchased Gas Cost Rates. Pennsylvania Public Utility Commission, accessed
April 14, 2018. <http://www.puc.state.pa.us/NaturalGas/pdf/PGC.pdf>.10

Quadrennial Technology Review 2015, Chapter 7: Advancing Systems and
Technologies to Produce Cleaner Fuels, accessed January 14, 2019.
[https://www.energy.gov/sites/prod/files/2016/05/f32/Ch.7-SI-Oil-and-Gas-
Technologies.pdf](https://www.energy.gov/sites/prod/files/2016/05/f32/Ch.7-SI-Oil-and-Gas-Technologies.pdf).....16

Upgrading Natural Gas Technology, access January 14, 2019.
<https://www.aiche.org/chenected/2018/07/upgrading-natural-gas-technology>.....16

The Marcellus Shale gas boom in Pennsylvania: employment and wage trends,
access January 14, 2019. [https://www.bls.gov/opub/mlr/2014/article/
the-marcellus-shale-gas-boom-in-pennsylvania.htm](https://www.bls.gov/opub/mlr/2014/article/the-marcellus-shale-gas-boom-in-pennsylvania.htm).....8

Rules

Pennsylvania Rule of Appellate Procedure 531(b)(2)3

Matter on Appeal

Adam Briggs, et al., Appellants vs. Southwestern Energy Production Company,
Appellee, Docketed at Number 1351 MDA 2017, digested at 2018 PA Super 79 ...6

I. INTERESTS OF AMICI CURIAE

The Pennsylvania Chamber of Business and Industry (the “PA Chamber”) is the largest, broad-based business association in Pennsylvania. It has close to ten thousand member businesses throughout Pennsylvania, who employ more than fifty (50%) percent of the Commonwealth’s private workforce. Its members range from small companies to mid-size and large business enterprises. The PA Chamber’s mission is to advocate on public policy issues that will expand private sector job creation, to promote an improved and stable business climate and to promote Pennsylvania’s economic development for the benefit of all Pennsylvania citizens.

The Chamber of Commerce of the United States of America (“US Chamber”) is the world’s largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the US Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the US Chamber regularly files amicus curiae briefs in cases that raise issues of concern to the nation’s business community.

Washington County, in particular, has been at the epicenter of shale gas development in Western Pennsylvania, and the Washington County Chamber of

Commerce (the “Washington Chamber”) and its members wish to see this continue in the future. For 105 years, the Washington Chamber has advanced the interests of Washington County and the community. Today, the Washington Chamber represents more than 1,000 businesses totaling more than 23,000 employees in the county. Numerous natural gas companies have invested more than \$6 billion in Washington County, and produced more than 11,000 jobs.¹ Natural gas accounts for more than 20% of the economy in Washington County.² Washington County and its municipalities have received more than \$73 million in Act 13 impact fees from 2011-2015.³

The Chambers have a significant interest in having the Court review and reverse the Superior Court Panel’s decision (the “Panel’s decision”). The Panel’s decision significantly changes settled rules, and creates substantial uncertainties and disruptions for the unconventional gas exploration and production industry. Over the past decade, the Chambers’ shale gas members have contributed substantially to economic growth in Pennsylvania, producing thousands of new jobs and motivating scores of new entrepreneurs.

¹ Jennifer Beahm, *Cracker will help boost Washington County, panelists say*, Pittsburgh Business Times, August 25, 2016.

² *Id.*

³ Pa. Pub. Util. Comm’n, *Act 13 County/Municipal Reporting*, available at: <https://www.act13-reporting.puc.pa.gov/Modules/PublicReporting/Governments.aspx>.

These uncertainties also have the potential to materially affect the business climate for the Chambers' members, beyond the primary oil and gas operators themselves. Numerous members, and their employees, are involved in a variety of roles, directly and indirectly supporting the shale gas industry. These services range from work directly on the drilling site, to supplying heavy equipment and equipment operators, to supplying other materials, supplies, clothing and services. Disruption and uncertainty in the unconventional gas production industry will collaterally impact the Chambers' members and their employees engaged in related operations such as construction of gathering lines, compressor stations, roads and more. Additionally, a productive unconventional gas industry has produced overall economic benefits by greatly reducing the cost of gas and electricity to all consumers.

