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Oil and Gas, Natural Resources, and Energy Journal

VOLUME 8 NUMBER 2

PENNSYLVANIA

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I. Introduction

The past year saw several oil and gas cases of particular interest in Pennsylvania. The Pennsylvania Supreme Court clarified the rights of parties to pursue inverse condemnation claims against those who hold certificates of public convenience (*Hughes v. UGI*). The Commonwealth Court expanded upon the liability of an owner of an oil and gas operator for well plugging costs (*DEP v. B&R Resources, LLC*). The Superior Court also held that a gas royalty clause in a lease with language "at the wellhead" was ambiguous (*Dressler Family, LP v. PennEnergy Resources, LLC*). Federal district courts remained active as well, issuing decisions involving joint operating agreements (*Epsilon Energy USA, Inc. v. Chesapeake Appalachia, LLC*), reserved royalty interests (*JJK Min. Co. II, LLC v. Morris*), and post-production cost deductions (*Tennant v. Range Resources - Appalachia, LLC*). The legislative front was quieter, with the Assembly not passing any significant new oil and gas legislation.

II. Pennsylvania Supreme Court

A. Hughes v. UGI Storage Co., 263 A.3d 1144 (Pa. 2021)

- The Pennsylvania Supreme Court held that a public or quasi-public entity need not possess a property-specific power of eminent domain in order for a landowner to state an inverse condemnation claim against it

The Supreme Court of Pennsylvania considered whether a claim for inverse condemnation is actionable under Pennsylvania's Eminent Domain Code ("Eminent Domain Code")[1] against a company vested with the power

1. 26 Pa. Stat. and Cons. Stat. Ann. §§ 101 – 1106 (West).

thereof, but lacking the express power to condemn that claimant's specific property.[2] The Court concluded that it is actionable, holding that a public or quasi-public entity "need not possess a *property-specific* power of eminent domain in order to implicate inverse condemnation[.]"[3]

Appellee UGI Storage Company ("UGI") filed an application with the Federal Energy Regulatory Commission ("FERC") for a certificate of public convenience and necessity to enable UGI to acquire and operate certain natural gas facilities. As a part of the application, UGI sought to acquire and operate a 1,216 acre underground natural gas storage facility in Tioga County. UGI's application included a 2,980-acre buffer zone around the facility as well. The Appellant Landowners ("Landowners") owned property within that buffer zone.

FERC granted the certificate of public convenience and necessity, but denied UGI's request to include the entire 2,980-acre buffer zone. Instead, FERC certified only portions of the proposed buffer zone. The Landowners' properties were outside of those certified portions. As such, the power granted to UGI under the certificate of public convenience and necessity did not expressly cover the Landowners' property interests. This "partial certification" of the gas-storage-field buffer zone did not comport with FERC's ordinary protocols.[4] The irregular configuration resulted from UGI's failure to give required notice to some of the landowners within the original planned field.

The Landowners filed a petition in 2015 seeking the appointment of a board of viewers under the Eminent Domain Code to assess damages for an alleged *de facto* condemnation of their property. They argued that UGI included their property in the buffer zone application because it "wanted to ensure that there would be no oil and gas extraction activities in close proximity" to the storage facility.[5] Furthermore, the Landowners also argued that UGI utilized the uncertified properties in the same manner as properties within the certified buffer zone, i.e., no oil and gas extraction can be performed in those areas. They claimed this amounted to an inverse condemnation because they lost the opportunity to obtain oil and gas leases on their interests.

UGI filed preliminary objections to the petitions. UGI's principal argument was that they cannot be liable for a *de facto* taking because they

2. Hughes v. UGI Storage Co., 263 A.3d 1144 (Pa. 2021).

3. *Id.* at 1158 (emphasis original).

4. *Id.* at 1146. Notably, FERC signaled that more of the proposed properties could be added to the buffer zone if UGI followed certain procedural requirements.

5. *Id.* at 1148.

