IN THE SUPREME COURT OF PENNSYLVANIA

DOCKET NUMBER 63 MAP 2018

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

v.

SOUTHWESTERN ENERGY PRODUCTION COMPANY
Appant

BRIEF OF APPELLEES

Appeal from the april 2, 2018 Order of the Superior Court
at Docket No. 1351 MDA 2017 reversing the August 8, 2017 Order
of the Court of Common Pleas of Susquehanna County at Docket Number 2015-01253

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STATEMENT OF ISSUE INVOLVED

At 443 MAL 2018 your Honorable Court has identified the issue in this case as follows:

> Does the rule of capture apply to oil and gas produced from wells that were completed using hydraulic fracturing and preclude trespass liability for allegedly draining oil and gas from under nearby property, where the well is drilled solely on and beneath driller's own property and the hydraulic fracturing fluids are injected solely on or beneath the driller's own property?

It is respectfully submitted that a more inclusive statement of the issue presented is as follows:

> Does the rule of capture apply to oil and gas produced from wells that were completed using hydraulic fracturing and preclude trespass and conversion liability for allegedly draining oil and gas from under an adjoining property where, even though the well is drilled solely on and beneath driller's own property *but* the hydraulic fracturing fluids *and proppants* are *intentionally* injected *into the adjacent property through horizontal fractures created by the driller causing natural gas*

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[1] At the very onset, it is suggested that any person considering this case might well be advised to visit "Youtube" and search for "hydraulic fracturing" for any one or more of the several videos found there that demonstrate the process with explanation.

to be drained therefrom. (Italics added.)

Answered in the negative by the Pennsylvania Superior Court.

The additional language makes it clear that the activity constituting the alleged trespass and conversion involves the injection of the "fluids" "proppants" into the "adjoining property", here being the adjoining property of the Briggses (as opposed to being injected only into the same land that is the location of the actual well, itself).

The issue as presented to the Superior Court and to your Honorable Court is a case of first impression in Pennsylvania.

COUNTER STATEMENT OF THE CASE

The topic of this case is the natural gas that is located in the Marcellus Shale strata that underlies most of northern Pennsylvania, including Susquehanna County; specifically, the natural gas located under the land of the Brigges, plaintiffs in the case below and Appellees in the present matter before your Honorable Court.

The Appellees, the Briggs Family, are the owners a parcel of land located in Harford Township, Susquehanna County, Pennsylvania, consisting of approximately 11.07 acres. There is no Lease or other agreement under the terms of which any person or entity is entitled to extract natural gas from on or under said parcel, a previous Lease with

SWN having expired and not "renewed" by SWN.[2]

Appellant, SWN, a natural gas production company, has leased the lands of others on three sides of Briggses' parcel. Since 2011, through the process of hydraulic fracturing, involving propelling proppants and other materials into the land of the Brigges, SWN has been and continues to extract natural gas from under the land of the Briggses with no Lease or other grant of permission by the Briggses to do so.

As described by the Superior Court decision in this matter, Briggs v. Southwestern Energy Production Company, 184 A.3d 153, (Pa. Super 2018) at page 159:

> "[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."** (Emphasis supplied.)

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[2] Even though the Brigges were willing to renew.

This process, initiated upon "neighboring" lands, forces the fluids containing the proppants into the shale formation under the Briggses' land allowing the natural gas trapped therein to flow from said Briggses' land into SWN's wellbore on the "neighboring" land in the same manner and with the same effect as a drill bit would do in every gas or oil well drilled since the Drake well1859.

See the diagrams demonstrating the proximity of the Southwestern Wells to Briggses' land attached hereto as appendices.

As a result of SWN's activity, the Briggs have filed the above captioned suit against SWN claiming compensatory damages for trespass and conversion as well as punitive damages.

After the Court of Common Pleas sustained SWN's motion for summary judgment dismissing these claims, the Brigges appealed to the Superior Court of Pennsylvania which reversed the said entry of summary judgment and remanded these claims to the Court of Common Pleas.

Thereafter, your Honorable Court granted SWN's petition for allowance of appeal bringing the matter before your Honorable Court for resolution.

SUMMARY OF ARGUMENT

As recognized by your Honorable Court nearly a century ago, the natural gas under the Brigges' land belongs, exclusively, to the Brigges as part of their ownership of their land. A fundamental and settled tenet of American law is the right of a landowner to exclude unwanted interference with his or her land.

No entity (such as SWN here) is entitled to enter upon or under a landowner's land to extract his or her natural gas. Indeed, not even the sovereign is entitled to invade or take land from a landowner without paying adequate compensation.

The manner in which these ownership rights are manifested is in the remedies afforded by the common law for centuries to owners of property against those who would invade these rights: trespass and conversion.

Nonetheless, through the process of hydraulic fracturing, SWN is and for years has been intentionally extracting natural gas from under the land of the Briggs family. Hydraulic fracturing is a process that extracts natural gas from the underground Marcellus Shale strata by injecting "proppants" into the Shale freeing the natural gas trapped therein. It is the proppants that serve the same purpose as a drill bit invading the land of the Brigges constituting the trespass; the extraction of natural gas being the conversion.

The Brigges filed a complaint in trespass and conversion against

SWN seeking appropriate damages. In response, SWN alleged "immunity" under what is known as the rule of capture which allows any landowner to extract as much natural gas from wells located **on his or her own property** regardless of the actual origin of the natural gas so long as the well is confined solely to his or her land.

Notwithstanding the uniform application of the rule of capture in Pennsylvania for nearly 150 years, SWN is asking your Honorable Court to recognize a dramatic and expansive interpretation of the rule of capture to allow SWN (and other similar entities) to disregard the centuries old concepts of land ownership, trespass and conversion law and provide SWN (and other similar entities) a virtual "privilege to plunder" natural gas from as many adjoining landowners as can be reached by the hydraulic fracturing process.

Much of this Brief is devoted to demonstrating why the centuries old concepts of land ownership, trespass and conversion law should be honored and preserved; and that your Honorable Court should not follow the Supreme Court of Texas in creating a "privilege to plunder".

The balance of this Brief is devoted to refuting allegations made by SWN and a myriad of Amicus Curiae speculating (with no support in the record) dire consequences to follow if the rule of capture is not converted into a "privilege to plunder".

The Superior Court wisely upheld the ancient and prevailing law. It is

respectfully submitted that your Honorable Court should do the same.

ARGUMENT

OWNERSHIP OF GAS "IN THE GROUND"

As recognized by this Honorable Court nearly a century ago, the natural gas under the Brigges' land belongs, exclusively, to the Brigges as part of their ownership of their land.

