NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

PECHIN LEASING LLC v. G. GRAY GARLAND, JR. AND MARGARET G. GARLAND, HUSBAND AND WIFE, JOHN G. MALONEY AND HELEN V. MALONEY, HUSBAND AND WIFE, LUZERNE LAND CORPORATION AND ALOE MINING CORPORATION APPEAL OF: LUZERNE LAND CORPORATION AND ALOE MINING CORPORATION	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 53 WDA 2013

Appeal from the Order Entered December 5, 2012
In the Court of Common Pleas of Greene County
Civil Division at No(s): AD 988, 2010

BEFORE: PANELLA, OLSON AND MUSMANNO, JJ.

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

Appellants, Luzerne Land Corporation (Luzerne) and Aloe Mining Corporation (Aloe) (collectively, Appellants), appeal from the order entered on December 5, 2012, granting a motion for judgment on the pleadings filed by Pechin Leasing LLC (Pechin).[1] We affirm.

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[1] G. Gray Garland, Jr., Margaret G. Garland, John G. Maloney, and Helen V. Maloney were named as additional defendants in this matter based upon a purported parallel chain of title over the subject property. On Pechin's motion, the trial court entered default judgment against them on May 4,
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The trial court briefly set forth the facts and procedural history of this case as follows:

> [In this case, Pechin] filed an action to quiet title against [Aloe], successor to [Luzerne]. In 1983, Luzerne acquired from Jones & Laughlin Steel, Inc. a tract of land in Cumberland Township, Greene County, containing 252.680 acres hereinafter known as the "Fuller tract." This deed specifically excepted and reserved the Pittsburgh Coal and mining rights.[fn] It further excepted all other seams of coal, except the Waynesburg Coal. Finally, it excepted the land encompassed in a deed to the Monongahela Railway Company.
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> In 1993, Luzerne leased this tract to Equitrans, Inc. for the production of oil and gas. Over the next few years, this lease was amended and assigned. In 1996, Luzerne conveyed to Pechin[] the Fuller tract. This instrument contains the following language:
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> > EXCEPTING AND RESERVING therefrom and thereout all the mineral rights, mining rights and tracts of land described in prior instruments of record.
> >
> > SUBJECT TO any and all agreements, rights, covenants and uses set forth in prior instruments of record.
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> > SUBJECT TO all public and private streets, roads, ways, easements, rights and rights-of-way therein and thereto of record or apparent on or in the premises hereby conveyed;
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> > FURTHER SUBJECT TO all zoning ordinances and other governmental use restrictions, and all encroachments, discrepancies, or conflicts in boundary lines, or shortage in area apparent on the

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2012. Those parties took no further action. They are not parties in the present appeal.

> premises or which an accurate and complete survey would disclose.
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> [Pechin] moved for judgment on the pleadings, arguing that it [was] entitled to judgment as a matter of law and that [the trial court] should quiet title as to the oil and gas underlying the Fuller tract to [Pechin]. It further assert[ed] that [the trial court] bar Luzerne and it[s] successor, Aloe [], from asserting any right, title or interest in or to oil and gas royalties from the 1993 lease.
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> _____
> [fn] The Pittsburgh Coal exception contains unusual language: "Excepting … all … the Pittsburgh … Seam of Coal, and oil and gas therein …". The parties agree that this clause refers only to such oil and gas as might be found in the Pittsburgh Coal Seam itself, and not the larger oil and gas estate which is at issue in this proceeding.

Trial Court Opinion, 12/5/2012, at 1-3 (record citations omitted).

The trial court determined that the reservation of "all the mineral rights" and "mining rights" in the aforementioned conveyance did not encompass a right to oil and gas. ***Id.*** at 4. Accordingly, on December 5, 2012, the trial court granted Pechin's motion for judgment on the pleadings. This timely appeal resulted.[2]

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[2] Appellants filed a notice of appeal on January 3, 2013. On January 18, 2013, the trial court ordered Appellants to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). Appellants complied timely on January 30, 2013. On February 11, 2013, the trial court filed an opinion pursuant to Pa.R.A.P. 1925(a) wherein it largely adopted its earlier decision setting forth its reasons for granting Pechin's motion for judgment on the pleadings. However, the trial court did address an additional jurisdictional issue pertaining to Appellants' argument that Pechin failed to include indispensable parties to the litigation. More specifically, the trial court determined that lessees, and subsequent assignees of oil and gas
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On appeal, Appellants present the following issues for our review:

1. Whether the lower court lacked subject matter jurisdiction as Pechin failed to join indispensable parties to their action.

