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ONE J

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PENNSYLVANIA



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I. Introduction

The past year, while relatively quiet on the legislative front, saw active litigation of numerous oil and gas disputes in Pennsylvania courts and administrative agencies. Notable issues included the proper application of the Pennsylvania Constitution’s Environmental Rights Amendment (*Pa. Env’tl. Def. Found. v. Commonwealth*); ongoing litigation and regulation relating to Act 13 of 2012 (*Robinson Twp. v. Commonwealth* and 78a regulations); litigation over the use of eminent domain power by midstream operators building pipelines (*In re Sunoco* cases); litigation over proper zoning of oil and gas related uses (*EQT Prod. Co. v. Borough of Jefferson Hills*); lease disputes (*Hildebrand v. EQT Prod. Co.*); and title disputes (*Cornwall Mountain Inv., L.P. v. Thomas E. Proctor Heirs Tr.*).

II. Legislative and Regulatory Update

Although numerous bills were proposed relating to oil and gas leases, operations, and taxation, no substantive legislation was passed in the past year.

The Department of Environmental Protection (“DEP”) finalized new Chapter 78a regulations relating to the environmental impacts associated with unconventional oil and gas operations. These new rules impose additional burdens and restrictions on operations including heightened design and engineering requirements for surface uses, phasing out of surface impoundments and greater setbacks from schools and other public facilities. New Chapter 78 regulations relating to conventional oil and gas operations are in progress and scheduled for release in the third quarter of 2018.

III. Supreme Court Cases

A. Pa. Env’tl. Def. Found. v. Commonwealth, 161 A.3d 911 (Pa. 2017).

The Supreme Court of Pennsylvania held that Fiscal Code provisions relating to proceeds from state mineral leases violated the Pennsylvania Constitution’s Environmental Rights Amendment, rejecting the established test under the Amendment.

The court broadened the scope of the Environmental Rights Amendment to the Pennsylvania Constitution (“ERA”) by rejecting a forty-four-year-old test used to determine the constitutionality of Commonwealth actions under the ERA.¹ Pennsylvania Environmental Defense Foundation (“PEDF”) challenged the constitutionality of sections of the Fiscal Code that allowed a portion of the revenues generated from leasing state lands to be diverted to the General Fund without any condition or restriction that those revenues be allocated to environmental conservation.²

The ERA states the following:³

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania’s public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

Since 1973, Pennsylvania courts applied a three-part test to determine whether statutes or regulations violated the ERA. The test, announced by the Commonwealth Court in *Payne v. Kassab*, asked:

- (1) Was there compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth’s public natural resources?
- (2) Does the record demonstrate a reasonable effort to reduce the environmental incursion to a minimum?
- (3) Does the environmental harm which will result from the challenged decision or action so clearly outweigh the benefits to be derived therefrom that to proceed further would be an abuse of discretion?⁴

The Commonwealth Court, reviewing PEDF’s challenge under the *Payne* test, granted summary relief in favor of the Commonwealth, upholding the code sections.⁵ On appeal, the supreme court noted that it had

1. Pa. Env’tl. Def. Found. v. Commonwealth, 161 A.3d 911 (Pa. 2017).

2. *Id.* at 921-22; see 72 PA. STAT. ANN. §§ 1602-E, 1603-E, 1604-E (West 2014) [the “Code Sections”].

3. PA. CONST. art. I, § 27.

4. 312 A.2d 86, 94 (Pa. Commw. Ct. 1973).

5. *Pa. Env’tl. Def. Found.*, 161 A.3d at 928.

affirmed the judgment in *Payne*, but “without adopting the three-part test.”⁶ In reviewing the constitutionality of the code sections, the court took the opportunity to reject the *Payne* test and invalidate 1602-E and 1603-E of the Fiscal Code under the language of the ERA, itself, and private trust principles.

The court found that the ERA grants two rights to the citizens of the Commonwealth: the right to “clean air and pure water, and to the preservation of natural, scenic, historic and esthetic values of the environment;” and “the common ownership by the people, including future generations, of Pennsylvania’s public natural resources.”⁷ The third sentence of the ERA establishes a public trust, of which the Commonwealth, itself, is the trustee.⁸ Quoting the plurality decision in *Robinson Township*, the Court described the duties of the trustee as follows:⁹

As trustee, the Commonwealth is a fiduciary obligated to comply with the terms of the trust and with standards governing a fiduciary's conduct. The explicit terms of the trust require the government to “conserve and maintain” the corpus of the trust. The plain meaning of the terms conserve and maintain implicates a duty to prevent and remedy the degradation, diminution, or depletion of our public natural resources. As a fiduciary, the Commonwealth has a duty to act toward the corpus of the trust—the public natural resources—with prudence, loyalty, and impartiality.

The court held the code sections facially unconstitutional because “[t]hey plainly ignore the Commonwealth’s constitutionally imposed fiduciary duty to manage the corpus of the environmental public trust for the benefit of the people to accomplish its purpose—conserving and maintaining the corpus by, inter alia, preventing and remedying the degradation, diminution and depletion of our public natural resources.”¹⁰

6. *Id.* at 927 (citing *Payne v. Kassab*, 468 Pa. 226, 361 A.2d 263, 273 (Pa. 1976)).

7. *Id.* at 931.

8. *Id.* at 932.

9. *Id.* (citing *Robinson Twp. v. Commonwealth*, 623 Pa. 564, 83 A.3d 901, 956-57 (Pa. 2013)) (internal citations omitted).

10. *Id.* at 938.

B. Robinson Twp. v. Commonwealth, 147 A.3d 536 (Pa. 2016).

The Supreme Court of Pennsylvania held that the provisions of Act 13 of 2012 providing for review of local zoning ordinance by the Pennsylvania Utility Commission were non-severable from unconstitutional provisions by prior decision of the court and section authorizing taking of real property for storage of natural gas was unconstitutional because it violated the public use requirement.

The court's decision was the latest arising from challenges brought against Act 13 of 2012, which amended the Oil and Gas Act to provide for limitations on local zoning ordinances regulating oil and gas operations. *Robinson II* (an appeal from the Pennsylvania Commonwealth Court's decision in *Robinson I*)¹¹ held that the statutory requirement that zoning ordinances permit oil and gas operations in all zoning districts was unconstitutional (the plurality decision relying upon the "Environmental Rights Amendment," Article I, section 27 of the Pennsylvania Constitution).¹² In *Robinson III*, the Commonwealth Court held on remand that provisions providing for review of local ordinances by the Pennsylvania Utility Commission (the "PUC") were not severable from the invalid provisions.¹³

On appeal the Supreme Court of Pennsylvania affirmed the Commonwealth Court's holding that Sections 3305 through 3309 (providing for review of ordinances by the PUC and loss of well impact fees for municipalities that enact violative ordinances) of Act 13 were not severable from sections 3303 and 3304 (restricting local zoning of oil and gas operations).¹⁴ The court concluded that if not for the new restrictions on local regulation of oil and gas operations, the legislature would not have passed the provisions providing for PUC review, and the penalties on local municipalities were inextricably linked to the stricken provisions.¹⁵

The supreme court next held that parts of Section 3222.1 of Act 13 protecting trade secrets and confidential proprietary information violated the Pennsylvania Constitution's prohibition of "special laws."¹⁶ The court further held that Section 3218.1's exclusion of private water supplies from

11. *Robinson Twp. v. Commonwealth*, 52 A.3d 463 (Pa. Commw. Ct. 2012).

12. *Robinson Twp. v. Commonwealth*, 623 Pa. 564, 83 A.3d 901 (2013).

13. *Robinson Twp. v. Commonwealth*, 96 A.3d 1104 (Pa. Commw. Ct. 2014).

14. *Robinson Twp. v. Commonwealth*, 147 A.3d 536, 542 (Pa. 2016).

15. *Id.* at 566 (citing 1 PA. CONS. STAT. § 1925; *Heller v. Frankston*, 504 Pa. 528, 475 A.2d 1291, 1295 (1984)).