In the Pennsylvania Supreme Court case of Hamilton v. Foster, 116 A. 50, 102, (Pa. 1922) appears language that is as germane to the present matter before your Honorable Court as if it were written with regard to this case as much as it was with respect to the case decided back in 1922:

> Much of the difficulty, under which appellants labor, would be removed if they did not attempt to extend the comparison made in Westmoreland Natural Gas Co. v. DeWitt, 130 Pa. 235, 249, far beyond the purpose for which it was intended. It was there said:
>
> > "Water and oil, and still more strongly gas, may be classed by themselves, if the analogy be not too fanciful, as minerals ferae naturae."
>
> The analogy is not too fanciful, when understood in the sense in which the words were used, as appears in the next sentence:
>
> > "In common with [wild] animals, and unlike other minerals, they have the power and the tendency to escape without the volition

of the owner";

but the first statement, whether or not qualified by the second, does not determine that oil and gas are not capable of ownership even when in place, or may not be the subject of a grant. On the contrary, in this State these matters are firmly established otherwise.

It has been many times decided that oil and gas are minerals, though not commonly spoken of as such, and while in place are "part of the land" (Kier v. Peterson, 41 Pa. 357, 362; Funk v. Haldema, 53 Pa. 229, 249; Stoughton's App., 88 Pa. 198, 201; Marshall v. Mellon, 179 Pa. 371, 374); like other minerals within the bounds of the freehold (which extends to the centre of the earth: Chartiers Block Coal Co. v. Mellon, 152 Pa. 286, 295), they may be the subject of sale (which is precisely what in legal effect this lease accomplishes): McIntosh v. Ropp, 233 Pa. 497, 512), separate and apart from the surface and from any other minerals beneath it. This being true, -- and it is not disputed by appellants, -- like all other minerals they necessarily belong to the owner in fee or his grantee, so long as they remain part of the property, and though he cannot use them until he has severed them from the freehold, **exactly as in the case of all other minerals beneath the surface, he nevertheless has an ownership which he can sell and which otherwise he will lose only by their leaving the property.** (Emphasis and format changes

supplied).

See U.S Steel v. Hoge, 468 A.2d 1380,1383 (Pa. 1983) for a more recent recognition of this concept including specific reference to Hamilton v. Foster, supra.

FUNDAMENTAL PROPERTY RIGHTS

Since this Honorable Court has long recognized that the Brigges own the natural gas in place under their land, the significance thereof is next considered.

A fundamental tenet of American law that the right to exclude unwanted interference is essentially the *sine qua non* of private ownership of property. *See, e.g.*, Kaiser Aetna v. United States, 44 U.S. 164, 176 (1979) (noting that "the right to exclude others" is "one of the most essential sticks in the bundle of rights that are commonly characterized as property"); *see also*, e.g, Dolan v. City of Touggourt, 512 U.S. 374, 384 (1994); Lucas v. South Carolina Coastal Council 505 U.S. 1003, 1044 (1992); Nolan v. California Coastal Common. 483 U.S. 825, 831 (1987).

Indeed, as one academician has explained:

> [The right to exclude is more than just "one of the most essential" constituents of property–it is the *sine qua non*. Give someone the right to exclude others from a valued resource, *i.e.*, a resource that is scarce relative to the human demand for it, and you give them property. Deny someone the exclusion right and they do not have property.

Thomas W. Merrill, *Property and the Right to Exclude*, 77 Neb. L. Rev.

730, 730 (1998).

"SETTLED PROPERTY RIGHTS"

Commencing at page 28 of its Brief, SWN suggests that the decision of the Superior Court upends "settled property rights".

The rule of property law that has shaped landowners' expectations for over 130 years (and centuries before that) is exactly as stated in the case of Hamilton v. Foster, supra. (This same decision was also cited by SWN at page 28 of its Brief.)

On this point the parties agree: "Legal rules governing property should not be easily overturned.[3] Yet that is exactly what SWN is asking your Honorable Court to do.

Notably, such a "invasion of property rights" is not available even to the sovereign State itself. See U.S. Const., amend. V ("[Nor shall private property be taken for public use, without just compensation."); Hawaii Housing Auth. V. Midriff, 467 U.S. 229, 245 (1984) ("A purely private taking could not withstand the scrutiny of the public use requirement[.]"); Pa. Const., art. I § 10 ("[Nor shall private property be taken or applied to public use, without authority of law and without just compensation being first made or secured."); Reading Area Water Auth. V. Schuylkill River Greenway Assn., 100 A.3d 572, 577 (Pa. 2014) (noting takings in

[3] SWN's Brief at page 29.

Pennsylvania must primarily benefit the public); 26 Pa.C.S. §§ 306–307 (requiring public purpose and just compensation).

There is no "manifest peculiarity of the oil and gas industry which warrants granting it [any] special treatment" under the Pennsylvania Constitution. Robinson Township v. Commonwealth of Pennsylvania, 147 A.3d 536, 576 (Pa. 2016) (Robinson III).

As the Superior Court recognized, interpreting the rule of capture to permit an oil and gas company to inject proppants into its neighbors' land would essentially give them carte blanche to ignore small landowners entirely and simply take their natural resources, thereby **creating** an essentially anarchical system of subsurface property rights.

The natural gas under Briggses' land is theirs. Without the intervention of "proppants" and other "fracking materials" being propelled into their land by SWN, it would be locked in place, not going anywhere.[4] and nobody has the right to "just come take it".

The activity of the "gas industry" in taking natural gas from persons like the Briggses here through "invasion by proppants" is akin to trespassing on a neighbor's land, opening the gate of the neighbor's livestock pen and "capturing" the livestock as they walk out, piously saying

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[4] [T]he majority of commercially developable oil and gas in Pennsylvania today lies within shale formations. This oil and gas cannot be developed without hydraulic fracturing." SWN's Brief at pages 25-26.

"I just found them walking about".[5]

Also, cracking the walls of a neighbor's house through blasting in a neighboring stone quarry on his own land creates liability even though the quarryman never stepped foot on the neighbor's land (and made every effort to prevent the damage from occurring). See, for instance, Lobozzo v. Adam Eidemiller, Inc., 263 A.2d 432, 433 (Pa. 1970).

It is SWN's failure to recognize these well established principles that permeates its (and all Amici's) erroneous arguments made in this case.

TRESPASS AND CONVERSION

The manner in which these ownership rights are manifested is in the remedies afforded by the common law for centuries to owners of property against those who would invade these rights: trespass and conversion.

