

## The Rule of Capture Held Captive:

*Pennsylvania Superior Court ruling challenges application of long-standing oil and gas law principle to unconventional shale operations.*

### INTRODUCTION

In a ruling issued on April 2, 2018, the Pennsylvania Superior Court ruled in *Briggs v. Southwestern Energy Prod. Co.* that hydraulic fracturing operations may constitute an actionable trespass if subsurface fractures, frac fluids, and proppant cross lease boundary lines and extend into the subsurface estates of adjoining property for which the operator does not have a lease to operate.<sup>1</sup> In support of its ruling, the *Briggs* court distinguished between conventional operations in a common pool resulting in the drainage of gas from neighboring properties and unconventional drilling operations causing the withdrawal of gas from fractures and artificial substances that extend into neighboring properties.<sup>2</sup>

### FACTUAL BACKGROUND

The plaintiffs in *Briggs* owned an 11.07-acre parcel of land in Susquehanna County.<sup>3</sup> Southwestern began operating several gas wells on property adjacent to the plaintiffs in 2011, and Southwestern's wells were hydraulically fractured in the Marcellus Shale formation. However, Southwestern did not obtain a lease for the plaintiffs' property for its operations.<sup>4</sup>

In their Complaint, the plaintiffs alleged that Southwestern had unlawfully extracted gas from the plaintiffs' property through its wells and had committed trespass.<sup>5</sup> Southwestern contended in its Answer that the plaintiffs' claims for trespass were precluded by the rule of capture.<sup>6</sup> After engaging in discovery, Southwestern filed a motion for summary judgment arguing, in part, that the rule of capture barred plaintiffs' damages claim for the drainage of gas from their property as a result of Southwestern's operations.<sup>7</sup> The trial court granted Southwestern's motion for summary judgment, finding that the rule of capture precluded plaintiffs from recovering damages.<sup>8</sup>

### RATIONALE OF THE SUPERIOR COURT

The Superior Court considered two points of error on appeal: first, whether the trial court erred in determining that the rule of capture precluded Southwestern from any liability under a cause of action for trespass or conversion when natural gas originating from under plaintiffs' land was extracted by Southwestern's operations; and second, whether the rule of capture applies to hydraulic fracturing operations so as to preclude Southwestern from liability under the causes of action of trespass or conversion when natural gas originating from under plaintiffs' land was extracted by Southwestern.<sup>9</sup>

The Superior Court noted Pennsylvania's case precedent recognizing the rule of capture, a long-standing principle of Pennsylvania mineral law that precludes liability from actions in trespass for production operations that result in the drainage of gas from adjacent properties.<sup>10</sup> Early Pennsylvania cases premised the rule of capture on the fugacious nature of gas.<sup>11</sup> However, noting a lack of case law discussing the application of the rule of capture to hydraulic fracturing operations that physically enter neighboring properties and withdraw gas, the *Briggs* court distinguished between a case from the Texas Supreme Court and followed the reasoning of a case from the United States District Court for the Northern District of West Virginia to conclude that hydraulic fracturing differs from conventional recovery methods with respect to the rule of capture.<sup>12</sup>

In *Coastal Oil & Gas Corp. v. Garza Energy Trust*, the Texas Supreme Court held that the rule of capture precluded landowners' trespass claims for drainage of gas when an operator had hydraulically fractured a well near the boundary of the landowners' property.<sup>13</sup> The Texas Supreme Court's decision in *Coastal Oil* recognized that the landowners had remedies available other than trespass damages, such as seeking administrative action with the Texas Railroad Commission or drilling an offset well.<sup>14</sup> The *Coastal Oil* court did not specifically address the subsurface trespass issue because the operator maintained a lease for the property allegedly affected which included the exclusive right to explore for and produce gas underlying the property.<sup>15</sup>

By contrast, the *Briggs* court noted that the United States District Court for the Northern District of West Virginia explicitly rejected the rationale of the *Coastal Oil* decision in ruling that a trespass claim was actionable and not protected by the rule of capture if hydraulic fracturing operations entered an adjoining property without a lawful right to do so even though the operator had lease rights to the property like the operator in *Coastal Oil*.<sup>16</sup> The Stone court denied the operator's motion for summary judgment, which relied on *Coastal Oil* to assert that the landowners' claims of trespass resulting from the operator's hydraulic fracturing operations were barred by the rule of capture.<sup>17</sup>

The *Briggs* court further noted that recent Pennsylvania Supreme Court decisions had determined that gas trapped in shale formations is non-migratory absent stimulation by hydraulic fracturing.<sup>18</sup> Although the rule of capture traditionally assumed that oil and gas originating in subsurface reservoirs migrated freely, the *Briggs* court adopted the rationale of the Stone case and narrowed the scope and application of the rule of capture with respect to gas trapped in shale formations. Specifically, the *Briggs* court determined that shale gas could only be produced by artificial means, such as by hydraulic fracturing, as compared to the natural migration of gas in shallower sand formations.<sup>19</sup>