16. *Id.* at 576.

spill notice requirements was an unsupportable “special law” that must be stricken in its entirety, but stayed its striking for a period of 180 days to give the legislature an opportunity to revise the provision.¹⁷

In the final part of its decision, the court examined Section 3241 of the Act, which provided that corporations that transport, sell or store natural gas had the right to appropriate interest in real property located in a storage reservoir or buffer zone. Plaintiffs claimed that the Section violated the Fifth Amendment of the United States Constitution and Article I, Section 10 of the Pennsylvania Constitution because the provision was not limited to takings for public purposes.¹⁸ The Commonwealth argued that the provision should be interpreted to be limited to public utility corporations.¹⁹ The supreme court held that on its face the provision was not limited to public utility corporations, which are limited to those corporations that produce, transmit, distribute or furnish natural gas “for the public for compensation.”²⁰ The court held that Section 3241 provided for unconstitutional takings under the United States Constitution and the Pennsylvania Constitution.²¹

IV. Superior Court Cases

A. Birdie Associates, L.P. v. CNX Gas Co., LLC, 149 A.3d 367 (Pa. Super. Ct. 2016).

The Pennsylvania Superior Court held that coal operators were not liable to a coal lessor for operating and producing coalbed methane, concluding that the operator was not required to mine coal under a lease providing for annual minimum royalties.

In 1985, lessors Ethel Spragg, Joan Spragg Wemlinger and David L. Wemlinger leased unto Consol Land Development Company the coal under a tract of land containing 289.91 acres, for a term of 20 years and an option to renew for an additional 20-year term. CLDC exercised its option to renew and extended the lease until 2025. Lessee paid the advanced minimum royalty but mined no coal from the premises and had no plans to do so in the near future.²²

17. *Id.* at 583.

18. *Id.* at 585.

19. *Id.* at 585-86.

20. *See id.* at 587.

21. *Id.* at 588.

22. *Birdie Assocs., L.P. v. CNX Gas Co.*, 149 A.3d 367, 369 (Pa. Super. Ct. 2016).

In 2010, successor lessor filed a complaint, alleging unjust enrichment because the operators were producing and marketing coalbed methane (“CBM”) from the leased property but not making any additional payments to the lessor. The court noted first that “[t]itle to CBM is vested in the owner of the coal.”²³ The 1985 lease was silent as to CBM or royalties resulting from the sale of CBM.²⁴ Lessor argued that the lease violated the Guaranteed Minimum Royalty Act (“GMRA”), 58 P.S. § 33.3, as lessee was not paying lessor one-eighth of all gas produced.

Operator argued that it was the owner of the coal and as such did not have to pay a royalty on the CBM. The court noted the Supreme Court of Pennsylvania recognized the established rule in Pennsylvania “that the lease of coal in place with the right to mine and remove all of it for a stipulated royalty vests in the lessee a fee.”²⁵ Therefore, “if the fee to the severed coal is vested in the lessee no interest in the coal as real property remains in the lessor and . . . his only interest therein is personal property.”²⁶ The lessor’s interest in the lease is properly termed a possibility of reverter.”²⁷ Lessor argued that the “Pennsylvania Doctrine” of a lease as a sale was outdated, citing *Olbum v. Old Home Manor, Inc.*²⁸ The superior court agreed that a coal deed does not always constitute a sale, but concluded that it did in this case: “[a]s the trial court explained, the leases in question clearly conveyed the ‘interest in and to all of the Pittsburgh seams or measures of coal and all constituent products of such coal in and underlying’ the various lands in Greene County.” Further, CBM “is doubtless a ‘constituent product’ of coal.”²⁹

Lessor’s other arguments regarding the minimum royalty act and the fact that lessees had not mined any coal or paid royalties aside from the advanced minimum royalty were dismissed because the owner of the coal was under no obligation to pay royalties on CBM nor under any obligation to mine the coal.³⁰ Thus the court affirmed the trial court’s decision.³¹

23. *Id.* (citing *U.S. Steel v. Hoge*, 468 A.2d 1380 (Pa. 1983)).

24. *Id.*

25. *Id.* at 371-72 (quoting *Smith v. Glen Alden Coal Co.*, 32 A.2d 227 (1943)) (internal quotations omitted).

26. *Id.* at 372 (citation omitted).

27. *Id.* (quoting *Smith v. Glen Alden Coal Co.*, 32 A.2d 227, 233 (1943)).

28. 459 A.2d 757 (1983).

29. *Birdie Assocs.*, 149 A.3d at 374 (citation omitted).

30. *Id.*

31. *Id.* at 375.

B. Cornwall Mountain Invs., L.P. v. Thomas E. Proctor Heirs Tr., 158 A.3d 148 (Pa. Super. Ct. 2017).

The Pennsylvania Superior Court held that a 1932 tax deed of interest assessed as “minerals only” conveyed severed oil and gas rights.

Cornwall Mountain Investments, L.P. (“Plaintiff”), filed a quiet title action against defendant owners (“Defendants”) of interests reserved in an 1894 deed relating to “unseated” (meaning undeveloped for tax purposes) tracts in Lycoming County comprising 2,842 acres.³² That deed reserved “all the natural gas, coal, coal oil, petroleum, marble and all minerals of every kind and character in, upon, or under said land.”³³

The Lycoming County assessment office records indicated that the reserved mineral rights were not assessed until 1930 and 1931, when they were assessed in the name of “Thomas E. Proctor & Heirs.”³⁴ In 1932, Cornwall Mountain Club, the surface owner, bought the mineral rights at a tax sale.³⁵ The mineral rights were later conveyed to Plaintiff in 2010.³⁶ The Court of Common Pleas of Lycoming County ruled in favor of the Plaintiff, and Defendants appealed.³⁷

Defendants argued that the tax assessments of “minerals rights only” did not include the reserved oil and gas, and consequently the 1932 tax deed did not convey the oil and gas to plaintiff’s predecessor.³⁸ Defendants cited *Butler v. Charles Powers Estate ex rel. Warren*, 620 Pa. 1 (2013), which re-affirmed the “Dunham Rule” (from *Dunham v. Kirkpatrick*, 101 Pa. 36 (1882)), which stands for the proposition that a reference to “minerals” in a reservation in a deed does not include oil and gas.³⁹

The superior court concluded that *Butler* affirmed the continued vitality of the rebuttable presumption of the *Dunham* Rule, but only with regard to reservations in conveyances between private individuals.⁴⁰ The superior court instead held that a tax deed conveys all interests properly included within the assessment, which in this instance included the oil and gas.⁴¹

32. *Cornwall Mountain Invs., L.P. v. Thomas E. Proctor Heirs Tr.*, 158 A.3d 148, 151 (Pa. Super. Ct. 2017).

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *See id.* at 151-52.

38. *Id.* at 155.

39. *Id.*

40. *Id.* at 156.

41. *Id.* (citing *Bannard v. N.Y. State Nat. Gas Corp.*, 448 Pa. 239 (1972)).

The court rejected defendants' second contention: that the oil and gas was not taxable because the oil and gas was not being produced at the time of the tax sale.⁴² The superior court relied upon the Supreme Court of Pennsylvania's holding in *Herder Spring Hunting Club v. Keller*, 143 A.3d 358 (Pa. 2016). Defendants also argued that the oil and gas was not taxable under *Indep. Oil & Gas Ass'n of Pennsylvania v. Bd. of Assessment Appeals of Fayette Cty.*, 572 Pa. 240 (2002), which ruled that oil and gas was not subject to property tax assessment. The superior court held that the holding of *IOGA* was prospective only, relying upon *Oz Gas, Ltd. v. Warren Area Sch. Dist.*, 595 Pa. 128 (2007).⁴³

Finally, the superior court rejected claims that the tax sales were constitutionally deficient (again citing *Herder Spring Hunting Club v. Keller*)⁴⁴ and that the tax sales were procedurally deficient, holding that the applicable statute of limitations barred non-jurisdictional attacks on the tax sales.⁴⁵

C. Murphy v. Karnek Family Partners LP & Range Res. Appalachia, LLC, 160 A.3d 850 (Pa. Super. Ct. 2017).

The superior court held that (1) a surface deed did not alter the initial vestment of oil and gas rights in grantor wife for life and remainder in her grantor husband and (2) a devise of "real estate property" included oil and gas.

