**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

ALAN W. AND ROSEANN LEE, HUSBAND AND WIFE,

Appellees

v.

ESTATE OF ANNA PEARL RIEMER, D/B/A HERMAN RIEMER GAS COMPANY; JAMES HOWARD RIEMER, INDIVIDUALLY, AND AS EXECUTOR OF THE ESTATE OF ANNA PEARL RIEMER; ROBERT W. SIEBERT, JR., D/B/A HARBOR VIEW OIL & GAS; ANDREW SMITH, INDIVIDUALLY, AND A.E.S. SPECIALIZED SERVICES, LLC

APPEAL OF: ESTATE OF ANNA PEARL RIEMER, D/B/A HERMAN RIEMER GAS COMPANY; JAMES HOWARD RIEMER, INDIVIDUALLY AND AS EXECUTOR OF THE ESTATE OF ANNA PEARL RIEMER; AND ROBERT W. SIEBERT, JR., D/B/A HARBOR VIEW OIL & GAS

Appellants

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 1865 WDA 2012

Appeal from the Order entered February 29, 2012,
in the Court of Common Pleas of Butler County,
Civil Division at No(s): A.D. 10-12020

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| ALAN W. AND ROSEANN LEE, HUSBAND AND WIFE,<br><br>Appellees<br><br>v.<br><br>ESTATE OF ANNA PEARL RIEMER, D/B/A HERMAN RIEMER GAS COMPANY; JAMES HOWARD RIEMER, INDIVIDUALLY, AND AS EXECUTOR OF THE ESTATE OF ANNA PEARL RIEMER; ROBERT W. SIEBERT, JR., D/B/A HARBOR VIEW OIL & GAS; ANDREW SMITH, INDIVIDUALLY, AND A.E.S. SPECIALIZED SERVICES, LLC,<br><br>APPEAL OF: ESTATE OF ANNA PEARL RIEMER, D/B/A HERMAN RIEMER GAS COMPANY; JAMES HOWARD RIEMER, INDIVIDUALLY, AND AS EXECUTOR OF THE ESTATE OF ANNA PEARL RIEMER; ROBERT W. SIEBERT, JR., D/B/A HARBOR VIEW OIL & GAS<br><br>Appellants | IN THE SUPERIOR COURT OF PENNSYLVANIA<br><br>No. 1866 WDA 2012 |

Appeal from the Order entered February 29, 2012,
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| ALAN W. AND ROSEANN LEE, HUSBAND AND WIFE,<br><br>Appellees<br><br>v.<br><br>ESTATE OF ANNA PEARL RIEMER, D/B/A HERMAN RIEMER GAS COMPANY; JAMES HOWARD RIEMER, INDIVIDUALLY, AND AS EXECUTOR OF THE ESTATE OF ANNA PEARL RIEMER; ROBERT W. SIEBERT, JR., D/B/A HARBOR VIEW OIL & GAS; ANDREW SMITH, INDIVIDUALLY, AND A.E.S. SPECIALIZED SERVICES, LLC<br><br>APPEAL OF: JAMES HOWARD RIEMER, EXECUTOR OF THE ESTATE OF ANNA PEARL RIEMER<br><br>Appellants | IN THE SUPERIOR COURT OF PENNSYLVANIA<br><br>No. 1867 WDA 2012 |

Appeal from the Order entered October 5, 2012,
in the Court of Common Pleas of Butler County,
Civil Division at No(s): A.D. 10-12020

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| ALAN W. AND ROSEANN LEE, HUSBAND AND WIFE,<br><br>Appellees<br><br>v.<br><br>ESTATE OF ANNA PEARL RIEMER, D/B/A HERMAN RIEMER GAS COMPANY; JAMES HOWARD RIEMER, INDIVIDUALLY, AND AS EXECUTOR OF THE ESTATE OF ANNA PEARL RIEMER; ROBERT W. SIEBERT, JR., D/B/A HARBOR VIEW OIL & GAS; ANDREW SMITH, INDIVIDUALLY, AND A.E.S. SPECIALIZED SERVICES, LLC<br><br>APPEAL OF: ESTATE OF ANNA PEARL RIEMER, D/B/A HERMAN RIEMER GAS COMPANY; JAMES HOWARD RIEMER, INDIVIDUALLY, AND AS EXECUTOR OF THE ESTATE OF ANNA PEARL RIEMER; ROBERT W. SIEBERT, JR., D/B/A HARBOR VIEW OIL & GAS<br><br>Appellants | IN THE SUPERIOR COURT OF PENNSYLVANIA<br><br>No. 1868 WDA 2012 |

Appeal from the Order entered December 7, 2011,
in the Court of Common Pleas of Butler County,
Civil Division at No(s): A.D. 10-12020

BEFORE: FORD ELLIOTT, P.J.E., ALLEN, and COLVILLE,* JJ.

MEMORANDUM BY ALLEN, J.: **FILED DECEMBER 13, 2013**

The Estate of Anna Pearl Riemer, [the Estate], d/b/a Herman Riemer Gas Company, James Howard Riemer, individually, ["Riemer"], and as executor of the Estate of Anna Pearl Riemer, Robert W. Siebert, Jr., d/b/a

*Retired Senior Judge assigned to Superior Court.