Trespass

As so correctly noted by the decision of the Superior Court in this case:

> "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

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[5] The famous fox in Pierson v. Post, 3 Cai. R. 175, 2 Am. Dec. 264 (N.Y. Sup. Ct. 1805) belonged to no one while "in the wild". However, if the same fox had been kept in a zoo its whole life, it would have belonged to the zoo's owner, and no one would have any right to "capture" it from there without committing trespass and conversion.

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 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. (Emphasis supplied).[6]

There are no exceptions to Sections 158 and 159. They are ironclad tort rules designed to protect the inviolability of real property guaranteed by the Pennsylvania Constitution from trespassers like SWN. Pennsylvania law has consistently recognized that causing something to enter another's land constitutes a trespass. See Hutchinson v. Schimmelfeder, 40 Pa. 396 (Pa. 1861) (landowner liable in trespass to adjacent landowner for depositing dirt against his neighbor's cellar wall, causing it to spring and crack); Rafferty v. Davis, 103 A. 951, 952 (Pa. 1918) ("[W]here one explodes blasts on his own land and thereby throws rock, earth or debris on the premises of his neighbor, he commits a trespass . . . ."); Baier v. Glen Alden Coal Co., 200 A. 190 (Pa. Super. Ct. 1938) (coal company held

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[6] See, also, Resatement (2d) 159.

liable in trespass for damages to an adjoining landowner's property caused by an explosion of dynamite in a bore hole drilled on a public street); Federoff v. Harrison Const. Co., 60 A.2d 334 (Pa. Super. Ct. 1947) (contractor held liable in trespass for damage to adjacent homeowner's' house cause by concussion from blasting operations); Conslyman v. Garrett, 164 Pa. Super. 618 (Pa. Super. Ct. 1949) (owner of pigs held liable in trespass for damage the pigs caused to a neighbor's land).

Here SWN is trespassing on the land of the Brigges by propelling a thing (the proppants) beneath the surface of the land of the Briggses through hydraulic fracturing.

SLANT DRILLING IS A TRESPASS

A "slant well" is one drilled on one property that "bottoms out" on adjoining land extracting oil or gas from under said adjoining land.

See the accurate language at pages 50-51 of SWN's Brief acknowledging liability for drilling under another's land:

> [. . .] [a]n operator may also be liable to a neighboring landowner if it physically drills a well into the neighbor's property without the right to do so. [5 citations redacted]. **Where an operator engages in conduct of this sort, the neighbor could recover damages for trespass, because the "capture" does not occur on the operator's property, but**

rather on the neighbor's property. (Emphasis supplied.)

When a well is drilled into a neighbor's property, the oil or gas is "captured" beneath the neighbor's land, not the driller's. See Lynch v. Burford, 50 A. 228 (Pa. 1901) (concluding that damages were recoverable where a landowner drilled a well on property that he had leased to a producer); see also Edwards v. Lachman, 534 P.2d 670 (Okla. 1974) (allowing the recovery of damages where an operator drilled into a neighbor's property); Hastings Oil Co. v. Texas Co., 234 S.W.2d 389, 398 (Tex. 1950) (same); Gliptis v. Fifteen Oil Co., 16 So.2d 471, 474 (La. 1943) (same). This paragraph taken verbatim from footnote 18 located on page 27 of SWN's Brief.

Propelling "proppants" into the Brigges' land is no different than if SWN had used a drill bit to invade the Brigges' land: both are trespasses.

Conversion

"Our Supreme Court defined conversion as 'an act of willful interference with a chattel, done without lawful justification, by which any person entitled thereto is deprived of use and possession.' Norriton East Realty Cereorp. v. Central-Penn Nat'l Bank, 435 Pa. 57, 254 A.2d 637, 638 (Pa. 1969). The Supreme Court also cited with approval Prosser's description of the ways in which conversion can be committed:

(a) Acquiring possession of the goods, with an intent to assert a right to them which is in fact adverse to that of the owner.

(b) Transferring the goods in a manner which deprives the owner of control.

(c) Unreasonably withholding possession from one who has the right to it.

(d) Seriously damaging or misusing the chattel in defiance of the owner's rights.

Id. (quoting William L. Prosser, LAW OF TORTS §? 15 (2d ed. 1955)) (emphasis added). In short, a claim for conversion arises from an intentional act.

See Palmer v. Doe. 136 A.3d 1111 (Pa. Cmwlth. 2016) from which the foregoing was taken verbatim. (Formatting appearance supplied.)

The extraction of Briggses' natural gas from under their land through hydraulic fracturing constitutes the conversion alleged in this matter.

DEFENSE OF SWN IN THIS CASE

With virtually no mention of the law of trespass and conversion, and with no denial that it is extracting natural gas from under the land of the Brigges through the process of hydraulic fracturing, SWN bases its entire defense on a misguided and incorrect assertion of "immunity" under the judicially created defense known as the "rule of capture".

RULE OF CAPTURE DISCUSSED

The rule of capture was developed in Pennsylvania in the case of Westmoreland & Cambria Natural Gas Co. v. DeWitt, 18 A. 724, (Pa. 1889) only 30 years **after** the advent of the oil industry itself (1859) when it was thought that **all** underground oil and gas could be found only in and extracted only from pools or reservoirs formed by "nature". No Pennsylvania case was found to have used the term "rule of capture" until the Superior Court's decision in this matter. **This decision never sanctioned the physical invasion (trespass) of adjoining property by any device such as a drill bit.**

The rule has never been successfully challenged, and it is not being challenged in this matter.

Except for single Texas case, discussed hereinafter, in each and every decision relied upon by SWN, the oil or gas was extracted from an underground pool or reservoir into which the oil and gas collected under the driller's own land "naturally" without the intervention of any human developer and **without any intrusion (trespass) into neighboring property.**

In Barnard v. Monongahela Natural Gas Co., 65 A. 801 (Pa. 1907), for example, this Honorable Court determined that **"[a]n oil or gas well may draw its product from an indefinite distance and in time exhaust**

a large space, with exact knowledge about the movements of that product being unattainable". SWN's Brief at page 18. (Emphasis supplied) That same case further stated that a property owner could drill a well on his own property and pump as much oil and gas as possible from underneath his own property "without so invading the property rights of the adjoining landowner as to be legally accountable therefor." Id. at 802.