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did not possess the power of eminent domain relative to the Landowners' property.[6] The court of common pleas granted the preliminary objections and dismissed the petitions under a three-part test that requires (1) the condemnor must possess a power of eminent domain; (2) the property owner must have been substantially deprived of the use and enjoyment of his property through exceptional circumstances; and (3) the damages sustained must be immediate, necessary and an unavoidable consequence of the condemnor's exercise of its eminent domain power.[7] The trial court concluded that UGI did not possess the power of eminent domain because the certificate of public convenience and necessity excluded the Landowners' property. Thus, the petition failed the first prong. The Commonwealth Court affirmed on similar—though slightly different—grounds through two separate appeals. The Commonwealth Court recognized that the first prong encompasses "an inchoate power of eminent domain," rather than as requiring a property-specific power, but ultimately affirmed, resting on the property-specific approach used by the trial court.[8] The Landowners appealed to the Supreme Court.

The Supreme Court vacated and remanded, holding that a public or quasi-public entity need not possess a *property specific* power of eminent domain in order to implicate inverse condemnation principles.[9] It is enough that the entity be an "acquiring agency" that is "*vested with the power of eminent domain* by the laws of this Commonwealth."[10] The Court noted that the power of eminent domain is expressed abstractly in the Eminent Domain Code, stating, "[t]here is no suggestion of any requirement of a relationship or nexus between this power and specific property."[11] An action for inverse condemnation may be based upon "the taking, injuring or destroying such property *by authority of law for a public purpose*."[12] In other words, to be actionable, a condemnor—like UGI in this instance—must have authority of law for a public purpose, but the Eminent Domain Code does not require the condemnor have a property-specific power of eminent domain.[13] The Supreme Court noted in its analysis that the same

6. *Id.* at 1150.
7. *Id.* at 1152.
8. *Id.* at 1154.
9. *Id.* at 1158.
10. *Id.* at 1156.
11. *Id.*
12. *Id* (citing 26 Pa. Stat. and Cons. Stat. Ann. §§ 502(c)(2) (action for inverse condemnation) and 103 (definition of "condemn")) (emphasis added).
13. *Id.* at 1156–57.

holds true whether the condemnor is a government actor or a company vested with the power by statute. The Court remanded back to the trial court for further proceedings consistent with its opinion.

III. Pennsylvania Commonwealth Court

A. Dep't of Env't Prot. v. B&R Res., LLC, 270 A.3d 580 (Pa. Commw. Ct. 2021)

- The Commonwealth Court vacated an Environmental Hearing Board order and clarified the standard for finding personal liability against an owner/member of a limited liability company under a well-plugging order

The Commonwealth Court clarified the standard for individual liability that may be incurred by operators facing orders to address orphaned and abandoned oil and gas wells in Pennsylvania.[14] The action began on June 29, 2015, when the Department of Environmental Protection ("Department") issued an administrative order (the "2015 Administrative Order"), ordering B&R Resources, LLC ("B&R"), and Richard Campola ("Campola"), in his individual capacity, to either plug or bring back into production forty-seven abandoned oil and gas wells (the "Wells"). Campola was the managing and sole member of B&R, a company that engaged in the exploration and production of oil and natural gas.

As a general rule, the liabilities of a business entity do not extend to the corporate officers, directors, or shareholders of the corporation. An exception to that general rule is the participation theory, which imposes individual liability on officers, directors, or shareholders for personally participating in wrongful conduct. The Department argued that Campola was liable because he personally participated in the abandonment of the Wells by failing to address the violations.[15]

Campola appealed the 2015 Administrative Order to the Environmental Hearing Board (the "Board"). After a two-day hearing, the Board dismissed the appeal in August 2017, holding that Campola was liable together with B&R under the participation theory to plug all forty-seven (47) Wells ("2017 Adjudication").[16] The Board held that an officer, director, or

14. Dep't of Env't Prot. v. B&R Res., LLC, 270 A.3d 580 (Pa. Commw. Ct. 2021) ("*B&R Resources II"*).

15. *Id.* at 586.

16. B&R Res., LLC v. Dep't of Env't. Prot., EHB Docket No. 2015-095-B, 2017 WL 3585535 (Pa.Env.Hrg.Bd. Aug. 9, 2017).

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shareholder could be liable for "intentionally neglecting" the company's obligations.[17] Under the intentional neglect standard, the Board held that actual affirmative acts are not necessary to find liability.[18] The Board held that Campola "actively avoided" plugging the Wells.[19] Campola appealed to the Commonwealth Court, arguing that the Board erred because B&R did not have the resources to plug the Wells.

