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James A. Pellow, III

Pennsylvania Supreme Court Issues Decision Involving “Rule of Capture”

*By James A. Pellow, III**

The author explores an important decision by the Supreme Court of Pennsylvania and concludes that the Pennsylvania legislature may have a say in the ultimate resolution of the issues raised by the case and the Rule of Capture in unconventional drilling operations.

In the 2018 case of *Briggs v. Southwestern Energy Production Company* (“*Briggs I*”), the Pennsylvania Superior Court ruled that hydraulic fracturing of shale gas (“fracking”) can constitute a trespass to adjacent land. The *Briggs I* decision would allow adjacent landowners to receive compensation for gas taken from under their lands. The *Briggs I* decision surprised and dismayed many in the industry who believed that the long-standing “Rule of Capture” would protect unconventional drillers from claims of trespass to land. Southwestern Energy subsequently appealed the Superior Court decision.

TRESPASS TO LAND

Now, the Pennsylvania Supreme Court has decided on appeal (“*Briggs II*”) that hydraulic fracturing of shale gas (“fracking”) may constitute a trespass to land, but only if the plaintiff landowner can prove that the driller caused an actual physical intrusion onto the landowner’s property.

The Pennsylvania Supreme Court’s decision in *Briggs II* overruled the *Briggs I* decision of the Superior Court and remanded the case to the trial court to determine whether or not Southwestern’s fracking activities had resulted in a physical intrusion onto the Briggs’ land.

Because the Superior Court decision was overturned, it may appear that the Pennsylvania Supreme Court decision in *Briggs II* was a victory for the gas industry. This is not necessarily so. The Pennsylvania Supreme Court confirmed that if the plaintiff can prove that the defendant’s fracking activities resulted in a physical intrusion onto the plaintiff’s lands, a trespass has occurred, and damages may be awarded for gas drained from under the plaintiff’s lands.

On the other hand, *Briggs II* requires the landowner to prove that an actual physical intrusion occurred and ruled that an intrusion cannot be assumed merely because fracking occurred. Proving that a physical intrusion occurred many thousands of feet underground may be difficult for the landowner. While

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it is possible to measure the extent of the wellbore and whether or not it intrudes under adjacent lands, it’s questionable whether an accurate measurement can be made of how far fracking materials may have traveled beyond the wellbore.

On remand, the *Briggs* case may provide guidance to litigants concerning the measure of proof required to assert a claim of trespass and conversion due to fracking activities.

FRACKING

To understand the *Briggs II* decision, the facts of the case and some fundamentals of the law of real property in Pennsylvania must be reviewed and applied to the process of fracking.

The Briggs own an 11-acre tract in Susquehanna County, Pennsylvania. Southwestern holds an oil and gas lease on an adjacent property and operates gas wells located on units, which include the leased property, but which do not include the Briggs’ property. The Briggs believe that Southwestern has been extracting gas from the shale underneath their property, using fracking. The Briggs filed suit against Southwestern, alleging that Southwestern had trespassed onto the Briggs’ property and converted (wrongfully took) gas belonging to the Briggs. The trial court held in favor of Southwestern, but the Superior Court found in favor of the Briggs.

Pennsylvania common law defines the concept of “trespass.” The common law provides that the owner of land owns the surface of the land, as well as everything below the surface, including the coal, oil and gas, and minerals, to the center of the earth. The common law further provides that if a person intrudes onto property owned by someone else without consent, or places an object onto property owned by someone else without consent, a trespass has occurred.

The Briggs claimed that by forcing fracking fluid into the shale under their property, Southwestern trespassed onto their land. The Briggs further claimed that Southwestern trespassed onto their property to take (“convert”) gas belonging to Briggs, and should be required to pay the Briggs for that gas.

THE RULE OF CAPTURE

Southwestern raised the “Rule of Capture” as its defense to the Briggs’ claims of trespass and conversion. The Rule of Capture is an exception to the fundamental law that landowners own everything under the surface of their property, and has been part of Pennsylvania jurisprudence for more than a century. The Rule allows operators to extract gas from underneath adjacent properties owned by other parties. The Rule recognizes that when a common

pool of gas underlies adjacent properties, the gas is “migratory” and will naturally flow into a well drilled on either property. Accordingly, the Rule of Capture provides that when one adjacent landowner drills a well on his or her property, that landowner may extract gas from the common pool without consent of the other landowner. This is true even if one landowner extracts all of the gas in the common pool.

The Briggs argued, however, that the Rule of Capture should apply only to conventional (vertical) wells drilled into a common pool of gas. By contrast, unconventional (horizontal) Marcellus Shale wells are not drilled into common pools where gas is migratory. Instead, the gas is trapped in the Marcellus shale and cannot migrate to the wellbore unless it is released by the force of injecting fracking fluid at high pressure into the shale. The Briggs argued that the Rule of Capture should not apply because fracking is such a new and different means of extracting shale gas. In *Briggs I*, the Superior Court agreed and held in favor of the landowners.

THE SUPREME COURT'S DECISION

On appeal in *Briggs II*, the Pennsylvania Supreme Court commenced its analysis by affirming that the Rule of Capture applies regardless of the means used to produce the oil and gas. The court criticized the Superior Court's decision insofar as it *assumed* that the Rule of Capture only applies to conventional drilling and would not apply in connection with fracking an unconventional well. Simply put, the court ruled, as a matter of law, that the technology and method of drilling are irrelevant to the application of the Rule of Capture.

Next, the court criticized the Superior Court's decision insofar as it *assumed* that Southwestern's fracking activities necessarily resulted in a physical intrusion to release (drain) gas trapped in the shale under Briggs' lands. The Superior Court reasoned that gas would never have been released from the shale underneath Briggs' lands unless Southwestern's fracking materials had fractured that shale. The Pennsylvania Supreme Court rejected this *ipso facto* argument. Instead, it ruled that expert testimony would be necessary to determine whether or not a physical intrusion had actually occurred on Briggs' lands as a result of fracking on Southwestern's land. The case was remanded to the trial court to make that determination.

Finally, the Pennsylvania Supreme Court declined to adopt the Texas Supreme Court position that the Rule of Capture applies to unconventional wells even where a physical intrusion can be proven, as a matter of public policy, in order to encourage modern development of oil and gas reserves.

CONCLUSION

The *Briggs II* decision recognized that such public policy matters are for the legislature to decide, not the courts. Accordingly, the Pennsylvania legislature may have a say in the ultimate resolution of the *Briggs* issues and the Rule of Capture in unconventional drilling operations.