It is this same lack of knowledge of the actual situs of the oil and gas in an underground pool or reservoir and the lack of any intrusion (trespass) into any adjoining land that underlies the decisions in this and every other case cited by SWN and its Amici Curiae concerning the extraction of oil and natural gas. As further example, Jones v. Forest Oil Co., 44 A. 1074 (Pa. 1900), concerned an underground pool or reservoir, as did the case of Kepple v. Pennsylvania Torpedo Co., 7 Pa. Super. 620, 621 (1898), wherein a "torpedo" of explosives was (supposed to be) used to enhance the production of a well drilled into an underground pool or reservoir.[7]

The same is true with respect to the use of nitro-glycerine: put it into underground pools or reservoirs into which the oil and natural gas flowed for the benefit of whomever "tapped" same.

Indeed, as stated at pages 4-5 of the Amicus Curiae Brief of the American Petroleum Institute, the purpose of the use of a shell or torpedo loaded with nitroglycerin was "an increase of its capacity to gather and

[7] The "torpedo" failed destroying the well leading to the litigation in that case.

hold oil **from the reservoirs surrounding it.**" (Emphasis supplied)

Again, this refers to a pool or reservoir and activity solely on the "actor's" own land. The location of the forced "fracturing" by use of such a "torpedo" including the ownership of the land where the actual "fracturing" occurs remain as unknown as the extent of the well, itself.

Moreover, again, there was no physical intrusion (trespass) into adjoining land.

In controlling contrast, by using the process of hydraulic fracturing the ownership of the land under which proppants are discharged and the extraction of natural gas that is planned, intended and expected by hydraulic fracturing is sufficiently known and determinable to support a finding of trespass and conversion when it takes place under adjoining land as in the present matter. The process here involves an intentional and planned invasion of the land of the Brigges causing the trespass and conversion.

It is SWN (and its myriad of Amici Curiae) that seek to upend nearly eight hundred years of property and estate law, let alone "a century and a half of property and tort law" (SWN's Brief at page 3) by endeavoring to **expand and actually convert** the rule of capture to an area where it has never been judicially recognized in Pennsylvania. "Legal rules governing property should not be easily overturned." SWN's Brief at page 29. "Settled expectations should not easily be disturbed". SWN's Brief at 15, 28, 29, 31.

The Superior Court's decision leaves totally untouched the century and a half of property and tort law concerning the rule of capture. This Honorable Court should not **convert** the rule of capture into a privilege to plunder.

THE "ONLY DIFFERENCE" MAKES ALL THE DIFFERENCE

At pages 19-20 of its Brief, SWN correctly states that "[The only difference between the existing Pennsylvania cases that apply the rule of capture and this case is that SWN is completing its wells using hydraulic fracturing". SWN correctly recognizes that the process of extracting the natural gas in this case is different from the extraction of gas from an underground pool or reservoir because of the process of hydraulic fracturing which represents the **only** way that the natural gas is going to be extracted from most, if not all, of the Marcellus Shale in Pennsylvania.[8] However, this difference makes all the difference to the outcome of this case.

While the origin and quantity of gas flowing into an underground pool or reservoir is "unknown", the origin of oil and gas extracted through the hydraulic fracturing process is totally known and ascertainable: it is being extracted only from the land into which the "fracking" materials, the

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[8] No underground pool or reservoir being exploited. "[T]he majority of commercially developable oil and gas in Pennsylvania today lies within shale formations. This oil and gas cannot be developed without hydraulic fracturing." SWN's Brief at pages 25-26.

proppants, are being forced through pressure from the borehole of the well installed by the producer (here SWN) just as certainly, and with the same effect as if a drill bit were used to invade the land of the affected landowners, here the Briggses.

It is readily acknowledged that hydraulic fracturing is a "lawful activity that landowners have the right to engage in on their property". SWN Brief at page 20. However, this is no more a right to invade a neighbor's property with proppants through the hydraulic fracturing process than to drill a well on a neighbor's property, extracting natural gas therefrom.

As such, it is not the process of hydraulic fracturing that makes the difference, it is the **trespass** upon the adjoining lands of the Brigges that makes all the difference.

It may be correct that the **total distance** that the proppants might be expelled from the borehole cannot be predicted with total accuracy. However, the distance from the borehole within which natural gas is planned, intended and expected to be extracted is known to the producer and the gas produced from that known and planned, intended and expected distance which can be reasonably accurately determined.[9] Nor is

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[9] Perhaps an analogy: In Susquehanna County, there are many stone quarries. All of the quarriable stone is located underground on the sides of mountains. In order to access the quarriable stone, the dirt, other rocks, etc. covering the stone strata (referred to as "overburden") has to be excavated. The principal method of loosening this overburden so that it can be easily removed with "earthmoving equipment" is by blasting with dynamite. While the total distance that the dynamite will send shock waves through the ground is unknown, the "planned, intended and expected" distance necessary to loosen the "overburden" covering a particular strata of stone is known. In a similar manner, while the total distance

there any allegation of "unlawfulness" being alleged in this case with respect to the process of hydraulic fracturing itself any more than it is not unlawful to operate a motor vehicle on the highways (but unlawful to drive the same vehicle on a neighbor's lawn). It is the invasion of the Brigges' land that constitutes the trespass which has never been sanctioned by the rule of capture.

Nor has SWN attempted to demonstrate the relevancy of the age of the hydraulic fracturing process. It is the underground pool or reservoir and location of the physical activity that makes all the difference.

At page 25, SWN stated that "[u]ntil the Superior Court's decision, no court in the Commonwealth had limited the application of the rule of capture based on the method of production or well completion". Conversely, no court in the Commonwealth has **expanded** the application of the rule of capture based on the method of production or well completion, which distinction is the basis upon which the Superior Court rendered its decision which should be affirmed by your Honorable Court.

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that a hydraulic fracturing operation will propel proppants might be unknown, there is a distance that the proppants are planned, intended and expected to be propelled causing the natural gas within that distance to be extracted through the wellbore. The Brigges have the right to prove that SWN "planned, intended and expected"to extract natural gas from under their property through propelling the proppants into their property thereby extracting natural gas therefrom.

COASTAL OIL SHOULD NOT BE FOLLOWED

The only reported decision that has been produced by SWN in support of its argument that faced and held that the rule of capture applies to insulate a company such as SWN from trespass and conversion liability through hydraulic fracturing such as is being done by SWN here is the case of Coastal Oil & Gas Corp. v. Garza Energy Trust et al. 268 S.W.3d 1 (Supreme Court of Tex. 2008), (hereinafter "Coastal").

For that reason, this section of the Brief will be devoted to that decision, why it should not be followed in Pennsylvania and why the Superior Court was correct in adopting the wisdom of the dissenting opinion therein written by Justice Johnson of the Supreme Court of Texas joined by two other Justices.