In 2018, the Commonwealth Court reversed the 2017 Adjudication and remanded to the Board.[20] The Commonwealth Court agreed with the Board that intentional neglect is enough to find liability under the participation theory. It held, however, that intentional neglect does not extend to violations which the company could not address. Campola is "liable for a statutory violation under the participation theory only if there is a causal connection between his wrongful conduct and the violation."[21] Any intentional decision that B&R would not plug a Well has a causal connection if B&R had the resources to plug those Wells.

Because each abandoned well is a discrete violation of the Oil and Gas Act, the Commonwealth Court held that the Board must ascertain how many Wells B&R could plug. As such, the Commonwealth Court reversed the Board's 2017 Adjudication and Order and remanded to the Board to determine "how many, if any, of the Wells could have been plugged if Campola had caused B&R to make reasonable efforts to plug the Wells[.]"

On remand, the Board concluded that it must determine what constitutes "reasonable effort" by B&R under Campola's direction to meet its statutory obligation to plug the Wells.[22] In so determining, the Board concluded that it must consider the financial resources available to B&R. It did not accept all of B&R's business decisions under a business judgment rule. Notably, the Board suggested that doing so would "treat B&R Resources' plugging obligation as a sort of afterthought to other business requirements."[23] The Board explained, "[j]ust like we disagree with the Department's position that all of B&R Resources' income should be used for plugging, we think that relegating a business' environmental obligations to a second-class

17. *Id.* at *14.

18. *See Id.* at 9-11.

19. *Id.* at *9-10.

20. B&R Res., LLC v. Dep't of Env't. Prot., 180 A.3d 812 (Pa. Commw. Ct. 2018) ("*B&R Resources I*").

21. *Id*. at 821.

22. B&R Res., LLC v. Dep't of Env't. Prot., EHB Docket No. 2015-095-B, 2020 WL 853729 at *5 (Pa.Env.Hrg.Bd. Feb. 14, 2020).

23. *Id.* at *5.

status behind all other business expenses is equally wrong and inconsistent with the law of Pennsylvania."[24] As such, the Board indicated that it would examine the merits underlying a business decision.

The Board's 2020 Adjudication analyzed business decisions related to financial expenditures, but found it inappropriate to speculate on some decisions, such as whether B&R could have generated more revenue by investing money differently. After completing its adjustments, the Board concluded that Campola wrongfully directed $85,278.00 away from B&R's plugging obligations. The parties stipulated that the cost to plug one of the Wells was $18,500. Dividing the amount directed away from plugging by the amount stipulated to plug each well, the Board decided that Campola personally caused four of the violations identified in the 2015 Administrative Order by his wrongful conduct. As such, the Board dismissed Campola's appeal as to four of the Wells but granted the appeal as to the remaining forty-three Wells. The Department appealed the 2020 Adjudication to the Commonwealth Court on March 13, 2020.

The Commonwealth Court framed the issues in relevant part as whether:

> the [Board] exceeded the scope of *B&R I's* remand instructions by reviewing Campola's expenditures of B&R's resources or revising its prior disposition of Campola's appeal; the [Board] erred in applying the legal standard set forth in *B&R I* by holding that only 4 of the 47 Wells could have been plugged had Campola caused B&R to make reasonable efforts to comply with the statutory mandate that abandoned wells must be plugged . . . .[25]

The Commonwealth Court concluded that the Board did not exceed the scope of *B&R Resources I*'s remand instructions by reviewing Campola's expenditures or revising its prior disposition of the appeal. The court found, however, that the Board did not properly apply the "reasonable efforts" standard to determine how many of the wells B&R could have plugged.

The Court noted that "reasonable efforts" is an objective standard that "evaluates one's actions to determine whether the person exhibited those qualities of attention, knowledge, intelligence and judgment which society requires of its members for the protection of their own interests and the

24. *Id.*

25. *B&R Resources II*, 270 A.3d at 591.

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interests of others."[26] This is measured by what a reasonable person would do "under the facts and circumstances presented in a particular case."[27] Where a statutory violation is involved, the reasonable person standard may become what "might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, *who desired to comply with the law*."[28]

Notably, in ascertaining the meaning of "reasonable efforts," the Court looked to cases that involved the duty to take reasonable attempts to mitigate damages—which the Court stated is "essentially what *B&R I* required".[29] "Reasonableness is to be determined from all the facts and circumstances of each case, and must be judged in the light of one viewing the situation at the time the problem was presented, and the fact finder's decision of reasonable efforts is entitled to deference *if it is supported by the record*."[30] In contrast, "actions that *continue the wrongful conduct* are *not* efforts that should be considered reasonable."[31]

Under these tenets, the Commonwealth Court found that "reasonable efforts" requires evidence that a person: (i) took affirmative, diligent action to prevent harm and protect the person's interests, as well as those of others; and (ii) acted as a reasonable person who desires to comply with the law. In sum, the Commonwealth Court concluded that "the person's actions should not simply continue the same wrongful conduct."[32] The Commonwealth Court reviewed the Board's findings through this lens.