The shale gas industry is of vital importance to Chambers' members, and any decision which introduces disruption and uncertainties that cause that industry to curtail its exploration and production of natural gas will have a material impact on future decisions regarding levels of investment and employment in Pennsylvania. This is of paramount concern to the Chambers.

Pursuant to Pennsylvania Rule of Appellate Procedure 531(b)(2), no party or their counsel, other than the amici and their counsel, paid, in whole or in part for, or authored any part of, the brief.

II. SUMMARY OF ARGUMENT

The Panel's decision to ignore century-old judicial precedent, finding the "rule of capture" does not apply to natural gas production that uses of hydraulic fracturing, a procedure that has been routinely used by the unconventional gas drilling industry in Pennsylvania and elsewhere for decades, must be reversed.

The Panel's decision would expose oil and natural gas producers to tort liability for lawful operations that have been a recognized aspect of Pennsylvania subsurface law for over a century. This will discourage oil and gas producers from engaging in efficient oil and gas production, as they would have to alter their hydraulic fracturing activities to avoid incurring liability. It will also disrupt long settled arrangements, including leases and contracts that have relied on long-settled principles of Pennsylvania law.

This also will impact hundreds of thousands of Pennsylvania workers who depend on the State's flourishing oil and gas industry. As of 2016, the oil and gas industry supports nearly 322,600 jobs in the Commonwealth. The disruption to settled and relied upon principles of property and liability law may decrease the availability of those jobs.

In addition, producers and landowners would be exposed to speculative and unwieldy litigation. Without protection from actions like trespass, producers would be uncertain where wells could be placed without facing tort claims, resulting in

the potential for significant volumes of natural gas to remain untapped, which in turn, could drive prices up for Pennsylvania's residents or deprive landowners of royalty revenue. For that reason, allowing the Panel's decision to stand, would lead to the loss of significant economic value of the natural gas presently within the Marcellus shale, for which the risk of litigation would discourage extraction.

The Panel decision fails to recognize hydraulic fracturing as simply one in a long line of technological innovation in the efficient recovery of oil and natural gas resources. Indeed, the policy behind the rule of capture has long recognized that landowners who do not presently have a lease or well on their property are afforded the opportunity to "go and do likewise," regardless of the technology involved.

Curtailing innovation and the recovery of natural gas through the use of hydraulic fracturing will logically restrict (a) Pennsylvania's labor work force, (b) leasehold royalties to Pennsylvania landowners, (c) business growth, (d) the benefits derived from significantly lower energy pricing, and (e) the environmental benefits of increased natural gas use.

The departure from the long-held, judicial precedent is simply unwarranted. For these reasons, the Chambers respectfully urge this Court to reverse the Panel's decision.

III. ARGUMENT

A. BACKGROUND

This matter involves the appeal of the Superior Court’s Order in Adam Briggs, et al., Appellants vs. Southwestern Energy Production Company, Appellee, Docketed at Number 1351 MDA 2017, digested at 2018 PA Super 79. Therein, a two judge Panel concluded that the more than century-old “Rule of Capture” doctrine did not preclude an action by plaintiffs alleging trespass onto their property by lawful natural gas exploration and production operations conducted exclusively on adjacent property leased by SWN Production Company, LLC (“SWNPC”). Specifically, the Panel determined that the “Rule of Capture” does not apply when natural gas production employs hydraulic fracturing, a procedure that is routinely used by the oil and natural gas industry in Pennsylvania and elsewhere, and has been for decades. In so ruling, the Panel’s decision created new trespass and conversion claims by property owners whose property is adjacent to property where natural gas is being recovered through the use of hydraulic fracturing.