Joe Krynovske ("Joe") and Bessie Krynovske ("Bessie"), husband and wife, (collectively, the "Krynovskes") acquired the Subject Property in 1931.⁴⁶ In 1938, the Krynovskes conveyed the property to a third party, who then conveyed the Subject Property back to Joe, subject to the following language: "Excepting and reserving hereout and herefrom all the oil and gas in or underlying said parcel of ground. . . ."⁴⁷ Through a separate deed, the third party conveyed all the oil and gas to Bessie "for and during the term of her natural life, with remainder in fee to Joe."⁴⁸ In 1939, the Krynovskes conveyed the Subject Property with the same oil and gas exception and reservation language contained in the earlier deed and added the following language: "This conveyance is also made under and subject to

42. *Id.* at 157 (citing *Herder Spring Hunting Club v. Keller*, 143 A.3d 358 (Pa. 2016)).

43. *Id.* at 158.

44. *Id.*

45. *Id.* at 160-61 (citing *Trexler v. Africa*, 33 Pa. Super. 395, 410 (1907)).

46. *Murphy v. Karnek*, 160 A.3d 850, 853 (Pa. Super Ct. 2017).

47. *Id.*

48. *Id.*

a deed of A. Kirk Wrenshall to Bessie Krynovske dated September 1, 1938 . . . by which conveyance all of the oil and gas rights were conveyed to the said Bessie Krynovske” (the “Surface Deed”).⁴⁹ Joe died intestate in 1959, survived by Bessie and their five children.⁵⁰ Bessie died testate in 1963, and devised unto her daughter, Helen Goodman, all her real estate.⁵¹ The will listed certain property, but did not include the oil and gas within and underlying the Subject Property.⁵² Helen Goodman died testate in 1987, devising “all the rest, residue and remainder” of her estate to her brother, Steve Karnek, Sr.⁵³ Steve died intestate in 1988, survived by his widow, Lucy Karnek, and his son, Steven Karneck, Jr. (the “Karneks”).⁵⁴ Lucy and Steve then conveyed all of their interests in the property to Karneck Family Partners, LP and in 2014 the property was leased to Range Resources Appalachia, LLC.⁵⁵

The grandchildren of Joe and Bessie brought a quiet title action regarding the ownership of oil and gas rights in the Subject Property previously owned by their grandparents, arguing that (1) Bessie’s life estate and Joe’s remainder interest remained intact after the execution of the Surface Deed, (2) Bessie inherited 1/3 of Joe’s remainder interest at his death with the five children inheriting the remaining 2/3 interest, (3) the five children inherited Bessie’s interest equally at her death, and (4) when the five children died, their interests passed according to their wills or intestacy laws.⁵⁶ The Karneks filed a counterclaim, also asking for quiet title, arguing that (1) the Surface Deed caused the oil and gas rights to be owned by Joe and Bessie as tenants by the entireties, (2) Bessie inherited 100% at Joe’s death, (3) Bessie devised 100% to her daughter, Helen, (4) Helen devised 100% to her brother, Steve, and (5) Steve’s interest was inherited by his widow and son who conveyed their interest to Karnek Family Partners.⁵⁷ Both parties filed cross-motions for summary judgment; the Washington County Court of Common Pleas dismissed the parties’ cross motions for summary judgment, determined the ownership interests,

49. *Id.* at 853-54.

50. *Id.* at 854.

51. *Id.*

52. *Id.*

53. *Id.* at 854-55.

54. *Id.* at 855.

55. *Id.*

56. *Id.*

57. *Id.* at 855-56.

and ordered Range to pay rents and royalties accordingly.⁵⁸ Both parties appealed.⁵⁹

On appeal, the court examined the Surface Deed language and the interpretation of Bessie's will. When interpreting deeds, "the court's primary objective must be to ascertain and effectuate what the parties intended."⁶⁰ The Surface Deed's exception and reservation clause was identical to the exception and reservation language in the 1938 deed to Joe.⁶¹ While the terms "excepted" and "reserved" are often used interchangeably, the intent of the parties actually governs whether the language creates an exception or a reservation. A reservation is the creation of a right or interest that did not previously exist; therefore, in this case Bessie's life estate existed before the Surface Deed, so no new interest in the oil and gas was created.⁶² The plain language of the Surface Deed stated that the deed was "under and subject" to Bessie's life estate.⁶³ The court concluded that until Joe's death, Bessie had a life estate and Joe had a remainder interest in and to the oil and gas.⁶⁴

The grandchildren argued that under Bessie's will, the Subject Property was not devised to Helen, but passed by intestacy to her five children equally, since Bessie's will did not specifically mention the oil and gas underlying the Subject Property.⁶⁵ When looking at the intent of testators, "a court must focus first and foremost on the precise wording of the will, and if ambiguity exists, on the circumstances under which the will was executed."⁶⁶ The court noted that "one who writes a will is presumed to intend to dispose of all his estate and not to die intestate as to any portion thereof."⁶⁷ Bessie's will stated, "I give, devise and bequeath *all* my real estate property to my daughter, Helen."⁶⁸ The court concluded that the devise of all the real estate included the oil and gas within and underlying the Subject Property, and the individual property descriptions following the

58. *Id.* at 856.

59. *Id.*

60. Mackall v. Fleegle, 801 A.2d 577, 581 (Pa. Super. Ct. 2002).

61. *Murphy*, 160 A.3d at 853.

62. *Id.* at 859.

63. *See id.* at 853-54.

64. *Id.* at 860.

65. *Id.* at 860-61.

66. In re Estate of Weaver, 392 Pa.Super. 312, 572 A.2d 1249, 1256, *appeal denied* 525 Pa. 659, 582 A.2d 325 (1990).

67. In re Grier's Estate, 403 Pa. 517, 170 A.2d 545, 548 (1961).

68. *Murphy*, 160 A.3d at 854.

grant did not limit or reduce the general devise.⁶⁹ This interpretation of the will language was also consistent with the presumption against partial intestacy.⁷⁰ The superior court affirmed the trial court's order.⁷¹

D. Hildebrand v. EQT Prod. Co., No. 1046 WDA 2016, 2017 WL 2482850 (Pa. Super. Ct. June 8, 2017).

The superior court held that the non-apportionment language in the lease was not nullified by later pooling and lesser interest clause modification.

Lessors' and their neighbors' ("Long," "Schmidt" and "Schinkovec") properties were all originally owned by Hupp and were leased to Lessee in 1928 ("Hupp Lease").⁷² The Hupp Lease covered 96 acres, providing for a five-year primary term and further "as long as the land was operated by the lessee in search of, or in the production of, oil and gas."⁷³ The Hupp Lease was modified in 1951 to permit gas storage and again in 2009 to permit pooling.⁷⁴ The 2009 modifications were executed through four separate instruments with all of the current owners of the Hupp Lease.⁷⁵ Lessors' modification incorrectly referenced the acreage as 75.66 acres, while the other three modifications recognized the full 96 acres subject to the Hupp Lease.⁷⁶ All four of the 2009 lease modifications included a pooling and unitization clause, which stated the following:

There shall be allocated to the portion of the leased premises included in any pooling such proportion of the actual production from all lands so pooled as to such portion of the leased premises, computed on an acreage basis, bears to the entire acreage of the lands so pooled. . . .⁷⁷

The Lessors' modification also included the following language: "In the event lessors herein should own less than the entire undivided fee simple in the property subject to the original oil and gas lease, then any royalties or

69. *Id.* at 862-63.

70. *Id.* at 863.