2. Whether the lower court erred in its grant of judgment on the pleadings in favor of Pechin.

3. Whether [Appellant's] specific recorded exception and reservation of mineral rights and mining rights includes the gas of the Marcellus Shale formation.

4. Whether the gas trapped in the Marcellus Shale should be considered the property of the owner of the gas, or, in light of ***U.S. Steel v. Hoge***, 468 A.2d 1380 (Pa. 1983), should be considered the property of the owner of the shale stratum (read: mineral rights). ***See Butler v. Charles Powers Estate***, 29 A.3d 35 (Pa. Super. 2011), alloc. granted 760 MAL 2011[.]

5. Whether the lower court erred in its conclusion that Pechin is the owner of the oil and gas underlying the subject acreage.

6. Whether the lower court abused its discretion in concluding that: "the most likely explanation for the difference in consideration was that the Waynesburg Coal had been removed by Luzerne," as there is no admitted fact of record to this effect.

7. Whether the conveyance to Pechin was subject to [l]eases and [a]greements of record, in which [Appellants] retained their royalty interest in "deep" oil and gas rights.

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leases, are not indispensable parties in an action to quiet title. Trial Court Opinion, 2/11/2013, at 2-4.

Appellants' Brief at 4-5.[3]

In their first argument presented, Appellants assert the trial court lacked subject matter jurisdiction because Pechin failed to join indispensable parties to the litigation. ***Id.*** at 18. More specifically, Appellants contend that lessees, "Richard H. Burkland, Ellsworth Land & Minerals, L.P., and Atlas America, LLC" as well as "Chevron Appalachia, LLC," (as purported successor to Atlas America, LLC) made royalty payments to Pechin, thus, making them indispensable parties in the action to quiet title. ***Id.*** According to Appellants, this is especially so because "Pechin's action to quiet title sought 'to establish that the title to the [p]roperty including the oil and gas estate in dispute and all royalties derived therefore, exclusively lies with …' Pechin." ***Id.*** at 19. Thus, Appellants theorize that the lessees constitute indispensable parties in this matter, because Pechin, through its quiet title action, seeks to confirm its legal right to royalty payments made by the lessees. ***Id.***

Because the question of whether a court has subject matter jurisdiction is a question of law, our standard of review is *de novo* and the scope of our review is plenary. ***Mazur v. Trinity Area School District***,

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[3] We have reordered Appellants' arguments for ease of discussion. Moreover, we note that while Appellants have listed seven issues in their statement of questions presented section of their brief, they present a total of four arguments.

961 A.2d 96, 101 (Pa. 2008). Our Supreme Court has previously determined:

> [U]nless all indispensable parties are made parties to an action, a court is powerless to grant relief. Thus, the absence of such a party goes absolutely to the court's jurisdiction. A party is indispensable when his or her rights are so connected with the claims of the litigants that no decree can be made without **impairing** those rights. A corollary of this principle is that a party against whom no redress is sought need not be joined. In this connection, if the merits of a case can be determined without prejudice to the rights of an absent party, the court may proceed.

Sprague v. Casey, 550 A.2d 184, 189 (Pa. 1988) (emphasis added) (internal citations omitted).

The determination of an indispensable party question involves the following considerations:

1. Do absent parties have a right or interest related to the claim?

2. If so, what is the nature of that right or interest?

3. Is that right or interest essential to the merits of the issue?

4. Can justice be afforded without violating the due process rights of absent parties?

Mechanicsburg Area School District v. Kline, 431 A.2d 953, 956 (Pa. 1981).