B. THE PANEL DECISION, IF ALLOWED TO STAND, WILL HAVE SIGNIFICANT CONSEQUENCES FOR PENNSYLVANIA’S INDUSTRY AND ECONOMY

Although the Panel’s decision recognizes the existence of this Court’s long standing precedent, ranging from 1889 through 1907, it ignores the principles so well established in that case law, thus reaching an incorrect result. In Pennsylvania

alone in 2015, the natural gas and oil industry supported nearly 322,600 jobs, provided nearly \$23.0 billion in wages and contributed nearly \$44.5 billion to the state's economy.⁴ Moreover, the impact fee paid by the industry, and tied directly to the number of wells drilled in a particular year, has generated more than \$1.4 billion in new revenue for the Commonwealth since 2011.

Indeed, the oil and gas industry supports jobs in: (1) the natural gas and oil industry; (2) the services industry; (3) wholesale and retail industries; (4) finance, insurance, real estate, rental and leasing industries; (5) manufacturing industry; (6) transportation and warehousing industry; (7) construction industry; (8) information industry; (9) agriculture industry; (10) utilities industry; (11) mining industry; and (12) various other industries.⁵ These industries involve numerous trades, including boilermakers, operating engineers, electricians, pipefitters, ironworkers, plumbers, laborers, insulators, painters, plasterers, masons, carpenters, sheet metal workers and teamsters.⁶

⁴ Impacts of the Natural Gas and Oil Industry on the US Economy in 2015, accessed January 14, 2019. <https://www.api.org/~media/Files/Policy/Jobs/Oil-and-Gas-2015-Economic-Impacts-Final-Cover-07-17-2017.pdf>.

⁵ Id.

⁶ See, Dr. Robert Bruno & Michael Cornfield, *Study of Construction Employment in Marcellus Shale Related Oil and Gas Industry 2008-2014*, University of Illinois, August 2014. http://ler-illinois.us-east-2.elasticbeanstalk.com/wp-content/uploads/2015/01/Marcellusjobsstudy_FINAL.pdf.

By way of example, in the fields of construction, manufacturing and logistics related to the oil and gas pipeline industry, in 2017, due to high production rates in the Marcellus region, Pennsylvania saw an increase of 153.5 percent, creating jobs for over 21,000 workers.⁷ Future development has already been planned as well. For example, Royal Dutch Shell announced plans to develop a \$6 billion “ethane ‘cracker’” in Beaver, Pennsylvania – promising 6,000 construction jobs, and 600 permanent positions.⁸ Such continued economic development would be hindered should the Panel’s decision stand.

Moreover, from 2007 to 2012, Pennsylvania went from being the tenth largest state for oil and natural gas employment to the sixth largest.⁹ Indeed, in comparison to the coal mining industry, which rose from 8,276 jobs in 2007 to 9,520 jobs in 2012, the oil and natural gas industry rose from 5,829 jobs in 2007, to 20,943 jobs in 2012.¹⁰ These are jobs directly related to the oil and natural gas industry – not jobs in the indirectly impacted industries.¹¹ Those increases, as

⁷ Consumer Energy Alliance, Everyday Energy for Pennsylvania, accessed January 14, 2019. <https://consumerenergyalliance.org/cms/wp-content/uploads/2018/08/CEA-Pennsylvania-Report.pdf>.

⁸ Appalachia markets itself as global energy hub, accessed January 14, 2019. <https://www.cnbc.com/2018/04/23/appalachia-markets-itself-as-global-energy-hub.html>.

⁹ The Marcellus Shale gas boom in Pennsylvania: employment and wage trends, access January 14, 2019. <https://www.bls.gov/opub/mlr/2014/article/the-marcellus-shale-gas-boom-in-pennsylvania.htm>.

¹⁰ Id.