71. *Id.*

72. *Hildebrand v. EQT Prod. Co.*, No. 1046 WDA 2016, 2017 WL 2482850, at *2 (Pa. Super. Ct. June 8, 2017).

73. *Id.* at *3.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

rentals accruing under this lease, if any, shall be reduced proportionally. . . .”⁷⁸

In 2011, Lessee unitized the Hupp Lease with other property for a unit totaling 346.71 acres.⁷⁹ Out of the 96 acres of the Hupp Lease, 76.15 acres were included in the unit, with 75.15 acres owned by Lessors and 1 acre owned by Long; Schinkovec and Schmidt owned nothing.⁸⁰ Even though no Schinkovec land was pooled, Lessee assigned Schinkovec a 1.34% Net Revenue Interest in the Unit.⁸¹ Lessor brought a declaratory judgment action against Lessee and Schinkovec, seeking an accounting and a declaration that Lessee wrongly paid royalties to Schinkovec.⁸² The Greene County Court of Common Pleas granted Lessee and Schinkovec’s motion for summary judgment.⁸³ Lessors appealed, challenging the trial court’s interpretation of the Hupp Lease provisions and subsequent lease modifications between the parties.⁸⁴

Pennsylvania law generally follows the rule of apportionment, whereby each lessor “should receive such share of the royalty as his or her share of the land bears to the whole tract covered by the lease. It does not matter on what acre or hundred acres the wells may be situated.”⁸⁵ By contrast, the Hupp Lease provided that in the event of a subdivision of the lease, royalties were to be paid only to the owner of the wellsite tract (non-apportionment).⁸⁶ The Lessors’ 2009 modification included language directing that royalties would be reduced proportionately in the event the Lessees “should own less than the entire undivided fee simple estate in the property subject to the oil and gas lease.”⁸⁷ The trial court interpreted this language to mean that since Lessors only owned a portion of the 96 acres, they agreed that “any royalties accruing under the lease . . . shall be reduced accordingly.”⁸⁸ Lessors argued that this language did not alter the non-apportionment language but was included to serve as a “lesser interest

78. *Id.*

79. *Id.* at *4.

80. *Id.*

81. *Id.* This percentage was based on the fact that Schinkovec owned 6.1% of the Hupp Lease lands, which comprised 21.96% of the total acreage included in the Unit.

82. *Id.* at *2.

83. *Id.* at *1.

84. *Id.*

85. *Wettengel v. Gormley*, 184 Pa. 354, 39 A. 57, 58 (1898).

86. *Hildebrand*, 2017 WL 2482850, at *4.

87. *Id.* at *5.

88. *Id.* at *2 (citing T.C.O., 5/20/14, at 4).

clause.”⁸⁹ A lesser interest clause or proportionate reduction clause permits a lessee to reduce royalty payments if a lessor actually owns less acreage than represented in the executed lease.⁹⁰ Based on the language contained in the Hupp Lease and the subsequent modifications, the superior court concluded that the non-apportionment language was not nullified by the lesser interest clause in the 2009 Lessors Modification or by any provisions contained in the neighbors’ modifications.⁹¹ The court reversed the trial court’s grant of summary judgment in favor of Lessee and Schinkovec.⁹²

V. Commonwealth Court Cases

A. *EQT Prod. Co. v. Borough of Jefferson Hills*, 162 A.3d 554 (Pa. Commw. Ct. 2017).

The Commonwealth Court reversed Borough’s denial of a conditional use permit for a natural gas wellsite.

The Borough of Jefferson Hills appealed an order of the Court of Common Pleas of Allegheny County reversing the Borough Council’s denial of a conditional use application submitted by EQT Production Company and ET Blue Grass Clearing, LLC (the “Applicants”).⁹³ The Commonwealth Court affirmed the Court of Common Pleas, holding that the burden shifted to the objectors to establish with probative evidence that there was a high degree of probability that the conditional use would constitute a detriment to the public health, safety, and welfare exceeding that ordinarily to be expected from the proposed use.⁹⁴ Additionally, the Commonwealth Court applied its recent decision in *Gorsline v. Bd. of Supervisors of Fairfield Twp.*, 123 A.3d 1142 (Pa. Commw. Ct. 2015) *appeal granted*, 139 A.3d 178 (Pa. 2016), and concluded that the evidence presented by the objectors “did not constitute the requisite substantial evidence to thwart the Applicants’ entitlement to a conditional use as a matter of right.”⁹⁵

The Applicants filed a conditional use application to the Borough of Jefferson Hills to construct, operate, and maintain a natural gas production

89. *Id.* at *5.

90. *Id.*

91. *Id.* at *6.

92. *Id.*

93. *EQT Prod. Co. v. Borough of Jefferson Hills*, 162 A.3d 554, 556 (Pa. Commw. Ct. 2017).

94. *Id.* at 557.

95. *Id.* at 559-60.

facility in an area zoned to permit oil and gas drilling as a conditional use.⁹⁶ The Borough Planning Commission unanimously recommended approval of the application subject to the Applicants updating certain information prior to the public hearing on the application.⁹⁷ However, the Borough Council of the Borough of Jefferson Hills (the “Council”) unanimously denied the application.⁹⁸

In its opinion accompanying the denial, the Council found that the application failed to comply with the general requirement that “[t]he use shall not endanger the public health, safety or welfare nor deteriorate the environment, as a result of being located on the property where it is proposed, but otherwise satisfied the objective requirements of the ordinance.”⁹⁹ The Council cited and gave substantial weight to testimony offered by the objectors, but did not place the burden to *prove* that the impact of the proposed use is such that would violate the other general requirements for land use set forth in the Borough Zoning Ordinance.¹⁰⁰ Moreover, the Council weighed the proposed use against the Environmental Rights Amendment of the Pennsylvania Constitution, finding that by “approving the proposed conditional use application it would neither be promoting the public health, safety and welfare, nor protecting the environment from deterioration, when there is an acknowledged risk that the activity the proposed conditional use allows undermines each of these values.”¹⁰¹

Without taking additional evidence or considering the Environmental Rights Amendment, but relying on the Commonwealth Court’s decision in *Gorsline*, the Court of Common Pleas reversed the Council’s denial of the application.¹⁰² The Court of Common Pleas concluded that the Council erred in two regards: first, the Council erred in determining that the Applicants failed to meet their burden of proving entitlement to a conditional use; second, the Council should have shifted the burden of presenting substantial evidence of any adverse impact on the public health, safety and welfare on to the objectors.¹⁰³

96. *Id.* at 557.

97. *Id.* at 558.

98. *Id.*

99. *Id.* (internal quotations omitted).

100. *Id.* at 558-59.

101. *Id.* at 559.

102. *Id.*

103. *Id.*

Affirming the Court of Common Pleas, the Commonwealth Court first noted that under a conditional use application, “once an applicant establishes compliance with the specific requirements of the ordinance, the proposed use enjoys a presumption that it is consistent with municipal planning objective and with the public health, safety and welfare.”¹⁰⁴ The objectors to the application must then prove “a high degree of probability that permitting the conditional use will cause a substantial threat to the community”—a threat greater than that which would normally flow from the proposed use.¹⁰⁵ In sum, “once the Applicants satisfied the specific, objective criteria for the conditional use, the burden shifted to the objectors.”¹⁰⁶ The Commonwealth Court considered the objectors’ testimony, which provided general examples of harms posed by unconventional oil and gas development, and concluded that it was insufficient to meet that burden of proof that this specific well site presented those harms.¹⁰⁷

In a closing note, the Commonwealth Court held that the Council’s use of the ERA to supplement the conditional permit process was improper:

Council’s decision to augment the conditional use requirements with criteria based on the ERA is tantamount to an attempt to, *sub silentio*, abrogate the legislative determination that a conditional use for oil and gas drilling is consistent with municipal planning objectives and with the public health, safety and welfare, including protection of the environment. Therefore, once the Applicants met the specific requirements of the ordinance, their proposed use enjoyed a presumptive consistency with that legislative determination.¹⁰⁸

B. Kiskadden v. Pa. Dep’t. of Env’tl. Prot., 149 A.3d 380 (Pa. Commw. Ct. 2016), *appeal denied* No. 480 WAL 2016 (May 2, 2017).