Harbor View Oil & Gas, ["Siebert"], (collectively "Appellants"), appeal from the trial court's order granting summary judgment in favor of Alan and Roseann Lee, husband and wife, ("the Lees"), regarding the termination of a 1923 gas lease between the parties, and their predecessors, due to the non-production from a well, known as the Dawson Well, on the Lees' property. Appellants further appeal from the trial court's order denying Appellants' motion for partial summary judgment seeking to dismiss the Lees' nuisance claims against Riemer and Siebert. Appellants additionally appeal from the trial court's order requiring the Estate d/b/a Herman Riemer Gas Company and Riemer, as the Estate's executor, to plug the Dawson Well. Lastly, Appellants appeal from the trial court's order denying Appellants' motion to strike irrelevant and unduly prejudicial statements from the Lees' response to Appellants' motion for partial summary judgment. After careful consideration, we affirm.

The trial court recited the following facts and procedural history regarding this case:

> This case arises from a Complaint to Quiet Title filed by [The Lees], on November 19, 2010. [The Lees] assert that they are owners of a parcel of land in Buffalo Township, Butler County, Pennsylvania. A 1923 gas lease between [the Lees'] and [Appellants'] respective predecessors gives [Appellants] the right to enter on [the Lees'] property for purposes of producing oil and gas for "the term of ten years, (and so long thereafter as oil or gas shall be produced from the lands hereby leased)." [The Lees] assert that, in 1998, [Appellants] either voluntarily shut in the only existing well on [the Lees'] property, referred to by both parties as the "Dawson Well," or that [Appellants] voluntarily closed off said well from the pipeline leading from

> [the Lees'] property. [The Lees] allege that the Dawson Well was shut in and not producing between February 1998 and May 2010. [The Lees] also assert that they have not been paid any royalties since February 1998. [The Lees] allege that the lease has expired by its own terms because [Appellants] have failed to produce gas or pay royalties for a period in excess of twelve years. On May 26, 2010, [the Lees] gave [Appellants] written notification that the lease was no longer valid. [The Lees] assert that, despite having such notification, [Appellants] entered upon [the Lees'] property the following day claiming that the lease remained valid. [The Lees] also assert that [Appellants] conducted earthmoving activities on [the Lees'] property in June 2010. Additionally, [the Lees] assert that the Dawson Well has been abandoned and that [Appellants] are statutorily required to have it plugged, which [Appellants] have not yet done. Based on these assertions, [the Lees] aver claims of Quiet Title, Trespass, and Public Nuisance.
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> On December 17, 2010, [Appellants] filed an Answer and New Matter to [the Lees'] Complaint in Quiet Title. [Appellants] admit that, in 1998, the Dawson Well was either shut in or disconnected from the pipeline running from [the Lees'] property. [Appellants] deny that the lease has expired, and they assert that gas could be produced from the well, which gas could then be marketed. In their New Matter, [Appellants] allege that Plaintiff, Alan Lee, has been difficult to deal with and that [the Lees] have impeded [Appellants'] access to the Dawson Well.
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> Finally, [Appellants] assert that the Dawson Well does not meet the statutory definition for abandonment because it has continued to produce gas from February 1998 to present, even though said gas could not be marketed. [The Lees] filed a Reply to [Appellants'] New Matter on January 6, 2011.
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> On May 26, 2011, [the Lees] filed a Motion for Partial Summary Judgment as to their claim for Quiet Title. [The Lees] assert that [Appellants] admit that the Dawson Well was shut in between February 1998 and May 2010. [The Lees] further assert that [Appellants] admit that they took no action to produce gas from the well during that time. [The Lees] also assert that [Appellants] admit to not having paid [the Lees] any royalties between February 1998 and May 2010. [The Lees] assert that the habendum clause of the lease provides that the lease will continue for "the term of ten years, (and so long thereafter as oil or gas shall be produced from the lands hereby leased)." [The

> Lees] argue that, since the secondary term of the lease expires when production ceases, the lease has terminated by its own terms, where [Appellants] have not operated the well, extracted or marketed any gas, and have not paid royalties to [the Lees] for a twelve-year period.
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> On June 23, 2011, [Appellants] filed a Response and New Matter to [the Lees'] Motion for Partial Summary Judgment and a Brief in Support thereof. [Appellants] argue that there are at least two issues of material fact in this case. [The Lees'] interference with [Appellants'] contractual right of entry, and [Appellants'] attempts at production. [Appellants] allege that [the Lees] interfered with their right of entry, and, in their New Matter, [Appellants] raise the affirmative defense of frustration of purpose to [the Lees'] assertion of failure to produce. [Appellants] allege that they had difficulty dealing with Mr. Lee. [Appellants] also allege that [the Lees] put a gate across the access way leading to the Dawson Well. [Appellants] argue that [the Lees'] interference prevented [Appellants] from exercising their right to produce oil and gas, and they further argue that [the Lees] would wrongfully benefit from such improper actions if the lease is deemed terminated.
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> On September 20, 2011, [the Lees] filed an Amended Brief in Support of their Motion for Partial Summary Judgment. [The Lees] again assert that it is undisputed that the Dawson Well was either shut-in or closed off from the gas line leading from [the Lees'] property in 1998.
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> [The Lees] assert that [Appellants] took such actions voluntarily. As such, [the Lees] argue that the legal effect of termination is clear in light of case law and the habendum clause of the lease. [The Lees] argue that [Appellants] have not produced any evidence to support their frustration defense. [The Lees] argue that the lease is terminated as a matter of law because the well has been shut in, or closed off, and in a state of nonproduction for more than a decade.
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> On October 13, 2011, [Appellants] filed an Amended Response to [the Lees'] Motion for Partial Summary Judgment and an Amended Brief in Support thereof. [Appellants] again argue that there are issues of material fact as to the defenses of frustration of purpose and unclean hands, as well as to the question of [Appellants'] attempts to produce. [Appellants] assert that [the Lees] interfered with [Appellants'] right to enter

> [the Lees'] property, and they argue that Mr. Lee's testimony that he did not block [Appellants'] access directly conflicts with [Appellants'] affidavit of Jeffrey Riemer. Mr. Riemer's affidavit states that a cable across the access way blocked his entry to the Dawson Well when he attempted to make repairs to the well after the 1998 shut-in. [Appellants] argue that Mr. Lee admits that he put a gate, and later a cable, across the access way. [Appellants] further argue that such actions would clearly restrict access. [Appellants] also argue that their expert report shows that the Dawson Well continues to produce to this day. [Appellants] admit that they have been "unable to market gas" from the well for some time, but they argue that said inability to market gas does not mean the well is not producing. [Appellants] argue that the lease remains in effect because the well remains capable of producing gas.