The Department argued that the Board erred by not considering whether B&R should have entered into a well-plugging schedule after receiving the 2015 Administrative Order, or by considering "purely discretionary" expenses and B&R's ability to borrow money.

The Commonwealth Court did not find that the Board erred regarding its consideration of the well-plugging schedule. The Department had argued that entering a well-plugging schedule would have resolved all of the violations in the 2015 Administrative Order. The Court noted that the only

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26. *Id.* at 595 (citing Cappelli v. York Operating Co., Inc., 711 A.2d 481, 485 (Pa. Super. Ct. 1998) (internal quotations omitted).

27. *Id.*

28. *Id.* (citing PA-JICIV § 13.240, Subcommittee N. (quoting Hayes v. Hagemeier, 400 P.2d 945, 949 (N.M. 1963)) (emphasis supplied).

29. *Id.* at 595-96.

30. *Id.* at 596 (citing Prusky v. ReliaStar Life Ins. Co., 532 F.3d 252, 259, 261, 263 (3d Cir. 2008)) (emphasis original).

31. *Id.* (citing Marion v. Bryn Mawr Tr. Co., 253 A.3d 682, 705 (Pa. Super. 2021)) (emphasis original).

32. *Id.* (citing *Marion*, 253 A.3d at 705).

mention of a well-plugging schedule is a single sentence in *B&R I*'s recitation of facts and "that existence of an alternative mitigation strategy does not establish that the strategy used was unreasonable."[33] The Court then turned its attention to the "purely discretionary" expenditures and B&R's ability to borrow money.

The Commonwealth Court declined to afford deference to Campola's business judgment. First, the Commonwealth Court concluded that "the evidence does *not* support the EHB's finding that *all* the legal expenses [incurred by B&R] were *required to be expended in order for B&R to remain in business*."[34] The Court asked whether specific legal expenditures were required to remain in business rather than "*expand*" B&R's business interests.[35] In doing so, the Commonwealth Court placed itself into B&R's shoes and found that "commencing litigation against landowners to bring wells online or inquiring about purchasing a gas line" did not have evidentiary support for the Board to find that they were "required" for B&R to remain in business. Because the Court concluded the Board's findings were not supported by substantial evidence, the Court then concluded that Campola "did not use reasonable efforts when causing B&R to expend funds for purposes that were not required for B&R to remain in business while ignoring B&R's statutory obligation to remedy its violations of the 2012 Oil and Gas Act."[36]

Finally, the Commonwealth Court reviewed whether the Board erred by not considering B&R's ability to borrow funds as a "reasonable effort" that Campola could have caused B&R to use to remedy the violations. Specifically, the Court looked at loans Campola made to B&R that B&R later used to defend Campola against personal liability in this litigation. The Commonwealth Court noted that, initially, defending B&R and Campola was one and the same. The Court then noted that the joint defense changed once the only dispute before the Board was Campola's personal liability, and not B&R's liability.[37]

The Commonwealth Court declined to calculate the number of Wells it felt B&R could have plugged under the Commonwealth Court's version of the applicable standard. To the Commonwealth Court, "it appears that Campola was willing to direct B&R to borrow money and pledge its assets when it was necessary to protect Campola personally but not when it was

33. *Id.* at 597 (citing *Marion*, 253 A.3d at 702).
34. *Id.* (emphasis supplied).
35. *Id.* (emphasis supplied).
36. *Id.* at 599.
37. *Id.* at 600.

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necessary for B&R to satisfy its legal obligation to remedy its statutory violations by plugging the Wells."[38] The Commonwealth Court concluded "it was error for the loans made after B&R's liability was no longer at issue not to have been included in B&R's financial ability to plug the Wells under the reasonable efforts standard, and we remand for the EHB to recalculate how many more Wells B&R could have plugged had these amounts been put to that purpose."[39] The Court remanded and directed the Board to add those funds back into B&R's financial ability to plug wells and recalculate the number of Wells Campola is personally liable for plugging.