The Commonwealth Court held that the Environmental Hearing Board (“EHB”) did not abuse its discretion in determining that a well operator did not cause environmental contamination.

104. *Id.* at 561 (citing *Sheetz, Inc. v. Phoenixville Borough Council*, 804 A.2d 113, 115 (Pa. Commw. Ct. 2002)).

105. *Id.*

106. *Id.*

107. *Id.* at 563.

108. *Id.* at 563-64.

Appellant, Loren Kiskadden, appealed an order by the EHB dismissing his appeal of a 2011 Department of Environmental Protection (“DEP”) determination that natural gas drilling operations did not contaminate his water well.¹⁰⁹ EHB found that he did not meet his burden of proving that natural gas drilling operations contaminated the well.¹¹⁰ The Commonwealth Court affirmed, finding that substantial evidence supported EHB’s findings of fact in its adjudication.¹¹¹ Additionally, the court held that EHB did not capriciously disregard materially competent evidence demonstrating the existence of a hydrological connection between Kiskadden’s water well and the natural gas operations at the Yeager Site.¹¹² Finally, the court held that EHB did not err as a matter of law in relying on speculative evidence to support its finding of fact that a hydrogeological connection did not exist between the well and the Yeager Site.¹¹³

C. Snyder Bros., Inc. v. Pa. Pub. Util. Comm’n, 157 A.3d 1018 (Pa. Commw. Ct. 2017).

The Commonwealth Court held that unconventional wells qualified as stripper wells excluded from well impact fees.

The Commonwealth Court reversed an order of the Public Utility Commission (“PUC”), which held energy and production company Snyder Brothers, Inc. liable for impact fees due under Act 13, 58 Pa. Cons. Stat. §§ 2301–3504, for production from wells that Snyder Brothers argued were excluded from the statute as “stripper wells.”¹¹⁴ Under section 2302(d), a “stripper well” does not have to pay impact fees.¹¹⁵ Section 2301 defines “stripper well” as an “unconventional gas well incapable of producing more than 90,000 cubic feet [cf] of gas per day during *any* calendar month”¹¹⁶ On appeal, the court had to determine whether the General Assembly, in drafting Act 13, intended the word “any” to mean “one” or “every.”¹¹⁷

109. See *Kiskadden v. Pa. Dep’t. of Env’tl. Prot.*, 149 A.3d 380, 381 (Pa. Commw. Ct. 2016), *appeal denied* No. 480 WAL 2016 (May 2, 2017).

110. *Id.*

111. *Id.* at 400.

112. *Id.* at 402.

113. *Id.*

114. *Snyder Bros., Inc., v. Pa. Pub. Util. Comm’n*, 157 A.3d 1018 (Pa. Commw. Ct. 2017).

115. 58 PA. CONS. STAT. § 2302(f) (West 2012).

116. *Id.* § 2301 (emphasis added).

117. *Snyder Bros.*, 157 A.3d at 1020.

PUC argued the term “any” in the definition of “stripper well” was ambiguous because the word “any” was subject to multiple reasonable meanings, as evidenced by the interpretations advanced by the parties.¹¹⁸ Snyder Brothers argued that PUC erred in finding ambiguity in the word “any.”¹¹⁹ The Commonwealth Court, sitting *en banc*, sided with Snyder Brothers and concluded that the word “any” in the definition of “stripper well” is unambiguous and “it clearly and plainly means what it says—‘any month.’”¹²⁰ The court gave limited deference to PUC’s findings because its interpretation of the word “any” was presented in the course of litigation and had not been previously articulated in an official rule or regulation.¹²¹ By concluding that the word “any” in the term “stripper well” unambiguously means “any” or “one” and not, as PUC argued, “all” or “every,” the court found that the facts established that the wells at issue produced less than 90,000 cf of gas in at least one month and are “stripper wells.”¹²² Therefore, the court held that Snyder Brothers did not have to pay impact fees for those wells.

D. Nat’l. Fuel Gas Midstream Corp. v. Dep’t. of Env’tl. Prot., No. 116 C.D. 2016 & No. 195 C.D. 2016, 2017 WL 2391719 (Pa. Commw. Ct. June 2, 2017).

The Commonwealth Court held that a wellpad and compressor station held by separate but affiliated companies could not be aggregated for purposes of determining the necessary air pollution control permit.

The Commonwealth Court vacated and remanded an order of the Environmental Hearing Board (“EHB”) that affirmed the Commonwealth of Pennsylvania, Department of Environmental Protection’s (“DEP”) Single Source Determination aggregating a compressor station with a well pad under a single air pollution control permit.¹²³ At issue was whether or not Trout Run LLC’s Bodine Compressor Station and Seneca Resources Corporation’s Well Pad E, which is exempt from air pollution control permitting requirements, were “under the control of the same person (or persons under common control)” which would allow DEP to aggregate both

118. *Id.* at 1021.

119. *Id.* at 1022.

120. *Id.* at 1023-24.

121. *Id.* at 1028.

122. *Id.* at 1030.

123. *Nat’l. Fuel Gas Midstream Corp. v. Dep’t. of Env’tl. Prot.*, No. 116 C.D. 2016 & No. 195 C.D. 2016, 2017 WL 2391719 (Pa. Commw. Ct. June 2, 2017).

facilities under the same permit.¹²⁴ Through differing analyses, both DEP and EHB found the two sources could be aggregated despite being operated by two separate companies and despite Well Pad E's exemption from permitting.¹²⁵ The court vacated the EHB decision and remanded to determine either direct involvement by a common parent company in the operations of both facilities or to pierce the corporate veil by showing that the two entities are the alter ego of one another or their parent.¹²⁶

DEP applied a three-part test to determine if more than one facility should be considered a single air pollution source.¹²⁷ Under the test, two or more facilities may be aggregated if they (1) belong to the same industrial grouping (having the same first two digits of the Standard Industrial Classification code); (2) are on one or more contiguous or adjacent properties; and (3) are under the control of the same person (or persons under common control).¹²⁸ Here, the only issue in dispute was that of "control" under the third prong.

DEP found the corporate structure and common ownership of Seneca Resources and Trout Run satisfied the control element of the three-part test.¹²⁹ Seneca Resources, which owns and operates Well Pad E, is an oil and gas exploration company and a wholly-owned subsidiary of National Fuel Gas Company.¹³⁰ Trout Run is a wholly-owned subsidiary of National Fuel Gas Midstream Corporation, which in-turn is a wholly-owned subsidiary of National Fuel Gas Corporation.¹³¹ DEP found the Bodine Compressor Station and Well Pad E to be under common control due to the corporate relationships among Seneca Resources, Trout Run, and their common owner, National Fuel Gas Corporation (though one step removed from Trout Run).¹³² EHB disagreed with the common ownership/corporate-structure analysis used by DEP but still found common control due to National Fuel Gas Corporation's power to influence or control the behavior of its subsidiaries through, in part, the "power of the purse."¹³³ EHB concluded that "it is the possession of the power to

124. *Id.* at *3.

125. *See id.* at *1.

126. *See id.* at *14.

127. *Id.* at *3.

128. *Id.*

129. *Id.* at *4.

130. *Id.* at *1.

131. *Id.*

132. *Id.* at *4.