Commencing at pages 13 the Coastal Court created several superficial "arguments" that the aggrieved landowner "supposedly made", and then dismissed them with little, if any, analysis.

Commencing at page 14, the Court set out its "four reasons" for its decision:

> **First, the law already affords the owner who claims drainage full recourse.**

Here, the Court resorts to the "go drill your own well" "remedy" which is already part of the rule of capture, not an analysis of whether or not extracting natural gas from under neighboring land by hydraulic fracturing

is "judicially sanctioned". The Texas Supreme Court then went on to state "[n]o one suggests that these various remedies provide inadequate protection against drainage[!]" (Ibid at page 14) (exclamation supplied, a period in the original). This is no reason to allow a gas company like SWN to "drain" another's land by a "fracture run of 2,500 to 4,500 feet from the wellbore which was called "typical" at Note 34 of the Coastal decision at page 51. Especially, and as aptly recognized by the Superior Court, the "go drill your own well" is a totally empty "remedy" in a case such as this. As the owner of 11.3 virtually landlocked acres, the Briggses here can hardly afford to drill a well, "frack" it and produce enough natural gas to pay the cost of obtaining the permit, let alone produce gas in a "paying quantity", not to mention getting it to market.[10] (As opposed to owning land over a known underground "pool" where anyone with a vertical well is "in on it".) Nor is there any governmental agency limiting or otherwise controlling production such as in Texas.

The Pennsylvania Superior Court was correctly unimpressed with this suggested "remedy" as should your Honorable Court.

> **Second, allowing recovery for the value of gas drained by hydraulic fracturing usurps to courts and juries the lawful and preferable authority of the Railroad Commission to regulate oil and gas production.** Coastal, pages 14-15. (emphasis supplied.)

Pennsylvania has no "Railroad Commission" with its broad regulatory

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[10] Nor could any other gas production company; specially, since SWN has the land on three sides of the Briggses' 11.3 acres leased and producing natural gas (some of which from under Briggses' land).

powers. **Further the whole reason for Courts and Juries is to resolve claims for damages such as this.** To say that Courts and Juries should **not** be involved is to absolve companies like SWN from being responsible to **any** authority, whatever, for converting the natural gas owned by others. Is this "where we are at?" If so, eight hundred years of jurisprudence was all for naught.

The Coastal Court's "analysis" "supporting" this second "reason" goes on to attempt to involve the Texas Railroad Commission which does little for the present case other than to demonstrate why this "reason", even if any good in Texas, is of

no consequence to the present matter in Pennsylvania.

Third, determining the value of oil and gas drained by hydraulic fracturing is the kind of issue the litigation process is least equipped to handle.

It is seriously questioned whether this "reason" is or ever was any good even in Texas. The law in Pennsylvania on the computation of damages is as well "equipped" to determine the value of the gas planned, intended and expected to be drained by hydraulic fracturing as with virtually any other claim for damages for trespass, conversion, contract actions, whatever. The computation process is exactly the same as is presently being used to divide the royalties payable on natural gas produced among those under whose land the extraction of natural gas in Pennsylvania is known to be taking place.

Furthermore, each well has an area from which the production of natural gas is planned, intended and expected. The percentage of this area owned by each landowner (Leased or otherwise) is easily computed.

At the very least the Briggses are entitled to try to provide a reasonably accurate computation of their percentage share of the natural gas being produced by SWN's "Folger 5 Well" (which is the "culprit" well in this case).

Whatever the difficulty of proof, this Honorable Court should not sanction trespass, conversion and plunder.

Fourth, the law of capture should not be changed to apply differently to hydraulic fracturing <u>because no one in the industry appears to want or need the change</u>. (Emphasis supplied.)

At the onset, it is the <u>Coastal</u> decision that effected the "change" in the rule of capture by expanding it just as SWN seeks a "change" in the rule of capture in the present matter by expanding it to sanction trespass and conversion.

Addressing this "reason": Of course "no one in the industry appears to want or need the change"[11]. They are using the rule of capture as a "license to plunder"[12] See <u>J. M. Young, v. Ethyl Corporation et al</u>., 521 F.2d 771, 774 (8th Cir. 1975) (which refused to **expand** the rule of capture to

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11 Implicently denying that it is making the "change".

12 Or as a threat to plunder.

include trespass and conversion by hydraulic fracturing)[13]. It is not at all surprising that "the industry" wants to expand the rule of capture.[14] Using modern techniques (which get better every day), with an expansion of the rule of capture, they can greatly reduce the number of acres that they have to lease and just drain natural gas from under whomever does not agree to their own Lease terms.

In refusing to be persuaded by the majority opinion in the Coastal case, the Pennsylvania Superior Court correctly determined that the three Judge dissenting opinion authored by Justice Johnson in the Coastal case presented a far more correct and judicial consideration of the law applicable to the facts in the Coastal case and adopted its reasoning. In his dissent, Justice Johnson, joined by two others, explained that his "fundamental disagreement" was with the majority's assertion "that its decision is *not a change* of the rule of capture." Id. at 45. The rule of capture does not apply to situations such as this, he said, "in which a party effectively enters another's lease without consent, drains minerals by

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13 In that case, the Eighth Circuit saw an important distinction between the natural migration of minerals as a result of pressure changes and the "forced migration" of minerals. "The rule of capture has been applied exclusively, as far as we know, to the escape, seepage, or drainage of 'fugacious' minerals which occurs as an inevitable result of tapping a common reservoir." Id. at 774. The rule does not apply "to situations in which non-fugacious minerals are forced from beneath a landowner's property." Id. "[T]he common law rule of capture is not a license to plunder." Id.

14 Six (6) Amicus Curiae Briefs supporting SWN have been filed in this case, representing many and only "gas producing " organizations.

means of an artificially created channel or device, and then 'captures' the minerals on the trespasser's lease." Id. at 43 (Johnson J., dissenting). Analogizing to slant drilling, Justice Johnson explained, "We have held that a trespass occurs when a well begun on property where the operator has a right to drill is, without permission, deviated so the well crosses into another's lease." Id. at 44. He aptly recognized that there was no meaningful distinction between this and "taking minerals from another's lease through fracturing" Id. "[B]oth involve a lease operator's intentional actions which result in inserting foreign materials without permission into a second lease, draining minerals by means of the foreign materials, and 'capturing' the minerals on the first lease." Id.

Foreshadowing what has happened in this case, Justice Johnson explained that the majority's holding "reduces incentives for operators to lease from small property owners" because they can use hydrofracturing to unleash and capture oil and gas on neighboring, unleased property. Id. at 45. "Today's holding 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, offering to pool or utilizing forced pooling, or paying compensatory royalties." Id. That is exactly what SWN has done here. It is respectfully submitted that your Honorable Court recognize the judicial consistency and correctness of this dissenting opinion in Coastal and adopt it.