Trial Court Opinion, 12/7/11, at 2-5.

On December 7, 2011, the trial court filed a memorandum opinion and a separate order determining that Appellants' leasehold interest in the Dawson Well had terminated due to the non-production from the well in paying quantities, which quieted title in the Lees' favor under Count I. On January 9, 2012, Appellants filed a motion for partial summary judgment to, *inter alia,* dismiss Count II of the Lees' action involving trespass, and to dismiss Riemer and Siebert from the Lees' public nuisance claim under Count III. On January 25, 2012, the Lees filed a praecipe to discontinue Count II and a response to Appellants' partial motion for summary judgment regarding Count III. On February 25, 2012, Appellants filed a motion to strike portions of the Lees' response to Appellants' motion for partial summary judgment. On February 29, 2012, after hearing arguments, the trial court filed separate orders which, *inter alia*: 1) concluded that

Appellants' motion for partial summary judgment regarding Count II was rendered moot by the Lees' praecipe discontinuing the same; 2) denied dismissing Riemer and Siebert from Count III's public nuisance claims; and 3) denied striking language from the Lees' responsive pleadings. On August 27, 2012, the Lees moved for partial summary judgment regarding Count III to determine that the Dawson Well was a public nuisance that required plugging by Appellants. On September 26, 2012, Appellants responded to the Lees' partial motion for summary judgment and filed a cross-motion for summary judgment regarding the same count. On October 4, 2012, Appellants filed an additional motion for summary judgment to dismiss Siebert from Count III. On October 5, 2012, the trial court determined: 1) that the Dawson Well constituted a public nuisance under the Oil and Gas Act, §§ 3220 and 3252; and 2) that the Estate d/b/a Herman Riemer Gas Company, and Riemer, as the Estate's executor, were the owners of the Dawson Well and were required to plug the Dawson Well. The trial court further determined that there were material questions of fact regarding Riemer's individual liability, and denied the portions of the Lees' partial motion for summary judgment, and Appellants' cross motion for partial summary judgment, regarding Riemer's individual responsibility for the Dawson Well's public nuisance and its plugging. On October 19, 2012, with the consent of Appellants, the Lees filed a motion to discontinue Count III against Riemer and Siebert, which the trial court granted on October 23, 2012. This timely appeal followed. Appellants complied with Pa.R.A.P.

1925. On January 10, 2013, the trial court issued four Pa.R.A.P. 1925(a) opinions individually addressing the issues Appellants raise on appeal.

Appellants present the following issues for our review:

> I. Did the trial court abuse its discretion or commit an error of law when it granted [the Lees'] Motion for Partial Summary Judgment and held that Appellants' leasehold interest in the Dawson Well has terminated?
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> II. Did the trial court abuse its discretion or commit an error of law when it ordered James Howard Riemer, Executor of the Estate of Anna Pearl Riemer, and the Estate of Anna Pearl Riemer, d/b/a Herman Riemer Gas Company, to plug the Dawson Well without first requiring [the Lees'] to exhaust their statutory remedies pursuant to the Oil and Gas Act?
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> III. Did the trial court abuse its discretion or commit an error of law in failing to dismiss Count III (Public Nuisance) as to individual defendants Riemer and Seibert because the Estate of Anna Pearl Riemer d/b/a Herman Riemer Gas Company is the owner/operator of the Dawson Well?
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> IV. Did the trial court abuse its discretion in relying on, and refusing to strike, portions of Appellees' Response to Appellants' Motion for Partial Summary Judgment and related Brief because the statements contained therein are irrelevant to the issues presented, constitute scandalous and impertinent matters, and were included only to prejudice Appellants, which they did?

Appellants' Brief at 4.

Appellants initially contend that the trial court erroneously determined that Appellants' leasehold interest in the Dawson Well was terminated. The trial court cogently explained:

> The lease at issue, recorded at Plan Book 668, Page 494 on December 1, 1923, provides that lessees, [Appellants] herein, have "the exclusive right to mine for and produce, store, pipe and transport petroleum oil, and natural gas from or across" lessors', [the Lees'], property for a primary "term of ten years,

(and so long thereafter as oil or gas shall be produced from the lands hereby leased)". Under said lease, lessors, [the Lees], are to receive a monthly royalty of "one-eighth of gas production" from each well on the property while gas is being marketed. The Dawson Well is the only well on [the Lees'] property that was drilled pursuant to the 1923 lease. Therefore, under the terms of the lease, [the Lees] are to receive royalty payments equal to one-eighth of the amount of gas produced and marketed from the Dawson Well. Under the terms of the 1923 lease, [Appellants'] rights conferred therein remain intact so long as oil or gas shall be produced from the Dawson Well. Case law provides that: "Where a lessor's compensation is subject to the volume of production, the period of active production of oil or gas is the measure of the duration of the lease." ***Clark v. Wright,*** 166 A. 775, 776 (Pa. 1933). The Pennsylvania Supreme Court has recognized that:

> Where the lessor's compensation is one-eighth of the oil produced, the tenancy as to the surface of the land, after the expiration of the fixed period, and after the fact that oil is not being found and produced in paying quantities becomes susceptible of proof, is a tenancy in the nature of a tenancy at will, and if not actually terminated by mutual consent, or continued by mutual consent in order that further exploration be made, may be terminated by either party.