133. *Id.* at *6.

influence or direct the behavior of the parties or the course of events, not the actual exercise of that power that satisfies the requirement [for] common control.”¹³⁴ Judge Labuskes, Jr. concurred in EHB’s opinion but wrestled with the conundrum created by the decision: How can two facilities be aggregated as a single source when one of those facilities is actually exempt from permitting requirements?¹³⁵ The court took note of this question in reaching its conclusions.¹³⁶

The court rejected both EHB’s and DEP’s definitions of control. First, the court noted that DEP’s finding of control due to common ownership abrogates the general rule that corporations are separate and distinct legal entities, even if a corporation’s stock is owned by a single person, as is the case with a wholly-owned subsidiary.¹³⁷ The court also found EHB’s “power to influence” standard of control too lax, stating that “the term ‘control’ is more than the power to merely influence; it involves the power to direct.”¹³⁸ Additionally, the court considered that DEP’s aggregation of Trout Run’s Bodine Compressor Station with Seneca Resources Well Pad E, which is exempt from permitting, ties the emissions thresholds of Trout Run’s facilities to the emissions from a facility that is otherwise exempt from permitting.¹³⁹ Aggregating both facilities could lead to liability and enforcement consequences imposed on Trout Run due to the acts and omissions of the exempt facility.¹⁴⁰ The court concluded

[u]nder the facts of this case, where one facility is exempt from permitting requirements, but its emissions are still being aggregated with another facility for purposes of that facility’s permit, DEP is required to either demonstrate [National Fuel Gas Corporation’s] direct involvement in the operations of Well Pad E and the Bodine Compressor Station or pierce the corporate veil by showing that the two entities are the alter ego of one another or their parent.¹⁴¹

134. *Id.* at *7.

135. *Id.* at *8.

136. *See id.*

137. *Id.* at *12.

138. *Id.* at *10.

139. *See id.* at *12.

140. *Id.* at *12-13.

141. *Id.* at *13.

VI. Federal Cases

A. Tiongco v. Sw. Energy Prod. Co., 214 F. Supp. 3d 279 (M.D. Pa. 2016).

The District Court for the Middle District of Pennsylvania denied defendant Lessee's motion for summary judgment on Lessor's nuisance claim, holding that there was issue of fact as to whether Lessee caused an intentional nuisance on Lessor's property.

Lessor entered into a lease with Southwestern Energy Production Company ("SEPCO"), whereby Lessor received a bonus payment and royalties in exchange for SEPCO producing oil and gas from a unit which included Lessor's property.¹⁴² While the lease language was silent on the matter, Lessor was allegedly told that there would not be any drilling within miles of her property due to the location of a water source.¹⁴³ Subsequently, SEPCO engaged in drilling operations less than a quarter mile from lessor's residence, which according to Lessor created "excessive noise, light and vibrations."¹⁴⁴ Lessor filed a complaint against SEPCO alleging private nuisance.¹⁴⁵ SEPCO filed a motion for summary judgment on three grounds: (1) the governing Susquehanna County noise and light ordinances established the proper standards for evaluating alleged nuisance activities; (2) the records failed to establish that SEPCO caused noise, light, and vibration harms; and (3) Lessor's testimony did not demonstrate that SEPCO acted intentionally.¹⁴⁶

Under the Restatement (Second) of Torts Section 822:

One is subject to liability for a private nuisance if, but only if, his conduct is a legal cause of an invasion of another's interest in the private use and enjoyment of land, and the invasion is either

- a. intentional and unreasonable, or
- b. unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities.¹⁴⁷

142. *Tiongco v. Sw. Energy Prod. Co.*, 214 F. Supp. 3d 279, 282 (M.D. Pa. 2016).

143. *Id.* at 282-83.

144. *Id.* at 283.

145. *Id.*

146. *Id.* at 285-86.

147. *Id.* at 284 (citing *Butts v. Sw. Energy Prod. Co.*, No. 3:12 CV 1330, 2014 WL 3953155, at *3 (M.D. Pa. Aug. 12, 2014)).

As to SEPCO's first argument, the district court held that county ordinances were not dispositive of what constitutes a significant invasion.¹⁴⁸ Under Pennsylvania law, a "private nuisance [may] flow from the consequences of an otherwise lawful act."¹⁴⁹ SEPCO's conduct could comply with the county ordinance and still be found to constitute a private nuisance under the community standards.¹⁵⁰ The inquiry focuses on whether SEPCO's conduct constituted a significant and unreasonable invasion of Lessor's use and enjoyment of her property.¹⁵¹ Deciding whether or not SEPCO's conduct was unreasonable was a question of fact for trial.

The district court also concluded Lessor produced sufficient evidence to demonstrate that SEPCO was the legal cause of the private nuisance.¹⁵² According to testimony, Lessor did not suffer from excessive noise, light, and vibrations before signing the lease agreement with SEPCO, and the fact that she observed SEPCO trucks driving to and from the drilling location was evidence of a legal causal connection between the two.¹⁵³ There was reasonable doubt as to whether SEPCO's actions were a substantial factor in the alleged injury, and thus, the question is left for the trier of fact.¹⁵⁴

SEPCO's third argument failed because Lessor produced sufficient evidence for a reasonable juror to conclude that SEPCO did in fact act intentionally.¹⁵⁵ Pennsylvania courts have not conducted an in-depth inquiry into what constitutes "intentional" conduct for private nuisances.¹⁵⁶ Some states have adopted the Restatement sections and have held that intentional means "defendant's knowledge that its conduct was invading the use and enjoyment of one's land;"¹⁵⁷ other state courts have found the test to be whether "the creator of the condition intends the act that brings about the condition."¹⁵⁸ Regardless of which test is used, the Restatement makes it clear that one need not intend to harm another party in order to be liable

148. *Id.* at 286-87.

149. *Id.* at 286 (quoting *Liberty Place Retail Ass'n, L.P. v. Israelite Sch. of Universal Practical Knowledge*, 102 A.3d 501, 508-09 (Pa. Super. Ct. 2014)).

150. *Id.* at 287.

151. *Id.*

152. *Id.* at 288-89.

153. *See id.* at 289.

154. *Id.* at 288-89.

155. *See id.* at 289-92.

156. *Id.* at 291.

157. *Id.* (citing *Pub. Serv. Co. of Colo. v. Van Wyk*, 27 P.3d 377, 394 (Colo. 2001)).

158. *Id.* (quoting *Keeney v. Town of Old Saybrook*, 237 Conn. 135, 676 A.2d 795, 810 (1996)) (internal quotations omitted).

for an intentional private nuisance.¹⁵⁹ In this case, SEPCO need only know, or be substantially certain, that its drilling activities will significantly interfere with Lessor's use and enjoyment of her property. The district court found there was sufficient evidence to allow a reasonable juror to conclude that SEPCO knew or was substantially certain, that its activities were nevertheless invading Lessor's use and enjoyment of her property.

The district court denied SEPCO's motion for summary judgment on the private nuisance claim.¹⁶⁰

B. Canfield v. Statoil USA Onshore Props. Inc., Civ. A. No. 3:16-0085, slip op., 2017 WL 1078184 (M.D. Pa. Mar. 22, 2017).

Lessors brought a class action against Lessees alleging various breaches of the lease relating to payment of royalties.¹⁶¹ Lessees subsequently brought a motion to dismiss based on lack of subject matter jurisdiction, lack of personal jurisdiction with respect to one defendant Lessee, and for failing to state a claim upon which relief can be granted.¹⁶²

The lease language permitted the deduction of post-production costs, but the addendum to the lease did not allow deduction of such costs.¹⁶³ Plaintiff alleged payments under the lease, which were made by both defendant Statoil USA Onshore Properties Inc. ("Statoil") and Chesapeake, were dramatically different due to the way the two entities calculated royalties.¹⁶⁴ Chesapeake paid a royalty to leaseholders based on a price paid by third-parties downstream of the wellhead.¹⁶⁵ Chesapeake's royalty price was based on the final natural gas product after the deduction of post-production costs and was calculated using the sale price of that finished product.¹⁶⁶ Statoil, on the other hand, sold at the wellhead, fixing the price of the natural gas to a uniform hub price or index price for natural gas, regardless of whether the natural gas was ever delivered to that particular hub on the interstate pipeline system.¹⁶⁷

159. *Id.* (citing Restatement (Second) of Torts § 825).

160. *Id.* at 292.