Generally, an action to quiet title is designed to determine a dispute over the title to real estate of which the plaintiff is in possession. ***See Moore v. Duran***, 687 A.2d 822 (Pa. Super. 1996); ***Seven Springs Farm,***

Inc. v. King, 344 A.2d 641 (Pa. Super. 1975). "Title" is defined as: "1. The union of all elements (as ownership, possession, and custody) constituting the legal right to control and dispose of property; the legal link between a person who owns property and the property itself. 2. Legal evidence of a person's ownership rights in property; an instrument (such as a deed) that constitutes such evidence." BLACK'S LAW DICTIONARY 1522 (8TH ed. 2004).

Here, the trial court determined:

> If a dispute arose about title to leased oil and gas, such as between heirs of a lessor, the lessee would not be an indispensible [sic] party to that dispute, because the lessee would still have the right to work the lease, and it would still owe rents and royalties in the amounts obligated by the lease. The lessee may sometimes wait for instructions from the court as to the proper person to pay, or sometimes make the payments into escrow, but its obligations under the lease are fixed. Those obligations cannot be ignored no matter to whom the money is owed.
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> If Burkland [et. al] or [their] assigns are deemed to be indispensible [sic] parties then all assignees of oil and gas leases would be indispensible [sic] parties to every issue trying the title to the land those leases encumber. This is not the law.

Trial Court Opinion, 2/11/2013, at 3-4.

Appellants have not cited any legal authority, and we have not independently found any precedent, that specifies a lessee as having an interest in land sufficient to confer indispensable party status in an action to quiet title. Appellants argue that the aforementioned parties have "revenue interest" in the subject property owned by Pechin. Appellants' Brief at 19.

However, the underlying action was to quiet title. The lessees quite simply do not have a legal right to control and dispose of property, could seek no redress, and do not require joinder. Hence, we agree with the trial court that the abovementioned lessees were not indispensable parties to Pechin's quite title action. Therefore, subject matter jurisdiction was proper. Accordingly, Appellants' first issue is without merit.

Appellants' issues 2 through 6 are inter-related and, therefore, we will address them together. Essentially, Appellants argue that their specific reservation of mineral rights includes the right to extract gas from the Marcellus Shale Formation. Appellants' Brief at 20. Thus, Appellants maintain that the trial court was required to follow this Court's decision in ***Butler v. Charles Powers Estate***, 29 A.3d 35 (Pa. Super. 2011). ***Id.*** at 20-23. Appellants contend the trial court compounded the error and abused its discretion in determining Pechin is the owner of the oil and gas underlying the land by examining evidence outside of the record regarding the amount of consideration paid. ***Id.*** at 23-25.

"Our standard of review of the grant of a motion for judgment on the pleadings is limited." ***Metcalf v. Pesock***, 885 A.2d 539, 540 (Pa. Super. 2005) (citation omitted). "A motion for judgment on the pleadings will be granted where, on the facts averred, the law says with certainty that no recovery is possible. As this appeal presents an issue of law, our review is plenary." ***Id.*** (citation omitted).

Appellants' reliance on this Court's decision in ***Butler*** is no longer applicable, because the Pennsylvania Supreme Court recently reversed that decision. ***See Butler v. Charles Powers Estate***, 65 A.3d 885 (Pa. 2013). Thus, our Supreme Court's recent opinion controls the instant matter. In ***Butler***, the Supreme Court examined nearly two centuries of law pertaining to contractual mineral rights.

Most significantly, the ***Butler*** Court looked at the rule announced in ***Dunham & Shortt v. Kirkpatrick***, 101 Pa. 36 (Pa. 1882), and its progeny. In ***Dunham***, our Supreme Court "examined an 1870 deed, which reserved to the grantor 'all the timber suitable for sawing; also all minerals,' to determine whether the reservation included oil with the term 'all minerals.'" ***Butler***, 65 A.3d at 889. The ***Dunham*** Court considered whether a deed should be viewed through the lens of a scientist or businessperson and held that a common understanding of the word minerals should be implemented. ***Id.*** at 890. The ***Dunham*** Rule established that minerals are of a metallic nature and, thus, for a deed reservation to include oil, it must specifically delineate as such. ***Id.***

Almost 80 years after ***Dunham***, following a litany of other decisions, the Supreme Court decided ***Highland v. Commonwealth***, 161 A.2d 390 (Pa. 1960), wherein it reaffirmed the rule that emerged from ***Dunham***:

> If, in connection with a conveyance of land, there is a reservation or an exception of 'minerals' without any specific mention of natural gas or oil, a presumption, rebuttable in nature, arises that the word 'minerals' was not intended by the parties to include natural gas or oil. [...]