Further, in the case of Stone v. Chesapeake Appalachia, LLC, 2013 WL 2097392, *8 (N.D.W.Va. Apr. 10, 2013), order vacated, 2013 WL 7863861 (N.D.W.Va. July 30, 2013),[15] the defendants likewise contended that the plaintiffs' trespass claim was barred by the rule of capture. As here, the defendants in Stone urged the court to "follow the lead of the Supreme Court of Texas" in Coastal Oil. Id. at *4. But the court found Justice Johnson's dissent more persuasive and rejected Chesapeake's argument. Coastal Oil "gives oil and gas operators a blank check to steal from the small landowner," the court explained. Id. at *6. If the rule of capture precludes liability for subsurface trespasses through hydrofracturing, companies like SWN "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," or they "may just take the gas without even contacting a small landowner." Id.

Again, it is respectfully submitted that your Honorable Court recognize the judicial consistency and correctness of the Stone decision and adopt it as the Superior Court wisely did.

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15 It appears that after the court in Stone, 2013 WL 2097392, had held that the rule of capture does not preclude damages for a trespass caused by hydraulic fracturing, the parties settled the case and, as part of the settlement, agreed to move to have the court's order vacated. Stone, 2013 WL 7863861.

As such, it is submitted that the Coastal decision provides no scholarly or other judicially supportable reason for it to be followed in this matter.

"POLICY DECISIONS"

As argued throughout this Brief, it is SWN that seeks an **expansion** of the rule of capture; not the Briggses seeking an exception thereto. No "new tort duty" is being sought by the Briggses; rather, they are pursuing the well recognized causes of action of trespass and conversion.

In this regard, SWN has suggested reference to a "criteria" set forth in the case of Althaus ex rel. Althaus v. Cohen, 756 A.2d 1166 (Pa. 2000). Addressing the stated "criteria":

(1) the relationship between the parties;

Both have rights associated with the ownership of their property; but none with regard to the other's property without a specific agreement.

(2) the social utility of the actor's conduct;

Since when did Pennsylvania law reward trespass and conversion? Since when did such actions have "social utility"?

Long passed are the days when it was "o.k." to prosper through trespass, conversion and a misguided perception of the "common good". It is hard to believe that the "gas industry" is relegated to trespass and conversion in order to produce natural gas in Pennsylvania, or cannot

succeed without a "license to plunder".[16]

(3) the nature of the risk imposed and foreseeability of the harm incurred;

The argument of SWN with regard to this "factor" is written with total disregard of its own statement to the effect that the natural gas in the Marcellus Shale strata under anyone's property is not going anywhere until taken through the hydraulic fracturing process.[17] Thus, the alleged "risk factor" is totally absent from the perceived "factor". In its place is the certainty of the eradication of the time honored remedies of trespass and conversion with regard to real estate ownership if the decision of the Superior Court in this case is disturbed.

(4) the consequences of imposing a duty upon the actor;

In the first place, no new "duty" is being imposed: rather, the duty to refrain from trespass and conversion which has been the uninterrupted law in the English speaking world for over 800 years.

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[16] In this regard, see the Amicus Curiae Brief of Washington County, Pennsylvania, and the Brief of the County of Washington and the Chamber of Business and Industry for the success of the natural gas industry in Pennsylvania. This success can hardly be dependent on trespass and conversion.

[17] SWN's Brief at page 24-25.

ALLEGATIONS OF "NEGATIVE CONSEQUENCE"

Economy

With absolutely no support from the record in this case, SWN and its Amici all predict that to allow the Briggses and others similarly situated to pursue trespass and conversion claims against "the gas industry" will have "negative consequences" and proceed to make wild and speculative predictions of doom and destruction of the economy of both Pennsylvania and the Nation.

For over 800 years, our society has flourished and expanded under the rule of law which should not be abandoned in order to create a privilege to plunder. Everyone else in society must conform to the rule of law and there should be no recognized exception in this or any other case. See Robinson III, supra.

Litigation

SWN's concern for "speculative and unwieldy" litigation harkens to the arguments made by virtually every potential wrongdoer that seeks to avoid responsibility for its actions. As the Superior Court correctly noted at 183 A.3d 153, 163:

> [W]e do not believe that such [evidentiary] 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.").

Every hydraulic fracturing operation has a planned, intended and expected field of the extraction of natural gas which can easily be proven by discovery and expert testimony as is planned in this case. It is only from this planned, intended and expected field of the extraction of natural gas that recovery can be made by a victim landowner such as the Briggs family here. Just because the **total** distance from a wellbore that the "proppants" might travel from a particular well cannot be predicted with total accuracy is no reason to preclude liability for trespass and conversion within the "extraction distance" from the well borehole that **can** be proven with the reasonable certainty required by law: "Generally, under Pennsylvania law, damages need not be proved with mathematical certainty, but only with reasonable certainty, and evidence of damages may consist of probabilities and inferences". Bailets v. Pennsylvania Turnpike Commission, 181 A.3d 324, 336, (Pa. 2018). That same rule applies here.

Nor will similar litigation "pit one landowner against another". Note that the only parties to this litigation are SWN- the gas producer, and the Briggs family- the victim landowners. Note that the "real owners" of the land upon which the culprit well is drilled are not (essential or otherwise) parties to this litigation.

Other alleged "negative consequences"

Commencing at page 45 SWN offers a myriad of scenarios "possible" from a decision of your Honorable Court upholding the application of trespass and conversion law to the facts in this case. It is submitted that they can hardly be taken seriously. The easiest is "potential liability of airplanes": an airplane that flies "overhead" at a "safe" distance causes absolutely no damage to the landowner providing no cause of action by the landowner. However, if the plane lands on a landowner's property or some object falls from the plane, this is a totally different situation with potential liability for such damages as are caused thereby. It is far better to "wait and see what happens" than to deny compensation in the case that is presently before your Honorable Court on the basis of unwarranted speculation with no support in the record.

History has proven, over and over again, that the law has been very well equipped to respond to whatever scenario as has been presented in the past, and will continue to be able to do so. This case presents no "new" law; is just another application of "ancient" law.

INVOLVEMENT OF THE PENNSYLVANIA GENERA ASSEMBLY

In the first place, by now it should be clear that Briggses firmly and consistently allege that there is no new cause of action envisioned, sought

or created in the above matter. Nor is this case any attack on the rule of capture.