IV. Pennsylvania Superior Court

A. Dressler Fam., LP v. PennEnergy Res., LLC, 276 A.3d 729 (Pa. Super. Ct. 2022)

- The Superior Court reversed the trial court's granting of summary judgment in favor of an oil and gas lessee, holding that a gas royalty provision was ambiguous as to whether it permitted the deduction of post-production costs

This breach of contract action involved the interplay of the deduction of post-production costs from gas sold under an oil and gas lease and the Pennsylvania Guaranteed Minimum Royalty Act. Plaintiff Dressler Family, LP ("Dressler") entered into a lease with defendant PennEnergy Resources, LLC ("PennEnergy")'s predecessor in interest. The royalty provision of the lease stated:

Lessee covenants and agrees to pay Lessor as a royalty for the native gas from each and every well drilled on said premises producing native gas, an amount equal to one-eighth (1/8) of the gross proceeds received from the sale of same at the prevailing price for gas sold at the well, for all native gas saved and marketed for the said premises, payable monthly.[40]

The terms "gross proceeds" and "sold at the well" were not defined in the lease, but the parties agreed that gas was not sold at the well. Gas was consistently produced from the leasehold since 2007. In 2015, PennEnergy's predecessor in interest began retroactively collecting certain post-production costs and deducting other post-production costs going forward, reducing Dressler's monthly royalty payments significantly.

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38. *Id.* (emphasis omitted)

39. *Id.* at 600-01.

40. Dressler Fam., LP v. PennEnergy Res., LLC, 276 A.3d 729, 731 (Pa. Super. Ct. 2022)

The trial court granted PennEnergy's motion for summary judgment, holding that the language of the lease was unambiguous and allowed the deduction of post-production costs.[41] On appeal, the Superior Court stated that "The issue before the trial court, as well as this Court on appeal, is whether a lease provision — setting royalties to be one-eighth (1/8th) of 'gross proceeds received from the sale of [gas] at the prevailing price for gas sold at the well' — permits Appellee to deduct post-production costs from the royalties."[42] The trial court proceeded to discuss the Guaranteed Minimum Royalty Act as applied in *Kilmer v. Elexco Land Services, Inc*.,[43] in which the Supreme Court noted that "[a]lthough [a gas] royalty is not subject to costs of production, usually it is subject to" post-production costs, including "costs of treatment of the product to render it marketable[and]costs of transportation to market." In *Kilmer*, the Supreme Court held "the GMRA should be read to permit the calculation of royalties at the wellhead, as provided by the net-back method in the Lease."[44] The trial court pointed out that although *Kilmer* allows the calculation of royalties at the wellhead using the net-back method, it does not require that such royalties be calculated in that manner.[45] The trial court reviewed the meaning of the term "at the well" in different jurisdictions, and noted that the First Marketable Product Doctrine, which requires that lessee pay all post-production costs, has not been adopted by Pennsylvania.

The Superior Court critiqued the parties' argument and the trial court's reasoning for going outside the four corners of the lease.[46] The Superior Court held that "the royalty provision contains a latent ambiguity, as 'it is reasonably susceptible of different constructions and capable of being understood in more than one sense.'"[47] The Superior Court held that the terms "gross" and "at the wellhead" as used in the gas royalty clause in the lease were ambiguous and reversed and remanded the case to the trial court, stating that, "[w]e enter no conclusion as to the proper meaning of the royalties provision of the Lease, but instead conclude the provision is

41. *Id.* at 730.
42. *Id*.
43. Kilmer v. Elexco Land Servs., Inc., 990 A.2d 1147 (Pa. 2010).
44. *Id. at* 1147, 1157-58.
45. *Id.* at 738.
46. *Id.* at 740.
47. *Id.* at 740 (quoting Mitch v. XTO Energy, Inc., 212 A.3d 1135, 1139 (Pa. Super. 2019)).