161. *Canfield v. Statoil USA Onshore Props. Inc.*, Civ. A. No. 3:16-0085, slip op., 2017 WL 1078184, at *1 (M.D. Pa. Mar. 22, 2017).

162. *Id.*

163. *Id.*

164. *See id.* at *3.

165. *Id.*

166. *Id.* at *4.

167. *Id.* at *3.

The district court found that Statoil's payments based on index price did not violate the lease.¹⁶⁸ The lease provided for royalty to be paid based on the proceeds from the sale of the gas, rather than the market value of the gas.¹⁶⁹ The price paid by Statoil at the wellhead was the price it received for the gas. Therefore, the royalties were calculated properly.¹⁷⁰ Furthermore, the district court rejected Plaintiff's claim that Statoil's sales to an affiliate at the wellhead breached the lease, finding that no provision of the lease forbade such sales.¹⁷¹

The district court refused to dismiss plaintiff's claim for breach of an implied duty to market the gas.¹⁷² The Pennsylvania Supreme Court declined to adopt the "First Marketable Product Doctrine," requiring Lessee to bear all costs until the point of sale.¹⁷³ However, the district court held that allegations of a "sham sale" between Lessee and affiliated purchaser were sufficient to survive the motion to dismiss.¹⁷⁴ The district court held that Lessor was also entitled to an accounting against Statoil, relating to the implied breach.¹⁷⁵ Lessor's remaining claims against Statoil's midstream affiliate were dismissed.¹⁷⁶ Subsequently, the district court rejected plaintiff's motion for reconsideration.¹⁷⁷

C. Valley Rod & Gun Club v. Chesapeake Appalachia, LLC, No. 3:13-CV-0725, 2017 WL 1173930 (M.D. Pa March 29, 2017).

The district court held that Defendants were legally entitled to access and use as much of Plaintiffs' surface property as was "reasonably necessary" or "necessary and convenient" to extract oil and gas to effectuate the lease, which included drilling wellpads and constructing roads.

Plaintiff, a not-for-profit corporation, executed a lease with Anadarko E&P Company, LP, who then assigned part of the lease to Chesapeake Appalachia, LLC, who then assigned part of its interest to Statoil Onshore Properties, Inc. (collectively, the "Defendants").¹⁷⁸ Defendants notified

168. *See id.* at *17.

169. *See id.* at *2.

170. *Id.* at *18.

171. *See id.* at *17.

172. *See id.* at *21.

173. *Kilmer v. Elexco Land Servs., Inc.*, 605 Pa. 413, 430, 990 A.2d 1147, 1158 (2010).

174. *Canfield*, 2017 WL 1078184, at *24.

175. *Id.* at *19.

176. *Id.* at *25-27.

177. *Id.*

178. *Valley Rod & Gun Club v. Chesapeake Appalachia, LLC*, 2017 WL 1173930, at *1 (M.D. Pa. March 29, 2017).

Plaintiff that they would be drilling a gas well on its property and installing roads, access, and drainage, along with the well pad.¹⁷⁹ During construction, Defendants used rock, soil, mulch and other surface materials found on Plaintiff's property.¹⁸⁰ Plaintiff brought an action in state court asserting trespass and misappropriation/conversion.¹⁸¹ The action was removed to the Middle District Court of Pennsylvania, and the district court dismissed the trespass claim.¹⁸² After failed mediation between the parties, Defendants filed a motion for summary judgment on the claim of misappropriation/conversion.¹⁸³

The lease provided:

Lessor hereby grants, demises, leases and lets exclusively to Lessee the oil and gas, including coalbed methane gas, underlying the land herein leased, together with such exclusive rights as may be *necessary or convenient* for Lessee, at its election to explore for, develop, produce, measure and market production from the premises. . . .¹⁸⁴

Under the terms of the lease, Defendants were legally entitled to access and use as much of Plaintiff's surface property as was "reasonably necessary" and "necessary and convenient" to extract the gas.¹⁸⁵ The district court restated the general rule of law that

when anything is granted, all the means of attaining it and all the fruits and effects of it are also granted; when uncontrolled by express words of restriction, all the powers pass which the law considers to be incident to the grant for the full and necessary enjoyment of it.¹⁸⁶

The implied right to enter and use the surface property as was "reasonably necessary" to construct the wellpad precluded a claim that the materials were misappropriated or converted.

The court also considered the terms of the oil and gas lease, as controlled by the principles of contract law: "The accepted and plain meaning of the

179. *Id.*

180. *Id.*

181. *Id.* at *2.

182. *See id.*

183. *Id.*

184. *Id.* at *1 (emphasis added).

185. *Id.* at *4.

186. *Id.* at *3 (citing *Obehy v. H. C. Frick Coke Co.*, 262 Pa. 83, 104 A. 864 (1918)).

language used, rather than the silent intentions of the contracting parties, determines the construction to be given the agreement.”¹⁸⁷ In this case, the terms were clear and unambiguous; therefore, “the intent of the parties is to be ascertained from the document itself.”¹⁸⁸ The lease contains the words “necessary and convenient,” which are unambiguous, and there is no dispute that in order to drill for oil and gas, Defendants needed to construct a wellpad.¹⁸⁹

Finally, the court noted an absence of a genuine issue of material fact.¹⁹⁰ Plaintiff never argued that the construction of the wellpad and road were not “convenient or necessary,” and the question of necessity and convenience was not a question for a jury; therefore, there was no genuine issue of material fact.¹⁹¹

VII. Condemnations

A. *In re Condemnation by Sunoco Pipeline L.P.*: Challenges to Sunoco’s Use of Eminent Domain

Sunoco Pipeline, L.P. has faced continued legal challenges in the Commonwealth Court to its use of eminent domain for construction of the Mariner East 2 natural gas liquids pipeline. Building on its 2016 decision in *In re Condemnation by Sunoco Pipeline, L.P., (Sunoco I)*,¹⁹² the Commonwealth Court issued four decisions analyzing varying challenges to Sunoco’s condemnation actions pursuant to the Mariner East 2 natural gas liquids pipeline project.¹⁹³

187. *Id.* at *5 (quoting *Willison v. Consolidation Coal Co.*, 536 Pa. 49, 54, 637 A.2d 979, 982 (1994)).

188. *Id.* (citing *Hutchinson v. Sunbeam Coal Corp.*, 513 Pa. 192, 519 A.2d 385, 390 (1986)).

189. *Valley Rod & Gun Club*, 2017 WL 1173930, at *5.

190. *Id.* at *6-8.

191. *Id.*

192. 143 A.3d 1000 (Pa. Commw. Ct. 2016), *petition for allowance of appeal denied* (Pa. Nos. 571, 572, 573 MAL 2016, filed Dec. 29, 2019).

193. *See In re Condemnation by Sunoco Pipeline L.P.*, No. 220 C.D. 2016, 2017 WL 2062219 (Pa. Commw. Ct. May 15, 2017) [*Gerhart*]; *In re Condemnation by Sunoco Pipeline, L.P.*, No. 565 C.D. 2016, 2017 WL 2291693 (Pa. Commw. Ct. May 24, 2017) [*Homes for America*]; and *In re Condemnation by Sunoco Pipeline, L.P.*, No. 1306 C.D. 2016, 2017 WL 2303666 (Pa. Commw. Ct. May 26, 2017) [*Blume*]. In these cases, the Commonwealth Court upheld trial court orders overruling landowner objections to Sunoco’s right to use eminent domain to take private property for the Mariner East 2 Project. (*Gerhart*, *Homes for American*, and *Blume* all have petitions for allowance of appeal pending before the Supreme Court of Pennsylvania.) *See also In re Condemnation by*