¹¹ Id.

stated above, show an even greater impact on the number of jobs the oil and natural gas industry has created in the Commonwealth. Moreover, due to the state's industry growth, the state's average annual wages rose to nearly \$83,000.00 in 2012 in the oil and natural gas industry, compared to an average annual pay in the state of \$48,397.00.¹²

In addition to increases in jobs and wages, the oil and natural gas industry has provided significant savings to Pennsylvania's residents. In 2008, prices for natural gas peaked at \$10.39 per thousand cubic feet in Pennsylvania.¹³ By 2016, the price for the same volume decreased to just \$3.72.¹⁴ As a result, between 2006 and 2016, Pennsylvania consumers have saved a total of \$30.5 billion due to the decrease of natural gas prices.

Indeed, a recent study by the Kleinman Center for Energy Policy at the University of Pennsylvania concluded that the rates charged by gas distribution companies fell by 72% between 2007, when the unconventional industry was just getting started, and 2016, and that the cost of direct purchases by industrial and

¹² Id.

¹³ Consumer Energy Alliance, Everyday Energy for Pennsylvania, accessed January 14, 2019. <https://consumerenergyalliance.org/cms/wp-content/uploads/2018/08/CEA-Pennsylvania-Report.pdf>.

¹⁴ Id.

commercial customers fell a like amount.¹⁵ Official data maintained by the Public Utility Commission support these conclusions, showing a direct downward trend in natural gas prices from 2007 through 2017.¹⁶

The increase in natural gas use has significant environmental benefits as well. Indeed, “[g]reater direct use of natural gas for heating and cooling, water heating, cooking and clothes drying can cut carbon emissions nearly in half.”¹⁷ “That is because natural gas appliances and the network that delivers the energy to [homes] is extraordinarily efficient.”¹⁸ Coupled with the energy rate savings consumers have experienced, the environmental benefits of increased natural gas utilization reduce common urban pollutants significantly.¹⁹

If the Panel’s decision were allowed to stand, producers of oil and natural gas would suddenly face exposure to tort liability for conducting operations that have been lawfully permitted for over a century. In so doing, and without this protection, oil and gas producers will face significant uncertainty regarding where wells can be drilled without becoming subject to claims, thus discouraging

¹⁵ Pennsylvania’s Gas Decade: Insights into Consumer Pricing Impacts from Shale Gas (2007- 2016), Kleinman Center for Energy Policy, accessed April 14, 2018, <https://kleinmanenergy.upenn.edu/paper/pennsylvanias-gas-decade>.

¹⁶ Purchased Gas Cost Rates. Pennsylvania Public Utility Commission, accessed April 14, 2018. <http://www.puc.state.pa.us/NaturalGas/pdf/PGC.pdf>.

¹⁷ American Gas Association, Cleaner Energy, accessed January 14, 2019. <https://www.aga.org/natural-gas/clean-energy/>

¹⁸ Id.

¹⁹ Id.

efficient oil and gas production and discouraging continued capital investment in Pennsylvania. As a result, Pennsylvania workers will be impacted directly, as the number of wells being drilled will drop. Indeed, curtailing hydraulic fracturing will logically curtail (a) Pennsylvania's labor work force, (b) leasehold royalties to Pennsylvania landowners, (c) business growth, (d) the benefits derived from significantly lower energy pricing. (See footnote 12, *supra*) and (e) the amount of revenue derived from the impact fee.²⁰

As evidenced above, over the past decade, the Chambers' unconventional natural gas industry members have contributed substantially to economic growth and economic savings in Pennsylvania, producing thousands of new jobs, motivating scores of new entrepreneurs, and decreasing the costs of energy for members of the Commonwealth. Accordingly, the Chambers respectfully urges this Court to reverse the Panel decision.

C. THE PANEL DECISION, IF ALLOWED TO STAND, WILL CREATE SPECULATIVE AND UNWIELDY LITIGATION

The Panel's decision will burden the courts with speculative, unwieldy, and uncertain litigation that will pit neighbors against neighbors, and landowners against producers. Indeed, if allowed to stand, the Panel's decision would

²⁰ Justice Billet's Concurring opinion in Coastal Oil & Gas Corp. v. Garza Energy Trust, 268 S.W.3d 1 (Tex. 2008), cogently demonstrates how energy production produces significant benefits for citizens and the state itself. 268 S.W.3d at 26-42.

encourage those unleased landowners to claim an interest in the production of thousands of wells – directly impacting and decreasing the interests of those who have leased their property.