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ambiguous and remand to the trial court to determine the proper meaning."[48]

V. Federal District Court

A. Epsilon Energy USA, Inc. v. Chesapeake Appalachia, LLC, 561 F. Supp. 3d 467 (M.D. Pa. 2021)

- The District Court granted a motion to dismiss in a dispute over the operator-shifting provision in oil and gas joint operating agreements

Plaintiff Epsilon Energy USA, Inc. ("Epsilon") entered into several joint operating agreements ("JOAs") with defendant operator Chesapeake Appalachia, LLC ("Chesapeake").[49] In 2018, Epsilon and Chesapeake began a dispute over new wells proposed by Epsilon under the JOAs. The parties entered into a settlement agreement that provided that if Chesapeake elected not to participate in or act as operator for the new wells proposed by Epsilon, that Chesapeake would cooperate with the designated operator of those wells.[50]

In 2020, Epsilon proposed four new wells on the Craig Well Pad in Rush Township, Susquehanna County. Chesapeake declined to participate in the proposed wells and also declined to act as operator. Chesapeake asserted that Epsilon was not permitted to act as operator of the proposed wells and did not permit Epsilon to access the Well Pad. Chesapeake proposed a new well that would conflict with the proposed wells.[51]

Epsilon brought an action seeking a declaratory judgment that it had the right to drill the proposed wells and that Chesapeake was required to cooperate with its operations. This action was dismissed because of Chesapeake's bankruptcy filing and subsequently refiled. The District Court denied Epsilon's motion for a preliminary injunction finding that the original well proposals had expired. Epsilon reproposed the wells and obtained leave of court to amend its complaint.[52] Chesapeake filed a motion to dismiss the amended complaint on the grounds that the operator-shifting provision, Article VI.2(a) of the JOAs, only permitted shifting operators for proposals to rework, sidetrack, deepen, recomplete or plug back an existing

48. *Id*. at 742

49. Epsilon Energy USA, Inc. v. Chesapeake Appalachia, LLC, 561 F. Supp. 3d 467, 470 (M.D. Pa. 2021).

50. *Id.* at 471-472.

51. *Id.* at 472.

52. *Id.* at 473-474.

well, and did not apply to new wells. In the alternative, Chesapeake argued that Epsilon had not met the conditions precedent to naming a new operator of the wells.[53]

The District Court first held that the JOAs were susceptible to more than one interpretation because Article VI.2(a) used "if/then" language to apparently trigger operator-shifting only for new operations on an existing well, however, Article VI.2(b) of the JOAs appeared to contemplate a new well being drilled by a new operator.[54] Accordingly, the Court concluded that it could not decide the issue as a matter of law and denied Chesapeake's motion to dismiss.[55] The Court next agreed with Epsilon that the JOAs did not condition designating a new operator on multiple JOA parties consenting to the wells, concluding that references in the JOAs to a plural should presumptively be understood to include the singular unless clearly suggested otherwise by the context.[56] However, the District Court agreed with Chesapeake that new well proposals under Article VI.2(a) of the JOAs must be commenced not later than ninety (90) days after the expiration of the 30-day notice period.[57] The Court rejected Epsilon's argument that Article XVI of the JOAs did not impose the ninety-day requirement, concluding that there was no conflict because a new well proposal could comply with both provisions simultaneously.[58]

Lastly, the Court rejected Epsilon's argument that Chesapeake's prior conduct was inconsistent with the 90-day commencement requirement, holding that course of performance evidence could not be used to supersede the unambiguous language of a contract.[59] The District Court granted Chesapeake's motion to dismiss the complaint.[60]

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53. *Id.* at 474.

54. *Id.* at 476-477.

55. *Id.* at 477 (citing Wayne Land & Min. Grp. LLC v. Delaware River Basin Comm'n, 894 F.3d 509, 528 (3d Cir. 2018)).

56. *Id.* at 478.

57. *Id.* at 479.

58. *Id.* at 479-480.

59. *Id.* at 480 (citing Allegheny Clinic v. Total Wellness Psychiatry, PLLC, No. 2:19-CV-00517, 2021 WL 2317415, at *5 (W.D. Pa. June 7, 2021) ("the express terms of the Agreement are to be given greater weight than course of performance."); Intermetal Mexicana, S.A. v. Ins. Co. of N. Am., No. 84-CV-6179, 1986 WL 10547, at *3 (E.D. Pa. Sept. 17, 1986) (noting that when parties have erroneously performed in a way that contradicts the plain language of the contract, "the court should not perpetuate the error." (quoting In re Chi. & E.I. Ry. Co., 94 F.2d 296, 300 (7th Cir. 1938)))).

60. *Id.* at 481.