As for involvement by the Legislature, it should be kept in mind that the rule of capture, like the ancient law of trespass and conversion, itself, was created, not by any Legislature; but by the judicial systems of the various States of the United States to determine the ownership of **migrating** oil and natural gas.

In the same manner, the most basic concepts of "ownership", "possession" and the rights thereto evolved through the judicial systems throughout the ages; albeit codified in several respects by several Legislatures.

With regard to the present matter, since there is no new cause of action being considered; since the Superior Court did not "create any new cause of action", the Legislature is not and need not be involved. The law of trespass and conversion has developed without Legislative intervention and is a perfectly adequate forum within which to resolve the dispute in this matter.

It is clear from the number and source of the Amicus Curiae Briefs filed in behalf of the "gas industry" that they are concerned about the continued success of the increasing importance of the production of natural gas to the economy of both Pennsylvania and the Nation. It has never been the intention of the Briggses in this case to jeopardize the

economy of any State or Nation, especially ours.

If the Legislature believes that the production of natural gas is in jeopardy, it could always extend the existing "forced pooling" statute to cover the Marcellus Shale. See 58 Pa. Stat. § 34.1.

AMICUS CURIAE FROM "GAS PRODUCERS"

No fewer than six other "gas industry trade groups" have joined with SWN in seeking reversal of the Opinion of the Superior Court through Amicus Curiae Briefs.

They all have the same arguments in common:

that the "gas producing industry" is entitled to intentionally extract natural gas from under "anybody's" land through hydraulic fracturing with or without a Lease and either paying royalties or not;

that the property rights of landowners are subordinate to the "gas producing industry";

that there should be no limit to obtaining natural gas through hydraulic fracturing, because "this is the way it has always been done";

that the Opinion of the Superior Court is an attack on the natural gas

industry in Pennsylvania;

that the Opinion of the Superior Court is an attack on the hydraulic fracturing process;

that the natural gas industry in Pennsylvania (and elsewhere) is endangered by the Opinion of the Superior Court;

The common answer to all of these arguments is the same: They are all wrong.

All of the "amicus curiae" take the position that there should be no liability imposed for knowing and intentional trespass and conversion.

Not one of the "Amicus Curiae" expressed any regard, whatever, for preserving the concept of property ownership.

SPECIFIC AMICUS CURIAE BRIEFS DISCUSSED

Pennsylvania Council of Business and Industry, Chamber of Commerce of U.S.

At page 10, the Amicus Curiae Brief of the Pennsylvania Council of Business and Industry, Chamber of Commerce of U.S. it is argued that "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."

Answer: Hydraulic fracturing has not been conducted for anywhere near "a century"; most likely for the past 15 years of significant activity. The laws against trespass and conversion[18] have been in place for centuries, and neither was never "lawfully permitted". If the Natural Gas industry "suddenly face[s] exposure" to trespass and conversion liability, it is because (1) the present matter is the first instance of trespass and conversion, or (2) this is the first instance to be litigated in this Honorable Court. Forcing proppants into a landowner's land and extracting therefrom the landowner's natural gas was never "lawful" even if this litigation is the first to seek judicial intervention in Pennsylvania.

Marcellus Shale Coalition

At pages 3-4, the Amicus Curiae Brief of the Marcellus Shale Coalition states: "Shale lacks the permeability and porosity necessary for natural gas to flow through the formation to the same degree as conventional reservoirs. Without hydraulic fracturing, there would be no economically viable production from shale formations such as the Marcellus and Utica . . ."

There is no argument with this statement which seems to be universally accepted as correct. However, the present suit is **not** any attack on the process any more than it is an attack on the rule of capture.

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[18] Through common law and statutes.

However, the legitimacy of the process is no "privilege to plunder". J. M. Young, v. Ethyl Corporation et al., supra.

At page 26, the Amicus Curiae Brief of the Marcellus Shale Coalition argues: "If unleased landowners wish to seek compensation for oil and gas underlying their property, they can do so by entering into a lease as opposed to filing a lawsuit."

As a matter of fact, the Briggses in this case **did** seek a renewal of their Lease with SWN at least eleven months prior to filing suit. SWN refused to even consider renegotiating a Lease; obviously preferring to just take (convert) the Brigges' natural gas without compensating them.

American Petroleum Institute

At pages 8-9, the Amicus Curiae Brief of the American Petroleum Institute argues: "Given the historical context, oil and gas producers, including those engaged in fracturing to release trapped hydrocarbons, have for decades reasonably relied on the common-law rule of capture in Pennsylvania. They have reasonably relied on the stability, certainty and predictability of the law in order to site, design and drill thousands of wells across the Commonwealth. They have, likewise, reasonably relied on the rule of capture when acquiring oil and gas rights and when negotiating and entering into oil and gas leases."

If there ever was such "reliance", same was misplaced and

demonstrates a lack of understanding of the actual history, purpose and **limitations** of the rule of capture itself. Especially, does such "reliance" demonstrate total disregard for the property rights of the victim property owners such as the Briggses here whose natural gas is being converted through the obvious trespass being committed by "producers" such as SWN in this case.

Nor is this suit about any "inadvertent drainage" as suggested at pages10, 11 and 13 of the Amicus Curiae Brief of the American Petroleum Institute . The borehole of the "culprit" well of SWN in this case is a mere 63 feet from Briggses' land[19] rendering the "drainage" anything but "inadvertent". This case has nothing, whatever, to do with anything "inadvertent".

Rather, this suit seeks recovery of damages in trespass and conversion for no more natural gas than can be proven was planned, intended and expected to be extracted from under their land by the activity of SWN here.

Amicus Curiae Briefs of Professors Engelder and Gillespie

The scholarly and scientific explanations of both Professors Engelder and Gillespie are very instructive as to the geological characteristics of natural gas and the formations in which it is found.

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[19] At the closest, and only 321 feet at the furthest.

Professor Gillespie faults neither the criteria established by Pennsylvania Courts for the rule of capture in the first place nor the limitations of said rule as recognized by the Superior Court here.

What the Courts refer to as a "pool" or "reservoir" of natural gas, Professor Gillespie calls "reservoir" or "reservoir rock" or "trap" (to which the rule of capture applies). What the Courts refer to as the "Marcellus Shale strata", Professor Gillespie refers to as "source rock" meaning that the natural "migration" of the natural gas contained therein is so very, very slow that the only way to extract it in the history of mankind is by hydraulic fracturing[20] (to which the rule of capture does NOT apply).