In *Homes for America*, the Commonwealth Court affirmed the Court of Common Pleas of Lebanon County's overruling of the Condemnee's Preliminary Objections to Sunoco's Declaration of Taking.¹⁹⁴ Sunoco filed a Declaration of Taking to condemn property necessary to the Mariner East 2 Project in Lebanon County.¹⁹⁵ The Condemnees objected, stating that (i) Sunoco does not have authority to condemn; (ii) Sunoco's corporation resolution does not authorize Sunoco to use eminent domain for the intrastate pipeline; (iii) Sunoco is collaterally estopped from asserting eminent domain power due to *Loper v. Sunoco Pipeline, L.P.*;¹⁹⁶ (iv) the Declaration of Taking falsely represented Mariner East 2 as an intrastate pipeline; (v) Sunoco seeks approval for two pipelines despite that FERC only approved one; and (vi) Pennsylvania law prohibits Sunoco's attempt to obtain eminent domain power under Pennsylvania Business Corporations Law without a FERC Certificate of Public Convenience and Necessity.¹⁹⁷ The record before the trial court in this matter is nearly identical to the one made *Sunoco I*.¹⁹⁸

The entire opinion is consistent with *Sunoco I*, stating that "because . . . these issues are directly controlled by this Court's *Sunoco I* decision with which the trial court's decision is in accord, we affirm the trial court's order overruling [the Preliminary Objections]." ¹⁹⁹ The second objection, regarding the lack of authorization in the corporation resolution for the second pipeline, is a newly presented argument,²⁰⁰ the court disagreed and cited *Sunoco I* for the proposition that "[a] [Certificate of Public Convenience] issued by the PUC is prima facie evidence that the PUC has determined that there is a public need for the proposed service and that the holder is clothed with the eminent domain power."²⁰¹

Similar to *Homes for America*, the Appellants/Condemnees in *Blume* sought review of the Court of Common Pleas of Cumberland County's decision overruling Preliminary Objections to Sunoco's Declaration of

Sunoco Pipeline, L.P., No. 2030 C.D. 2016, 2017 WL 2805860 (Pa. Commw. Ct. June 29, 2017) [*Perkins*].

194. *Homes for America*, 2017 WL 2291693, at *1.

195. *Id.*

196. No. 2013-SU-004518-05 (Ct. C.P. York Co. Feb. 24, 2014).

197. *Homes for America*, 2017 WL 2291693, at *2.

198. *Id.*

199. *Id.* at *9.

200. *Id.* at *6.

201. *Id.* (citations omitted).

Taking.²⁰² Appellants set forth several issues on appeal that closely tracked the issues raised in *Homes for America*.²⁰³ The court found support in *Sunoco I* for the trial court's order overruling the objections but expanded slightly on the "corporate resolution" argument raised in *Homes for America*.²⁰⁴ Here, the court noted that Sunoco Pipeline, L.P. introduced a corporate resolution of Sunoco Logistics Partners Operations GP LLC.²⁰⁵ Sunoco Logistics Partners Operations GP LLC is the general partner of Sunoco Pipeline, L.P.²⁰⁶ The resolution, passed by Sunoco Logistics Partners Operations GP LLC, authorized Sunoco Pipeline, L.P., to perform all necessary acts to effectuate the implementation of the ME2 project—including acquiring all necessary rights of way.²⁰⁷ Appellants' property was specifically identified as a property that would be condemned.²⁰⁸ Therefore, the court found that the trial court did not err in holding that the corporate resolution complied with statutory requirements and Sunoco's condemnation was a valid exercise of the authority granted.²⁰⁹

In the next challenge, Appellants/Condemnees added an argument to the "public interest" challenge, positing that the Property Rights Protection Act ("PRPA")²¹⁰ prevented condemnation because Sunoco is a private corporation seeking to condemn land for private enterprise.²¹¹ In *Gerhart*, the court disposed of the argument with two sentences:

[I]n *Sunoco I*, based upon essentially the same record as was before common pleas in this matter, we held that Sunoco is a public utility regulated by PUC. As PRPA expressly exempts a

202. See generally *Blume*, 2017 WL 2303666.

203. *Id.* at *2 ("Condemnees assert a number of grounds to support reversal of the trial court. Although they enumerate nine issues on appeal, several are intertwined and can be consolidated into the following: (1) whether the proposed pipeline is solely interstate, subject only to the jurisdiction of the Federal Energy Regulatory Commission (FERC); (2) assuming it is not, whether Condemnor has the power of eminent domain as a 'public utility corporation'; (3) whether there is a public need for the project; and (4) whether Condemnor procedurally complied with all the legal requirements to condemn the property, i.e. passage of appropriate corporate resolutions and posting of adequate bond") (internal citations omitted).

204. *Id.* at *7.

205. *Id.* at *6.

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.* at *7.

210. 26 PA. CONS. STAT. §§ 201-204 (West 2016).

211. *Gerhart*, 2017 WL 2062219, at *9.

“public utility” as defined in Section 102 of the Code, 66 Pa. C.S. § 102, from the general prohibition against taking property for “private enterprise,” we conclude that PRPA does not bar Sunoco’s Declaration for Condemnees’ property and therefore affirm common pleas on this issue.²¹²

Gerhart also raised an argument that Supreme Court of Pennsylvania decision in *Robinson Twp v. Commonwealth* (“*Robinson IV*”),²¹³ which struck down 58 Pa. C.S. § 3241 (giving a right of eminent domain to corporations who transport, sell, or store natural gas), “reaffirm[ed] that Sunoco cannot condemn the Condemnees’ property absent a finding that the public is the ‘primary and paramount beneficiary.’ ”²¹⁴ Sunoco argued, and the court agreed, that *Robinson IV* did not address the legality of eminent domain exercised by public utilities certified and regulated by the PUC.²¹⁵ Instead, *Robinson IV* was limited to private, non-regulated corporations.²¹⁶

Building on *Gerhart*, the Commonwealth Court continued to uphold Sunoco’s power of eminent domain in another of the several landowner appeals objecting to that authority in *Perkins*.²¹⁷ Before the court was an appeal of a trial court order overruling the landowner-condemnees’ (“Condemnees”) preliminary objections to Sunoco’s declaration of taking.²¹⁸ In this matter, the Commonwealth Court undertook to fully address objections raised under the PRPA, which prohibits the use of eminent domain for private enterprise.²¹⁹ The trial court held that Sunoco, a public utility possessing a Certificate of Public Convenience issued by the Pennsylvania Public Utility Commission (“PUC”), is vested with the power of eminent domain and falls into an exception to the PRPA.²²⁰

The Condemnees appealed the trial court’s decision only to the extent it overruled their objection stating Sunoco was prohibited by PRPA from condemning private property because Sunoco is using the power of condemnation for private enterprise.²²¹ Section 204(a) of the PRPA

212. *Id.*

213. 147 A.3d 536 (Pa. 2016).

214. *Gehart*, 2017 WL 2062219, at *9.

215. *Id.* at *10.

216. *Id.*

217. *Perkins*, 2017 WL 2805860, at *1.

218. *Id.*

219. *Id.* at *2.

220. *Id.*

221. *Id.*

expressly prohibits use “of the power of eminent domain to take property in order to use it for private enterprise.”²²² That express prohibition is subject to a number of exceptions, including for property taken by, “[a] public utility or railroad as defined in 66 Pa. Con. Stat. § 102 (relating to definitions).”²²³ Finding that Sunoco fit the definition of “public utility” under section 102, the court held that PRPA does not bar Sunoco Declaration for taking the Condemnees’ property.²²⁴

The Condemnees argued that the court’s analysis under the PRPA should include a determination that the project is for the public’s benefit.²²⁵ Resting on *Sunoco I*, the court explained that PUC already determined that the Mariner East 2 project was in the public interest.²²⁶ Once PUC makes that determination, the trial court does not have jurisdiction to review the PUC’s adjudication.²²⁷ Therefore, the trial court “did not err in not engaging in a public use analysis.”²²⁸

222. 26 PA. CONS. STAT. § 204(a) (West 2016).

223. *Id.* § 204(b)(2)(i).

224. *Perkins*, 2017 WL 2805860, at *3.

225. *Id.*

226. *Id.* at *3-4.

227. *Id.* at *4.

228. *Id.* at *5.