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B. JJK Min. Co. II, LLC v. Morris, No. 2:20-CV-2025, 2021 WL 4594675 (W.D. Pa. Oct. 6, 2021)

- The District Court granted defendant oil and gas lessee's motion to dismiss, holding that royalty deed did not convey any interest after termination of then-existing lease

Plaintiff is the successor of a grantee under an 1897 royalty deed ("Royalty Deed") from Miles Meek and his wife to George Swingle covering 236.173125 acres ("Subject Premises"). Prior to the Royalty Deed, the Meeks executed an oil and gas lease covering the Subject Premises with South Penn Oil Company for a term of ten years, and "as long after the commencement of operations as said premises are operated for the production of oil or gas and as much longer as the rent for failure to commence operations is paid and as long after the commencement of operations as said premises are operated for the production of oil and gas" [61] ("South Penn Lease"). The subsequent Royalty Deed conveyed "[a]ll of his oil and gas rite being the full half of his eighth interest, one sixteenth royalty to have and hold for ever all of the undivided (1/16) one sixteenth royalty and gas rite."[62] Subsequently, the South Penn Lease terminated.[63]

Plaintiff filed an action to quiet title to 46.235% of the oil and gas in and under the Subject Premises. Defendant oil and gas operator under a subsequent lease filed a motion to dismiss, claiming that Plaintiff's oil and gas rights terminated upon the expiration of the South Penn Lease.[64] Plaintiff (citing cases in Texas and Kansas) argued that the Royalty Deed was subject to the "Estate Misconception Theory" which "explains that landowners around the turn of the twentieth century mistakenly used the fraction of one-eighth (1/8) to refer to the entirety of their interest once they had entered into an oil and gas lease, thereby intending to convey both a royalty and a reversionary interest (the interest that returns to a lesser at the termination of a lease)."[65] The District Court noted that no Pennsylvania court had applied this theory and declined to apply it.[66]

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61. JJK Min. Co. II, LLC v. Morris, No. 2:20-CV-2025, 2021 WL 4594675, at *1 (W.D. Pa. Oct. 6, 2021).

62. *Id.* at *2.

63. *Id.* at *5.

64. *Id.* at *1.

65. *Id.* at *5.

66. *Id.*

The District Court noted that oil and gas are severable in Pennsylvania and that an oil and gas lease conveys a fee simple determinable in the oil and gas to the lessee:

> In addition to interests in real estate, Pennsylvania law recognizes three distinct estates in real estate: the surface estate, the mineral estate, and the right to subjacent or surface support. *Consolidation Coal Co. v. White*, 875 A.2d 318, 326 (Pa. Super. Ct. 2005). The three estates are severable. *Id.* A person who owns property in fee simple absolute can sever the mineral estate interest by conveying the mineral estate interest in fee simple absolute. *See Snyder Bros.*, 676 A.2d at 1230. Alternatively, a fee simple owner of minerals can sever the mineral estate and convey fee simple ownership of such mineral estate interest by virtue of an oil and gas lease. *Id.* Such oil and gas lease creates a fee simple determinable in the lessee and a possibility of reverter in the lessor.[67]

Subsequent to the lease, the landowner owns a personal property right in the royalties and a possibility of reverter, the only remaining real property interest.[68] Looking to the terms of the Royalty Deed, the District Court concluded that it conveyed a 1/16 oil and gas royalty right.[69] The District Court further concluded that only the personal royalty rights were conveyed, and not the possibility of reverter, citing the lack of reference to the right of reverter and the terms of conveyance used:

> The language within the Meeks to Swingle Royalty Deed supports that only defined royalties were intended to be sold to Swingle. The Article of Agreement was titled, "Royalty Deed," and the language within the document only refers to royalty interests. It contains four express references to royalty; however, it does not refer to any possibility of reverter or reversionary

67. *Id*. at *3.

68. *Id.* at *4. ("At its essence, once a lessor executes an oil and gas lease, the lessor presently owns a right in the royalties to be paid under the lease. *Snyder Bros.*, 676 A.2d at 1230 (citing Smith v. Glen Alden Coal Co., 32 A.2d 227 (1943)). Royalty rights are personal property. *Id.* (citing *Smith*, 32 A.2d 227). The royalty interest entitles the lessor or his assignee to receive the royalty payments from the lessee or assignee as provided for under the terms and provisions of the oil and gas lease. *Smith*, 32 A.2d at 232-33. After entering into an oil and gas lease, the only remaining real property interest that the lessor owns in the minerals is the possibility of a reverter, as discussed above. *Herr*, 957 A.2d at 1285.").