***T.W. Phillips Gas and Oil Co.,*** 227 A.2d 163, 165 (Pa. 1967), quoting ***Cassell v. Crothers,*** 44 A. 446 (Pa. 1889). [Appellants'] leasehold right to enter upon [the Lees'] land is also conditioned upon the production of the Dawson Well. The record shows uncontroverted evidence that Defendant, Herman Riemer Gas Co., voluntarily shut-in the well in 1998. No gas was marketed between February 1998 and May 2010. As such, [the Lees] did not receive monthly royalty payments during that time. [Appellants] argue that, because the Dawson well was capable of producing gas during that twelve-year timeframe, the lease is not terminated. However, the language of the lease does not provide that [Appellants'] rights are to remain intact so long as gas could be produced; rather, the lease provides that [Appellants'] rights are to remain intact "so long thereafter as oil or gas shall be produced from the lands hereby leased." As such, the lease clearly defines that production of oil or gas shall be necessary to continue the lease.

> [Appellants] argue that their expert has determined that gas was produced from the Dawson well between February 1998 and May 2010. The report of [Appellants'] expert, Chester "Chad" Spohn, represents that, as of September 19, 2011, natural gas existed in the pipeline and at the wellhead of the Dawson Well. However, even if this Court assumes that the reported existence of gas in the line in September 2011 proves that gas existed between February 1998 and May 2010, the mere existence of gas does not equate with the lease requirement that gas shall be produced. The Pennsylvania Superior Court has recognized that even production for the lessor's personal use does not constitute "production" where an oil and gas lease provides that the lease duration continues beyond the primary term for as long as oil or gas shall be produced from the leased premises. ***Babb v. Clemensen,*** 687 A.2d 1120, 1121 (Pa. Super. 1996). The Superior Court has held that "production" means commercial production, or the production of oil or gas in paying quantities. ***Id.*** at 1122. Commercial production and paying quantities means gas or oil produced in amounts that yield a profit to the lessee. ***Young v. Forest Oil Co.,*** 45 A. 121, 123 (Pa. 1899). Thus, there must have been more than a mere existence of gas to sustain [Appellants'] leasehold interest; there must have been production of oil or gas. There is no evidence that [Appellants] received a profit, however small, from any gas produced from the Dawson Well between February 1998 and May 2010. In fact, [Appellants] admit that they did not market gas from the Dawson Well during that time. As such, it is uncontroverted that no gas was produced in paying quantities during that time, thus no gas was produced as contemplated by the terms of the lease. Therefore, by virtue of lack of production between February 1998 and May 2010, and by nonpayment of royalties during that period of time, the lease terminated by its own terms.

Trial Court Opinion, 12/7/11, at 7-9.

The trial court further reasoned:

> [Appellants] also cite ***Mitchell Energy Corp. v. Stagl,*** 27 Pa. D. 81. C.3d 132 (Crawford Co. 1983), in arguing that "the mere fact that the well is shut in from time to time" does not change the status of a producing well. ***Id.*** at 140. This Court does not find the ***Mitchell*** case analogous to [Appellants'] situation. In

> ***Mitchell,*** the company producing gas from the well on the lessor's property ceased production for one or more periods of time, far less than one year, due to changing market conditions. ***Id.*** at 136. The situation in the present case is radically different. [Appellants] admittedly left the Dawson Well shut-in for a period of time exceeding twelve years and chose to do so because of a need for repairs, not because of changing market conditions. Therefore, the argument of Defense on this issue lacks merit.

Trial Court Opinion, 12/7/11, at 9, n.1.

The trial court additionally concluded that Appellants' leasehold interest in the Dawson Well had terminated by Appellants' abandonment of the well. Specifically, the trial court determined:

> "'Abandonment' is the relinquishment or surrender of rights of property by one person to another." ***Cassell,*** 44 A. 446. It includes both...intention to abandon and the external act by which the intention is carried into effect." ***Id.*** "Abandonment is a question of fact, to be determined by the acts and intentions of the parties." ***Aye v. Philadelphia Co,*** 44 A. 555, 556. However, "[a]n unexplained cessation of operations," which continues for an extended period of time, can permit a finding of "abandonment as a matter of law." ***Id.*** [The Lees] assert that there is no issue of material fact as to [Appellants'] abandonment of their interest in the Dawson Well. [The Lees] assert that [Appellants] showed their intent to abandon the well when they voluntarily shut in the well in 1998 and then ceased to pursue active production until 2010. Given the uncontested evidence, that the well was shut in in 1998 and there was no production or marketing of gas and no payment of royalties through May 2010, as a matter of law, this court can conclude abandonment and the intent to abandon. ***See White v. Young,*** 186 A.2d 919 (Pa. 1963); ***Clark,*** 166 A. 775.

Trial Court Opinion, 12/7/11, at 10.