> To rebut the presumption [...] there must be clear and convincing evidence that the parties intended to include natural gas or oil within [the term minerals].

Butler, 65 A.3d at 891, *citing* ***Highland***, 161 A.2d at 398-399. Thus, the Supreme Court noted "for deed reservations we must assume, absent evidence to the contrary, that mineral is a term of general language, and presumably is intended in the ordinary popular sense which it bears among English speaking people, *i.e.*, metallic substances and not oil and gas." ***Id.*** (quotations and citation omitted).

The ***Butler*** Court went on to examine its 1983 decision in ***United States Steel Corporation v. Hoge***, 468 A.2d 1380 (Pa. 1983) (***Hoge II***). In ***Hoge II***, the Supreme Court examined the ownership of "coalbed gas," "which is found within crevices and empty pockets in coal seams" and "bears little if any distinction from the gas found in oil-and-gas-bearing sands (natural gas)." ***Butler***, 65 A.3d at 892 (citation omitted). In ***Hoge II***, "various landowners in Greene County obtained deeds to tracts of land that, through a single predecessor, had already relinquished all rights to the coal contained within the Pittsburgh Coal Seam underlying the surface of the subject properties to U.S. Steel." ***Id.*** In order to recover coalbed gas, the landowners had to utilize the process of hydrofracturing. ***Id.*** at 892, n.3. "U.S. Steel sought injunctive and declaratory relief in the Greene County Court of Common Pleas, contending that drilling into the coal seam for coalbed gas constituted an unlawful trespass and that the hydrofracturing

caused irreparable harm to the seam unquestionably owned by U.S. Steel." ***Id.***

The Supreme Court in ***Hoge II***, "[w]ithout discussing, or indeed, even citing to the merits of the ***Dunham*** Rule, [] began its analysis by noting that 'gas is a mineral, though not commonly spoken as such, … and therefore necessarily belongs to the owner in fee, so long as it remains part of the property... .'" ***Id.*** at 893, *citing* ***Hoge II***, 468 A.2d at 1383. Thus, the Court opined that "*gas as is present in coal must necessarily belong to the owner of the coal*, so long as it remains within his property and subject to his exclusive dominion and control." ***Butler***, 65 A.3d at 893. (emphasis in original). The ***Hoge II*** Court

> went on to make some critical distinctions concerning the unique nature of coalbed gas. It noted that the commercial exploitation of coalbed gas was 'very limited and sporadic' because it was generally viewed as a dangerous waste product of coal mining, which had to be vented from a coal seam to allow the coal to be safely mined. Th[e Supreme] Court therefore questioned why the landowners' predecessor would retain the right to a waste product with well-known explosive and dangerous predispositions? The answer, in [our high] Court's opinion, was in the language of the deed reservations themselves, which explicitly left to the surface owners the unfettered right to all of the oil and gas below the severed coal seam.
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> > [The ***Hoge II*** Court found] implicit in the reservation of the right to drill through the severed coal seam for 'oil and gas' a recognition of the parties that the gas was that which was generally known to be commercially exploitable. [The Court determined it strained] credulity to think that the grantor intended to reserve the right to extract a valueless waste

> product with the attendant potential responsibility for damages resulting from its dangerous nature.

Id.

Accordingly, in ***Butler***, our Supreme Court "granted allowance of appeal to consider whether a deed executed in 1881, which reserved to the grantor the subsurface and removal rights of "one-half [of] the minerals and Petroleum Oils" contained beneath the subject property, includes within the reservation any natural gas contained within the shale formation beneath the subject land known as the Marcellus Shale Formation." ***Butler***, 65 A.3d at 886. The ***Butler*** Court determined that "the ***Dunham*** Rule remains viable and controlling [and] ***Hoge II*** is distinguishable and inapplicable[.]" ***Id.*** at 896. More specifically, our Supreme Court determined that, without an express reservation for oil and gas rights, "the rule in Pennsylvania is that natural gas and oil simply are not minerals because they are not of a metallic nature, as the common person would understand minerals." ***Id.*** at 898. Moreover, "the party advocating for the inclusion of natural gas within the deed reservation bears the burden of pleading and proving by clear and convincing [parol] evidence that the intent of the parties who executed the reservation was to include natural gas" at the time the deed was executed. ***Id.*** (parenthetical omitted).