Although the Panel’s decision properly cites to long standing decisional law from our Pennsylvania Supreme Court, ranging from 1889 through 1907, it ignores the precedential reasoning and purpose behind that case law. Indeed, in Westmoreland and Cambria Natural Gas Co. v. DeWitt, 18 A. 724 (Pa. 1889), our Supreme Court recognized that gas – which is the natural resource at issue here – is “a mineral with peculiar attributes,” and, therefore, the question of “possession” requires an analysis which is different from that applied to ordinary mineral rights; *i.e.*, coal. As the DeWitt decision noted, “unlike other minerals, [oil and gas] have the power and the tendency to escape without the volition of the owner.”²¹ DeWitt goes on to hold:

If an adjoining, or even a distant, owner, drills his own land, and captured gas, so that it comes into his well and under his control, it is no longer yours, but his.

18 A. at 725.

Eleven years later, in Jones v. Forrest Oil Co., 44 A. 1074 (Pa. 1900), the Court addressed the same core issue. There, the question was the extent to which an owner of oil wells may use mechanical devices, such as gas pumps, to help

²¹ As discussed below, these statements continue to hold true of gas recovered through the use of hydraulic fracturing.

bring oil to the surface, even when doing so would affect the production of neighboring wells. In concluding that gas pumps were permitted without legal consequence, the Court reasoned:

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.

44 A. at 1075.

Finally, in Barnard v. Monongahela Natural Gas Co., 65 A. 801 (Pa. 1907), the Court was asked to consider whether a landowner may drill a well close to his property line, thus drawing gas from beneath an adjoining property without invading his neighbor's property rights. In other words, whether such an activity creates an action for trespass. Consistent with DeWitt and Jones, the Court held:

[E]very 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.

65 A. at 802.

In addressing any claim of unfairness, the Supreme Court provided explicit guidance to the neighboring property owner: "go and do likewise." Id. The Panel discounts this recourse, citing to the cost of an unconventional well. However, the Panel misunderstands the nature of the recovery of gas from unconventional wells. Few, if any, individual landowners have the resources to develop and recover the natural gas beneath their property, from either conventional or unconventional

wells. Rather they lease with a production company, as the landowners did in this case. In the modern context, “go and do likewise” means the adjoining landowner is free to lease with another company and recover the gas beneath its property. In other words, either on your own or under a leasehold arrangement to a third party, you may do the same as your neighbor. The judicial precedent cited above thereafter remained for over a century without any disruption and the logic continues to be valid to this day.

However, if the Panel’s decision is allowed to stand, without the certainty and protection afforded by the long-standing, judicial precedent of the Rule of Capture, it will undoubtedly create hundreds if not thousands of lawsuits or threats of lawsuits which, for the last 110 years, have been moderated by judicial precedent. Producers would be uncertain where wells could be placed without facing tort claims, resulting in the potential for significant volumes of natural gas to remain untapped, which in turn, could drive prices up for Pennsylvania’s residents or deprive landowners of royalty revenue. Indeed, the Panel’s decision would make the recovery of natural gas through hydraulic fracturing subject to so much litigation that it will likely have the ultimate effect of significantly curtailing this activity which has been so valuable to Pennsylvanians.

The “damages” alleged in these suits and claims will be premised on the supposition that tiny cracks may have occurred in rocks thousands of feet below

the surface of the ground. However, there are no reliable means enabling a jury or court to determine whether any oil or gas produced from a well came from under a different property, and if from under a different property, the quantity of that oil and gas. Accordingly, those unleased landowners would tie up valuable court resources in pursuing actions against their neighbors and producers over something that may indeed prove unknowable.

The climate surrounding the oil and natural gas industry would be better served with the long-held, judicial precedent of the Rule of Capture. Indeed, it provides certainty and protection to those who seek to extract the natural gas. As always, those landowners who feel that their rights to the oil and natural gas are being impacted are free to lease their property themselves, and “go and do likewise.” See Barnard, *supra*.