Ultimately, the Superior Court ruled that the rule of capture does not preclude liability for trespass by hydraulic fracturing operations that extend into and extract gas from neighboring properties where the operator does not have a mineral lease.<sup>20</sup> The *Briggs* court reversed the trial court's entry of summary judgment and remanded the case for further proceedings relating to the plaintiffs' trespass and conversion claims.<sup>21</sup>

## **IMPLICATIONS OF THE BRIGGS DECISION**

There is now greater uncertainty for operations in the Marcellus Shale and Utica Shale because operators may be liable in trespass for fracs and other operations traveling beyond lease boundaries as a result of the *Briggs* decision. Although the rule of capture historically barred liability for damages resulting from the drainage of gas, it is unclear whether the rule applied when operations physically crossed into adjoining properties and developed gas underlying the property.<sup>22</sup> Importantly, historical case law applying the rule of capture did not specifically address whether operations on one property could directly contact and develop gas underlying adjacent properties.

The scope of the *Briggs* decision may be limited only to instances where operations penetrate the gas reservoirs of adjoining properties that are unleased and produce gas through a well on another property. In particular, the *Briggs* decision appears to recognize the continuing validity of the rule of capture when drainage of gas occurs naturally as opposed to instances where artificial means are applied to stimulate the flow of oil and gas through a well. However, the *Briggs* court did not identify what proof is required to demonstrate that gas was produced by natural as opposed to artificial means.

An application for reconsideration was made to the Superior Court on April 16, 2018, and the Superior Court denied the application on May 16, 2018. The *Briggs* case has not yet been appealed to the Supreme Court of Pennsylvania as of this case update. Further, depending on the additional evidence developed in the case on remand, it is unclear whether the plaintiffs will be able to substantiate their claims of trespass. As such, the Superior Court's ruling is not yet established precedent, but the *Briggs* decision provides a new and important level of analysis when

hydraulic fracturing and other enhanced recovery methods disturb neighboring properties not subject to an oil and gas lease.

## ABOUT THE AUTHOR



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## REFERENCES

<sup>1</sup> No. 1351, 2018 Pa. Super. LEXIS 299, at \*25 (Pa. Super. Ct. Apr. 2, 2018).

<sup>2</sup> *Id.* at \*22,

<sup>3</sup> *Id.* at \*1.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at \*2.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at \*3.

<sup>8</sup> *Id.* at \*4.

<sup>9</sup> *Id.* at \*4-5.

<sup>10</sup> See *Id.* at \*8.

<sup>11</sup> *Id.* at \*8-10.

<sup>12</sup> See generally *Id.* at \*14-21.

<sup>13</sup> 268 S.W.3d 1, 17 (Tx. 2008).

<sup>14</sup> See *Id.* at 14-17

<sup>15</sup> See *Id.* at 12 (declining to address the issue of subsurface trespass but acknowledging decisions conflicting with the traditional application of the rule of capture to drainage of gas from neighboring properties).

<sup>16</sup> *Briggs*, 2018 Pa. Super. LEXIS 299, at \*19-21, see also *Stone v. Chesapeake Appalachia, LLC*, No. 5:12-CV-102, 2013 U.S. Dist. LEXIS 71121, \*23 (N.D.W.Va. 2013). The operator in *Stone* did not have the pooling right to join the landowners' lease with neighboring leases to operate as a unit.

<sup>17</sup> *Id.* at \*19, see also *Id.* at \*18, n. 8 (noting that the *Stone* case was subsequently settled and the District Court's order vacated). In *Stone*, the district court found that the operator had aggressively sited its vertical wellbore within two hundred feet (200') of the landowners' property and the horizontal wellbore came within tens of feet to the property line. 2013 U.S. Dist. LEXIS 71121 at \*2.

<sup>18</sup> *Id.* at \*11 (quoting *Butler v. Charles Powers Estate ex rel. Warren*, 65 A.3d 885, 894 (Pa. 2013)).

<sup>19</sup> *Id.* at \*21-22.

<sup>20</sup> *Id.* at \*25.

<sup>21</sup> *Id.* at \*26. The *Briggs* court noted that the record was unclear whether Southwestern's operations actually crossed into plaintiffs' subsurface property, and the *Briggs* indicated that there was no evidence or estimation of how far Southwestern's operations extended.

<sup>22</sup> See, e.g. *Westmoreland v. Dewitt*, 18 A. 724, 725 (Pa. 1889) (recognizing that operations might 'tap' gas underlying adjoining properties to produce the gas) and *Jones v. Forest Oil Co.*, 44 A. 1074 (Pa. 1900) (stating that an operator can use any available technical means to produce gas even if it results in the production of gas from neighboring properties).