69. *Id.* at *5.

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> interest. Further, it applies the terms, "bargain sell and set over," which are consistent with intended sales of personal property. In contrast, the Royalty Deed is devoid of real estate terms of conveyance, such as "transfer, demise, grant, or convey." The terms, "bargain sell and set over," as used in the Meeks to Swingle Royalty Deed, are different from the terms Meeks applied within the South Penn Lease, "grant, demise, lease and let," to convey an oil and gas fee simple determinable real estate interest to South Penn. The 1897 Royalty Deed's use of bargain, sell and set over to transfer royalty interests, rather than terms that convey real estate interests, supports that the intent was to sell only oil and gas royalty interests.[70]

The District Court concluded that the royalty rights conveyed terminated upon the termination of the South Penn Lease.[71] The District Court dismissed Plaintiff's quiet title action, as well as related claims for an accounting, declaratory judgment and unjust enrichment.[72]

C. Tennant v. Range Res. - Appalachia, LLC, 561 F. Supp. 3d 522 (W.D. Pa. 2021)

- The District Court granted oil and gas lessee's motion for summary judgment, holding that lease permitted post-production costs deductions and lessee did not have a duty to prove that such costs increase the value of the gas

Plaintiff landowners, the Tennants and McIlvaines (collectively "Landowners"), claimed that Defendant Range Resources-Appalachia, LLC ("Range Resources") breached the terms of their oil and gas leases by "failing to demonstrate that post-production costs deducted from their royalty payments resulted in a net increase in the value of gas produced under those leases."[73] The Landowners entered into identical oil and gas

70. *Id.* at *6.

71. *Id.* ("Upon termination of the South Penn Lease, the Meeks' possibility of reverter interest in the oil and gas mineral estate reverted and vested the fee simple oil and gas mineral interest back to the Meeks and their heirs and successors-in-interest. Neither South Penn nor George Swingle owned any remaining mineral oil and gas estate or royalty interest.').

72. *Id.* at *7 ("When the South Penn Lease terminated, JJK Mineral no longer owned any royalty property right; thus, Defendants do not owe JJK Mineral any equitable value for any post-Lease termination oil and gas production on the property.").

73. Tennant v. Range Res. - Appalachia, LLC, 561 F. Supp. 3d 522, 524 (W.D. Pa. 2021).

leases with Range Resources, which included a royalty provision that allowed for the deduction of specified post-production costs. Mr. McIlvaine, who is an attorney, negotiated the leases on behalf of the Tennants. Range Resources paid royalties to Plaintiffs that showed the deduction of post-production costs. Landowners asserted a breach of contract claim that the royalty statements did not contain any "identification, demonstration or proof that any of the assessed deductions resulted in a net increase in the value of the gas to substantiate the deductions."[74]

Both Landowners and Range Resources moved for summary judgment. The District Court determined that the plain and unambiguous language of the leases did "not impose on Defendant a duty to demonstrate that post-production costs deducted from Plaintiffs' royalty payments resulted in a net increase in the value of the gas produced."[75] The District Court concluded that "it is impossible for [the lessee] to be held responsible for terms that it did not contract for."[76] Further, Landowners offered no proof that the post-production operations did not increase the value of the gas. A defendant need not prove a negative when it moves for summary judgment on an issue that the plaintiff must prove at trial. It need only point to an absence of proof on plaintiff's part, and, at that point, plaintiff must demonstrate that there is a genuine issue for trial.[77] In light of the Landowners' failure to demonstrate a genuine issue of fact, the District Court ruled in favor of Range Resources.[78]

74. *Id*. at 526 (internal quotation marks omitted).

75. *Id*. at 532.

76. *Id.* (quoting Gottselig v. Energy Corp. of Am., Civ. No. 15-971, 2015 WL 5820771, at *6 (W.D. Pa. Oct. 5, 2015)).

77. *Id.* at 533 (quoting Jovic v. Legal Sea Foods, LLC, 2:16- cv-01586 (WHW)(CLW), 2018 WL 5077900, at *3 (D.N.J. Oct. 18, 2018); Gagliardi v. Equifax Info. Servs., LLC, Civ. No. 09-1612, 2011 WL 337331, at *10 (W.D. Pa. Feb. 3, 2011)).

78. *Id.* at 534.

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