The firmly established Rule of Capture has served an important and logical purpose for more than a century – protecting homeowners and producers alike – and it should not be judicially discarded.

**D. THE PANEL DECISION, IF ALLOWED TO STAND,
INHIBITS INNOVATION AND GROWTH**

Since the first well was drilled in Pennsylvania, companies and entrepreneurs have been rapidly transforming the industry with their technological advancements. Indeed, recent extraction improvement, including advances in horizontal drilling, hydraulic fracturing, and well simulation technologies have

promoted economical extraction of natural gas.²² Such advancements have directly resulted in additional savings for Pennsylvanians and made the United States a major energy producer.

As stated by the U.S. Department of Energy, the increase in natural gas production “result[s] primarily from new technology developments in hydraulic fracturing and horizontal drilling that have allowed industry to produce oil and gas from low permeability formations including shale and “tight” formations, often called ‘unconventional resources.’”²³

Indeed, these recent, innovative advancements have increased economic growth and reduced the environmental impact at the surface and in the subsurface. The “march of time” and continued innovation has shifted the recovery of oil and gas toward unconventional formations. As stated by Justice Willet in his concurring opinion in Coastal Oil:

In *Manziel*, we stated that “[s]econdary recovery operations are carried on to increase the ultimate recovery of oil and gas,” and that “[i]t cannot be disputed that such operations should be encouraged.” If anything, ***encouraging the use of leading-edge technology is a greater concern today than in 1962 when Manziel was decided.***

²² See, e.g., Upgrading Natural Gas Technology, access January 14, 2019. <https://www.aiche.org/chenected/2018/07/upgrading-natural-gas-technology>.

²³ Quadrennial Technology Review 2015, Chapter 7: Advancing Systems and Technologies to Produce Cleaner Fuels, accessed January 14, 2019. <https://www.energy.gov/sites/prod/files/2016/05/f32/Ch.7-SI-Oil-and-Gas-Technologies.pdf>.

268 S.W.3d at 34 (emphasis added).

Moreover, as in Jones, supra, the extraction of oil by the “exercise of all the skill and invention of which man is capable” certainly encourages future advancement and innovation. Jones, 44 A. at 1075. Through the recent, and continuing, innovations, natural gas has been, and should continue to be, extracted under the same rules that have applied for over a century of continued innovation. Rather than recognizing hydraulic fracturing as another increment in a century-long march of innovation, the Panel saw hydraulic fracturing as something that changed the nature of natural gas recovery.²⁴ In fact, the logic in DeWitt is as applicable to recovery of gas through hydraulic fracturing as it was to conventional recovery. Just as it is unknown exactly how and where gas will flow when drilling into a conventional formation, it is unknown exactly where fractures will propagate, how many, if any, will reach an adjoining property, whether those fractures will remain open and produce gas and whether that gas will find its way to the well. Just like the unknowns with conventional wells, the unknowns for hydraulic fracturing illustrate why the Rule of Capture continues to be appropriate

²⁴ The Panel may have also substantially misunderstood the nature of fractures created by hydraulic fracturing. On pages 21-23 of the Panel’s decision, they refer to creating an “artificial channel” beneath the adjoining property, suggesting they envision an open conduit draining the neighboring property rather than the miniscule fractures that may or may not allow for the passage of gas.

Should the Panel's decision stand, they will have thwarted an innovation that has allowed Pennsylvania and the United States to become major energy producers, with significant economic and geopolitical ramifications, and will cast doubt on how the Rule of Capture will apply to future innovations in the field. For these reasons, the Chambers respectfully urges this Court to reverse the Panel decision.

IV. CONCLUSION

For the foregoing reasons, the Chambers respectfully request this Court affirm the Court of Common Pleas of Susquehanna County, and reverse the decision of the Superior Court.

Respectfully submitted,

POST & SCHELL, P.C.