Our careful scrutiny of the record supports the trial court's determination that there were no genuine issues of material fact that the

lease between Appellants and the Lees had ended due to the nonproduction from the Dawson Well of paying quantities of gas, and due to the Appellants' abandonment. In Appellants' answer and new matter to the Lees' complaint, Appellants admitted "that no gas was produced for marketing from [the Dawson Well] during the time period [between February 19, 1998 and May 26, 2010][.]" Appellants' Answer and New Matter to Complaint in Quiet Title, 12/17/10, at 2 (unnumbered). Appellants further admitted that "no gas was produced for marketing from [the Dawson Well] during the time period stated and no royalty was therefore paid[.]" *Id.* at 3 (unnumbered). Appellants averred that Alan Lee "was obstreperous and difficult to deal with to the point that [Anna Pearl Riemer, ("Mrs. Riemer")] no longer wished to attempt to deal with [Mr. Lee]. Because of the already existing condition of the well derrick in 1998, when the gathering line rusted and began to leak at that time, [Mrs. Riemer] as Herman Riemer Gas Company [("Company")] **chose to shut in the well for safety reasons rather than attempt to deal with Plaintiff Alan Lee.**" *Id.* at 8 (unnumbered) (emphasis supplied). According to Appellants, on "December 19, 2001, [Company] capped the gathering line where it intersected Kepple Road to prevent backflow…from other lines causing a reduction in gas pressure and supply." *Id.* at 11 (unnumbered). The metered Dawson Well continued to be read "regularly from the time it was shut in on February 19, 1998 until the present." *Id.* Appellants averred that "[t]hese meter readings taken during this time showed that gas was being produced by the well **but continued to be lost**

**through leakage in the lines before it could be gathered to take to market.**" *Id.* (emphasis supplied).

Mr. Lee testified that after the Dawson Well was shut by Mrs. Riemer, she explained that "the well was played out basically…it wasn't worth fooling with…[and] it wasn't worth doing the repairs to the well." N.T., 8/24/11, at 44-45. Mr. Lee "was given the explanation that the well was not…producing enough gas to maintain it." *Id.* at 44. Thus, the record supports the trial court's determination that Appellants abandoned the Dawson Well, and that "it is uncontroverted that no gas was produced in paying quantities [between February 1998 and May 2010], [and] thus no gas was produced as contemplated by the terms of the lease. Therefore, by virtue of lack of production between February 1998 and May 2010, and by nonpayment of royalties during that period of time, the lease terminated by its own terms." Trial Court Opinion, 12/7/11, at 9. Likewise, our review of the record supports the trial court's determination that "[g]iven the uncontested evidence, that the well was shut in in 1998 and there was no production or marketing of gas and no payment of royalties through May 2010, as a matter of law, this court can conclude abandonment and the intent to abandon." *Id.* at 10.

Appellants cite ***Cole v. Philadelphia Co.,*** 26 A.2d 920, 923 (Pa. 1942) to argue that "temporary cessation of production cannot form the basis for automatic termination when termination would not be reasonable in view of all the circumstances." Appellants' Brief at 9. However, Appellants'

reliance on ***Cole*** is misplaced. As succinctly explained by the Lees, ***Cole*** "involved a well that was disconnected from its pipeline only while the well was drilled deeper." Lees' Brief at 9. Instantly, the Dawson Well was shut in and unrepaired for 12 years.

Appellants contend that the Lees' actions barring Appellants' access to the Dawson Well frustrated the Appellants' purpose and constitutes unclean hands such that the trial court erred in granting summary relief in the Lees' favor regarding the Lees' quiet title count. The trial court determined these defenses were unavailing and explained:

> [Appellants] argue that the cessation of gas production for marketing purposes can be explained by the fact that [the Lees] impeded [Appellants'] ability to make repairs to the well after [Appellants] shut-in the well in 1998. In this regard, [Appellants] assert the affirmative defenses of frustration of purpose and unclean hands. In general, the defendant has the burden of proof to establish an affirmative defense. ***Baldwin v. Devereux Schools,*** 154 A. 21, 23 (Pa. 1931).
>
> As such, the evidence on these issues must be evaluated to determine whether [Appellants] have developed evidence to give rise to a question of material fact concerning their affirmative defenses.
>
>> Under the doctrine of frustration of purpose, contract law provides that a party's duties under a contract may be discharged where "after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the nonoccurrence of which was a basic assumption on which the contract was made...unless the language or circumstances indicate the contrary".
>
> Restatement (Second) of Contracts § 90 (1981). To establish this affirmative defense, [Appellants] must offer evidence that 1) the purpose that is frustrated was a principal purpose of that party in making the contract; 2) the frustration must be

substantial; 3) the nonoccurrence of the frustrating event must have been a basic assumption on which the contract was made. Restatement (Second) of Contracts § 90 cmt. a. The doctrine of frustration of purpose is to be applied sparingly. ***Darn v. Stanhope Steel, Inc.,*** 534 A.2d 798, 812 (Pa. Super. 1987). Here, [Appellants] argue that their purpose of producing gas from the Dawson well was [Appellants'] principal purpose in entering into the assignment contract for the lease.