Once the natural gas reaches he "reservoir rocks" the ownership of same cannot be fairly determined; hence the rule of capture. However, while the natural gas remains in the "source rocks" (i.e. Marcellus Shale as it exists in much of Pennsylvania) the ownership of same **can** be fairly determined, hence the correct decision of the Superior Court.

Perhaps the distinction between "conventional" and "unconventional" as used in judicial decision is not as "pure" as described by Professor Gillespie in his Amicus Curiae Brief; nonetheless, the distinction between drawing oil or gas from an underground pool or reservoir into which oil or gas collects without human intervention making same subject to the rule of capture, (conventional) and extracting gas from underground shale through

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[20] See the Brief of SWN and most Amicus Curiae Briefs supporting SWN.

hydraulic fracturing (unconventional) is both real and controlling in this case.

Nor did the Superior Court "restructure" the relations between landowners in Pennsylvania. It simply did not change them.

Professor Engelder seems to be of the opinion that **all** natural gas extraction from the ground is and always has been some sort of hydraulic fracturing with all "gas bearing strata" being a "reservoir" which is at odds with the need for hydraulic fracturing as described at length in Appellant's Brief.

CONCLUSION

For the reasons set forth in the opinion of the Superior Court of Pennsylvania and this Brief, it is respectfully submitted that your Honorable Court should uphold the centuries old concepts of property ownership through the doctrines of trespass and conversion; not **expand** the application of the rule of capture as sought by SWN in this case and affirm the decision of the Superior Court.

Respectfully submitted,

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APPENDIX 1

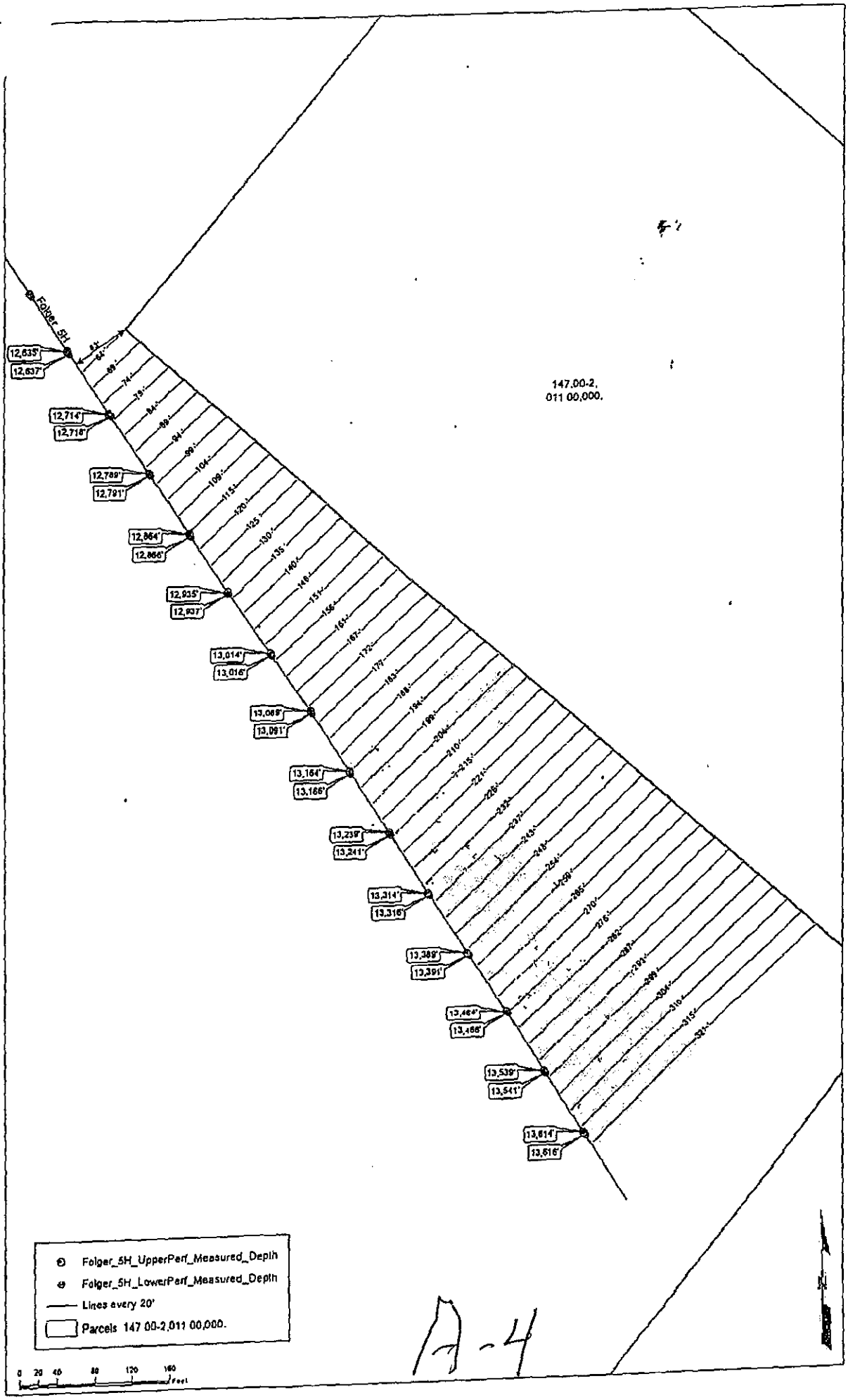
A-1

Well Name	Approximate Closest Distance to Parcel 147.00-2,011.00	Lat_Length
Folger 5H	63 feet	6300
Innes South 5H	625 feet	4875
Folger 4H	847 feet	6301
Innes South 6H	1440 feet	5372

Unit	Acres
FOLGER	573.487
INNES SOUTH	663.542

RR-H

A-2


Folger 5H
12,635'
12,637'
12,714'
12,716'
12,789'
12,791'
12,864'
12,866'
12,935'
12,937'
13,014'
13,016'
13,089'
13,091'
13,164'
13,166'
13,239'
13,241'
13,314'
13,316'
13,389'
13,391'
13,464'
13,466'
13,539'
13,541'
13,614'
13,616'
147.00-2,
011 00.000.
Folger_5H_UpperPerf_Measured_Depth
Folger_5H_LowerPerf_Measured_Depth
Lines every 20'
Parcels 147.00-2,011 00.000.
0 20 40 80 120 160
Feet

A-4

ED 11

CERTIFICATE OF COMPLIANCE WITH PA.R.A.P. 127

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

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CERTIFICATE OF COMPLIANCE WITH PA.R.A.P. 2135

I certify that the number of words in this Brief is 9,453 as per the word processing program used to compose this Brief.

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