BY: /s/ James J. Kutz
Terry R. Bossert, Esquire (PA ID 17670)
James J. Kutz, Esquire (PA ID 21589)
Ryan M. Logan (PA ID 320720)
17 North 2nd Street, 12th Floor
Harrisburg, PA 17101
Telephone: 717-731-1970
Facsimile: 717-731-1985
Email: jkutz@postschell.com
tbossert@postschell.com
rlogan@postschell.com

Date: January 30, 2019

*Counsel for The Pennsylvania Chamber of
Business and Industry, Chamber of Commerce
of the United States of America, and
Washington County Chamber of Commerce*

CONFIDENTIAL INFORMATION CERTIFICATION

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

POST & SCHELL, P.C.

BY: /s/ James J. Kutz

James J. Kutz, Esquire
Attorney I.D. 17670
17 North 2nd St., 12th Fl.
Harrisburg, PA 17101
Telephone: (717) 731-1970
Facsimile: (717) 731-1985

Date: January 30, 2019

*Counsel for The Pennsylvania
Chamber of Business and Industry,
Chamber of Commerce of the United
States of America, and Washington
County Chamber of Commerce*

CERTIFICATE OF COMPLIANCE

Pursuant to Pa.R.A.P. 531, I hereby certify that this amicus curiae brief contains less than 7,000 words as calculated by the word count feature on the word processing program that was used to prepare it.

Respectfully submitted,

POST & SCHELL, P.C.

BY: /s/ James J. Kutz

Terry R. Bossert, Esquire

Attorney I.D. 17670

James J. Kutz, Esquire

Attorney I.D. 21589

Ryan M. Logan

Attorney I.D. 320720

17 North 2nd Street, 12th Floor

Harrisburg, PA 17101

Telephone: 717-731-1970

Facsimile: 717-731-1985

Email: jkutz@postschell.com

tbossert@postschell.com

rlogan@postschell.com

Date: January 30, 2019

*Counsel for The Pennsylvania
Chamber of Business and Industry,
Chamber of Commerce of the United
States of America, and Washington
County Chamber of Commerce*

CERTIFICATE OF COMPLIANCE

Pursuant to Pa.R.A.P. 531(b)(2), I hereby certify no party or their counsel, other than the amici and their counsel, paid, in whole or in part for, or authored any part of, the brief.

Respectfully submitted,

POST & SCHELL, P.C.

BY: /s/ James J. Kutz

Terry R. Bossert, Esquire

Attorney I.D. 17670

James J. Kutz, Esquire

Attorney I.D. 21589

Ryan M. Logan

Attorney I.D. 320720

17 North 2nd Street, 12th Floor

Harrisburg, PA 17101

Telephone: 717-731-1970

Facsimile: 717-731-1985

Email: jkutz@postschell.com

tbossert@postschell.com

rlogan@postschell.com

Date: January 30, 2019

*Counsel for The Pennsylvania
Chamber of Business and Industry,
Chamber of Commerce of the
United States of America, and
Washington County Chamber of
Commerce*

CERTIFICATE OF SERVICE

I, James J. Kutz, Esquire, an attorney at the law firm of Post & Schell, P.C., do hereby certify that on the date set forth below, I did cause to be served a true and correct copy of the foregoing document on all counsel of record via the Court's electronic notification system, as follows:

Laurence M. Kelly, Esquire
65 Public Avenue
Montrose, PA 18801-1219
Counsel for Adam, Paula, Joshua and Sara Briggs, Appellant

Jeffrey J. Malak, Esquire
Chariton, Schwager & Malak
138 South Main Street
P.O. Box 910
Wilkes-Barre, PA 18703-0910

Robert L. Byer, Esquire
Meredith E. Carpenter, Esquire
Duane Morris, LLP
30 South 17th Street
Philadelphia, PA 19103
Counsel for Southwestern Energy Production Company, Appellee

POST & SCHELL, P.C.

Date: January 30, 2019

/s/ James J. Kutz

James J. Kutz, Esquire