[Appellants] also argue that [the Lees] frustrated their purpose of producing gas from the Dawson Well by placing a gate, and later a cable, across the access way to the well. [Appellants] also assert that Mr. Lee was "difficult to deal with". As evidence of their assertions, [Appellants] present testimony from Mr. Lee that he was agitated with [Appellants] when they entered upon his property in June 2010. [Appellants] also present Mr. [Jeffrey] Riemer's Affidavit that a cable existed across the access way when he went to the property to make repairs after the 1998 shut-in. Mr. Riemer stated that, after viewing the cable, he "returned to the office to locate a key and was unable to do so." Mr. Riemer further stated that "[n]o other instructions were available for access to the Dawson Well." Mr. Lee testified that he had offered Herman Riemer Gas Co. the use of his driveway for access to the well and that he had told [Appellants] that they could call him to gain any other access. Deposition of Alan Lee, p. 98. [Appellants] do not offer any evidence that, prior to June 2010, they requested and were denied any access to the well. The affidavit of Mr. Riemer does not establish any affirmative act by [the Lees] that prevented [Appellants] from gaining access to the well from its shut-in in 1998 until 2010. As of the parties' encounter in June 2010, the well had been shut-in for approximately twelve years. The evidence proffered by the defense is not sufficient to establish any question of material fact concerning any defense of frustration of purpose. As such, [Appellants] have not established their asserted defense of frustration of purpose.

[Appellants] also assert the affirmative defense of unclean hands. "A court may deprive a party of equitable relief where, to the detriment of the other party, the party applying for such relief is guilty of bad conduct relating to the matter at issue." ***Terraciano v. Com. Dept. of Transp., Bureau of Driver Licensing,*** 753 A.2d 233, 237 (Pa. 2000), *citing* ***Shapiro v. Shapiro,*** 204 A.2d 266, 268 (Pa. 1964). Here, [Appellants]

> allege that [the Lees'] bad conduct prevented them from accessing the well, such that [the Lees] should be precluded from claiming that [Appellants'] interest in the well has terminated due to lack of production. [Appellants] may not rest upon averments in their pleadings, but must demonstrate that there is a genuine issue for trial. ***Davis,*** 770 A.2d at 357. [Appellants] assert that Mr. Lee was difficult to deal with and that their access to the well was precluded after the 1998 shut-in, resulting in the twelve-year lack of production of gas. However, [Appellants'] assertion remains unsupported by the available evidence. While Jeffrey Riemer states, in his Affidavit, and Mr. Lee admits, that a cable was drawn across the access way, [Appellants] fail to provide evidence to suggest that the mere existence of the cable constitutes an act of bad conduct. Mr. Lee's testimony, that he offered [Appellants] the use of his driveway for purposes of access and that he offered to admit [Appellants], by virtue of the cabled access way, upon [Appellants'] request for such admittance, remains uncontroverted. [Appellants] offer no evidence of ever having requested and been denied access in 1998 or at any other time through 2010. The only other proffered evidence that concerns Mr. Lee's "difficulty" relates to June 2010, which is beyond the critical point for determining whether Mr. Lee's actions give rise to any question of material fact relevant to the termination or abandonment of the lease. As discussed above, the lease terminated by its terms for nonproduction and nonpayment of royalties between February 1998 and May 2010.
>
> Alternatively, the well was abandoned and the lease was terminated by [the Lees'] letter of May 2010. Therefore, [Appellants] have produced no evidence sufficient to establish a genuine issue of material fact as to the defense of unclean hands.

Trial Court Opinion, 12/7/11, at 9-12.

The record confirms the trial court's rejection of these defenses. Mr. Lee explained that after he purchased the residence, "I put a gate over the entrance…because I wasn't living in the area and I wanted to prevent people from just riding on the property…And I took [Mrs. Riemer] a key to the gate

so that...they would have a key for whenever they needed to get to the well since I wasn't living in Freeport at the time[.]" N.T., 8/24/11, at 34. The gate was only "wide enough to drive a truck through." *Id.* at 35. Mr. Lee "didn't fence the entire perimeter of the 64 acres" he owned. *Id.* at 36. While Appellants highlight that Mr. Lee stopped providing a key to the gate, the record reflects that Mr. Lee "gave not one, but several keys to [Mrs. Riemer] to access the gate" over the years "when the locks changed." *Id.* at 135. Mr. Lee testified that he "quit doing it after we got out there and figured they could always come to the house. We lived there. I had a business in Freeport. I was in plain access." *Id.* Mr. Lee agreed that he had told Mrs. Riemer "that [he] would give her access if she just called [him] and asked [him] or she could go in the driveway[.]" *Id.* at 135-136; *see also Id.* at 98-99.

Indeed, Mr. Lee testified that on May 27, 2010, Siebert, Riemer, and Jeffrey Riemer did just that to enter the Lees' property uninvited. N.T, 8/24/11, at 24. Mr. Lee observed a "pick-up truck of some type...in my...backyard. And another three or four men, or more standing around there." *Id.* at 20. There was "another truck that was...in the main part of the driveway" next to the Lee's residence. *Id.* at 22. Appellants themselves averred that Siebert and "other individuals entered on the Lees' property on May 27, 2010[.]" Appellants' Answer and New Matter to Complaint in Quiet Title, 12/17/10, at 5-6 (unnumbered). Aside from Mr. Lee's oral objections to their presence, Appellants did not describe encountering any physical

obstacles that barred their uninvited entry that day. Likewise, no physical impediments were referenced regarding Defendant Andrew Smith's subsequent entry onto the Lees' property on June 14, 2010, with "earth moving equipment." *Id.* Significantly, Appellants "specifically denied that Andrew Smith, A.E.S. Specialized Services, LLP, and [the Estate] d/b/a [Company] needed the permission of [the Lees] to go on [the Lees'] property to attend to the Dawson Well, or that [the Lees'] specific objection to them doing so [was] relevant." *Id.* at 6 (unnumbered).

While Appellants argue that the Lees had unclean hands and barred Appellants' access to the Dawson Well, a complete reading of the notes of testimony referenced by Appellants belie Appellants' argument. Further, Appellants' entry onto the Lees' property in May 2010, and with ground moving equipment in June 2010, do not support Appellants' defense that the Lees' effectively frustrated Appellants' purpose and Appellants' rights of entry under the lease. Likewise, Appellants' reliance on Jeffrey Riemer's affidavit to preclude summary relief in the Lees' favor is unavailing. While Appellants emphasize Jeffrey Riemer's statement that he looked for but did not find a key to the Lees' gate to show that Appellants' access was barred, this statement subsumes and corroborates Mr. Lees' sworn testimony that keys had traditionally been given. *See* Jeffrey Reimer's Affidavit, 10/7/11, at 1. Further, the affidavit is wholly silent as to any specific examples of dates, times, and locations of attempted entries after Jeffrey Riemer did not find a key to the Lees' gate. *Id.* Appellants' reliance on the expert report by

Chester Spohn is equally misplaced. While the report says that the Dawson Well "is producing gas," the report is devoid of any affirmative statements regarding the period between February 19, 1998 and May 26, 2010, which is at issue in this case. *See generally* Dawson Well Test, 9/19/11.

Significantly, Appellants never initiated any court action to enforce their right to enter the Lees' land. Appellants ceased production for repairs and did not give royalties to the Lees since 1998. Accordingly, as cogently reasoned by the trial court, there is no material question of fact that abandonment, and not just temporary cessation, along with nonproduction, can be deemed to have occurred under the law, such that the Lees are entitled to summary relief.

In their second issue, Appellants contend that the trial court erred in ordering the Estate d/b/a Company and Riemer, as the Estate's executor, to plug the Dawson Well "in the absence of any proceedings involving" the Department of Environmental Protection ("DEP"). Appellants' Brief at 8. We have explained:

> In reviewing the trial court's interpretation of statutory language, we are mindful of the well-settled rule that "[s]tatutory interpretation implicates a question of law." Thus, our scope of review is plenary, and our standard of review is *de novo.*

***Commonwealth v. Dixon,*** 53 A.3d 839, 842 (Pa. Super. 2012) (internal citations omitted). Here, the trial court disputed the assignment of error and reasoned:

> [Appellants] argue that this Court erred in granting [the Lees'] Motion for Partial Summary Judgment regarding their Count III, Nuisance, claim, and in ordering the plugging of the Dawson Well pursuant to 58 Pa.C.S.A. § 3220. [Appellants] argue that [the Lees] failed to exhaust their administrative remedies under the Oil and Gas Act, which, they further argue, provides the exclusive remedy for violations of its provisions. However, as noted in the October 4, 2012 Order, this Court relied on 58 Pa.C.S.A. § 3252 in rendering its decision. Section 3252 provides:
>
>> A violation of section 3217 (relating to protection of fresh groundwater and casing requirements), 3218 (relating to protection of water supplies), 3219 (relating to use of safety devices) or 3220 (relating to plugging requirements), or a regulation, order, term or condition of a permit relating to any of those sections constitutes a public nuisance.
>
> 58 Pa.C.S.A. § 3252. Section 3220, referenced in Section 3252, provides the following, in pertinent part:
>
>> (a) General rule.--Upon abandoning a well, the owner or operator shall plug it in the manner prescribed by regulation of the department to stop vertical flow of fluids or gas within the well bore, unless the department has granted inactive status for the well or it has been approved by the department as an orphan well.
>
> 58 Pa.C.S.A. § 3220. Here, in its December 6, 2011 Memorandum Opinion and Order, this Court determined that the Dawson Well was abandoned. There is no question of material fact that the well was not plugged in. Therefore, pursuant to Section 3220, the Dawson Well constituted a public nuisance. As such, this Court properly granted [the Lees'] Partial Motion for Summary Judgment with regard to their Count III, Nuisance, claim. This Court properly ordered the plugging the Dawson Well pursuant to Section 3252.

Trial Court Opinion, 1/10/13, at 1. Appellants' claims lack merit.

Although Appellants cite provisions of the Oil and Gas Act, Appellants only cite one case for the general proposition that "[w]here the legislature

provides a specific remedy for a wrongdoing, the courts may not create new or different remedies." Appellants' Brief at 13-15. Appellants do not sufficiently develop how, under the facts of this case or under an interpretation of the Oil and Gas Act §§ 3220 and 3252 as referenced above, the trial court created a "new" or a "different" remedy, such that the trial court's determination requiring Appellants to plug the well was erroneous and "premature." *Id.* at 15. Indeed, Appellants' counsel argued before the trial court that "the point...under Count III [was] not about how we enforce the remedy[.]" N.T., 10/4/12, at 9. Appellants' counsel posited that "[t]he remedy, when you look at the statute I don't believe that we're stating that **the only remedy of the Lees is the Oil and Gas Act."** *Id.* at 10 (emphasis supplied). We find that Appellants' lack of development of this argument waives the same. ***See Korn v. Epstein,*** 727 A.2d 1130, 1135 (Pa. Super. 1999) ("arguments not *appropriately* developed are waived) (emphasis in original) (internal citations omitted).

Waiver notwithstanding, Appellants reference, *inter alia,* Section 3251(a) to show that the Lees as "parties 'having a direct interest in a matter' could have requested a conference with the Company and the [DEP] in order to review the status of the Well and any plugging requirements." Appellants' Brief at 15. Appellants contend that "[b]ecause the Lees failed to exhaust the statutory remedies available to them pursuant to the Act, the trial court's Order requiring the Company to plug the Dawson Well is premature." *Id.* The language referenced by Appellants does not state that

parties similarly situated to the Lees' "shall" request a conference, or are exclusively mandated to do so. It is well settled that we must abide by the plain meaning of a statute's language. ***Dixon, supra,*** at 842 ***citing*** 1. Pa.C.S. §1921 ("When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit."). Accordingly, we will not ignore the plain meaning of the statute's language in favor of imbuing the language with a meaning it does not have, or with requirements that are not specifically mandated by its provisions.

Appellants' third issue contends that "it was error to fail to dismiss Count III (Public Nuisance) against Riemer and Siebert with prejudice because the Company is the only owner/operator of the Dawson Well." Appellants' Brief at 8. We disagree. Appellants discount the trial court's explanation that there were "material questions of fact relative to [Riemer's] individual functions in relation to the Dawson Well which require[d] fact-finding," and which precluded summary relief and the dismissal of this Count against Riemer individually with prejudice. S*ee* Order, 10/5/12, at 2 (unnumbered); *see also* N.T., 10/4/12 at 19-20; N.T., 2/28/12, at 9-14; *See* Pa.R.C.P. 1035.2(2) (noting that motions for summary judgment require the pleadings to be "closed" and to follow the completion of discovery regarding the issue for which summary relief is sought). We cannot ignore the foregoing determinations by the trial court when the record supports them. As for Siebert, on October 19, 2012, the Lees moved to discontinue Count

III against him *without prejudice*, which the trial court granted with Appellants' *consent* on October 23, 2012. On October 24, 2012, the trial court "in light of the discontinuance of Count III" against Siebert, declared Siebert's motion for summary judgment moot, and "cancelled" Siebert's "submission" of this motion. Appellants cannot now appeal the lack of prejudice with which Siebert was dismissed from this action, having consented to such a dismissal, and having never argued the merits of Siebert's motion for summary judgment before the trial court. *See* Pa.R.A.P. 302(a) ("Issues not raised in the lower court are waived and cannot be raised for the first time on appeal.").

Appellants' fourth issue assigns error to the trial court for not striking portions of the Lees' response to Appellants' motions for partial summary judgment. Appellants contend that the statements contained therein are "scandalous," "impertinent," and "unnecessary and irrelevant" to the issues presented, "which in the absence of any necessity are unbecoming to the dignity of the court." Appellants' Brief at 15, and 8.

"To be scandalous and impertinent, the allegations must be immaterial and inappropriate to the proof of the cause of action." ***Common Cause/ Pennsylvania v. Com.,*** 710 A.2d 108, 115 (Pa. Cmwlth. 2006) (internal citation omitted). Here, the trial court rebutted this argument and explained:

> With regard to [Appellants'] argument that this Court erroneously refused to strike the above-referenced portions of and exhibits to [the Lees'] Response and Brief, as referenced in this Court's second-filed February 28, 2012 Order, this Court gave full consideration to [Appellants'] Motion to Strike and to the arguments of counsel for both parties. This Court found that statements made by [the Lees], and the documents referenced by [the Lees], were relevant to establish the existence of questions of material fact concerning [Riemer's] individual operation and ownership interest in the Dawson Well, because they concern [Riemer's] activities regarding operation of said Well and the [Company], a sole proprietorship. Operation and ownership are relevant to the issue of liability pursuant to the Oil and Gas Act. *See* 58 Pa.C.S.A. §§ 3203; 3220; and 3252. For these reasons, [the Lees'] statements and cited documents, regarding [Riemer's] conduct as an individual and as executor of [the Estate] and as sole proprietor of the [Company], are appropriate and relevant in the context of [the Lees'] Response to and Brief in Opposition to [Appellants'] Motion for Partial Summary Judgment seeking the dismissal of [Riemer] and [Seibert].

Trial Court Opinion, 1/10/13, at 2-3. We agree, and find that the trial court did not err in refusing to strike the language from the Lees' response to Appellants' motion for partial summary judgment. The statements at issue provide background and information for the Lees' actions and Appellants' motivations, and were supported by the pleadings filed by the Lees as exhibits to their responsive pleadings to the Appellants' motion for partial summary judgment. *See generally,* [Riemer's] Petition for Court Approval of Sale/Transfer of Estate Assets, 4/5/11; [Janice Hope Riemer's] Petition for Citation to Compel Accounting, 4/21/11; [Janice Hope Riemer's] Petition for Citation for Removal of Fiduciary, for Declaratory Judgment and for Surcharge, 4/21/11. In addition, the Lees' arguments before the trial court

substantiate the inclusion of the disputed statements. *See* N.T., 2/28/12, at 9-14.

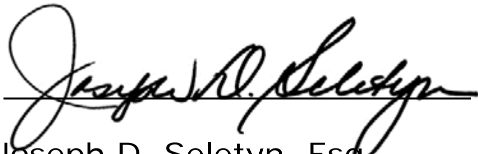
In all, we agree with the trial court that:

> [T]he evidence does not give rise to any question of material fact that [Appellants] did not produce gas, market gas, or pay royalties from the Dawson Well between February 1998 and May 2010. Therefore, the lease terminated by its own terms. Alternatively, under Pennsylvania case law, following said cessation of production for a period of twelve years, the Dawson Well was abandoned, and the 1923 lease transformed into a tenancy at will. Said tenancy was unilaterally and properly terminated by [the Lees] via their May 26, 2010 letter to [Appellants], notifying [Appellants] that the lease was no longer valid. [Appellants] have not proffered evidence to give rise to any question of material fact to prove the necessary elements of their asserted affirmative defenses of unclean hands and frustration of purpose relevant to the termination of the lease.

Trial Court Opinion, 1/10/13, at 12-13.

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/13/2013