Furthermore, the ***Butler*** Court "reject[ed] any insinuation [] that ***Hoge II*** limited or overruled the ***Dunham*** Rule by stating that 'gas is a mineral'" because the ***Hoge II*** Court did not discuss ***Dunham***. ***Id.*** In

addition, the ***Butler*** Court distinguished ***Hoge II***, because in that case, "the deed reservation at issue there concerned coal rights and the related right of ventilation of coalbed gas." ***Id.*** The Court noted "the right of coalbed ventilation would only apply to coalbed gas because of its extremely dangerous and volatile nature" and "coalbed gas was not commercially viable at the time the deed reservation in ***Hoge II*** was executed due to its explosive characteristics." ***Id.*** at 898-899. Finally, the ***Butler*** Court stated:

> Lastly, the *situs* of Marcellus shale natural gas and the methods needed and utilized to extract that gas do not support deviation from a ***Dunham*** analysis. While we recognize that hydrofracturing methods are employed to obtain both coalbed gas and Marcellus shale natural gas, the basis of the ***Dunham*** Rule lies in the common understanding of the substance itself, not the means used to bring those substances to the surface. We therefore find no merit in any contention that because Marcellus shale natural gas is contained within shale rock, regardless of whether shale rock is or is not a mineral, such consequentially renders the natural gas therein a mineral.

Id. at 899.

Applying the legal precepts discussed in ***Butler*** to the facts of the instant matter, we conclude that as a matter of law Appellants were not entitled to relief and the entry of judgment on the pleadings was proper. The reservation at issue here makes no explicit reference to oil and gas and refers instead to "all the mineral rights" of the subject property. As ***Butler*** makes clear, natural gas and oil simply are not minerals because they are not of a metallic nature, as the common person would understand minerals. Appellants have not offered clear and convincing parol evidence of the

parties' intent to include oil and gas rights at the time the mineral reservation was made. Moreover, this dispute centers solely around Marcellus shale gas, not coalbed gas, and as in ***Butler***, ***Hoge II*** is inapplicable herein. For all of the foregoing reasons, on the facts averred, the law says with certainty that no recovery was possible for Appellants. Accordingly, there was no trial court error in entering judgment on the pleadings.

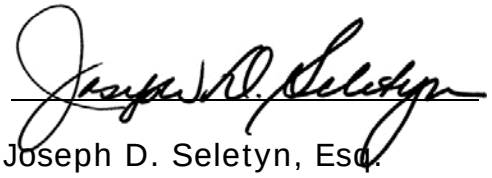
Finally, Appellants argue that when Luzerne conveyed its interest to Pechin, the conveyance was subject to Appellants' retained royalty interests in "deep" oil and gas rights. Appellants' Brief at 25-26. More, specifically, Appellants contend that, in 1994, Luzerne entered into a lease with an entity called Equitrans whereby, Luzerne reserved "for all zones at a depth deeper than three thousand (3000) feet below the Elizabeth Sand, whichever is deeper, a 1/8th royalty interest in all oil and gas produced from the land." ***Id.*** at 10. Appellants maintain that the deed between Luzerne and Pechin was subject to this lease. ***Id.*** at 25-26.

Initially, we note that Appellants have not provided legal authority to support its position and, therefore, we could find this issue waived. ***See Giant Food Stores, LLC v. THF Silver Spring Dev., L.P.***, 959 A.2d 438, 444 (Pa. Super. 2008) ("The Rules of Appellate Procedure state unequivocally that each question an appellant raises is to be supported by discussion and analysis of pertinent authority. Failure to do so constitutes

waiver of the claim."). However, as previously discussed in determining subject matter jurisdiction, we conclude the lease between Luzerne and Equitrans is not affected by the action to quiet title. Royalty rights remain unchanged by a determination of ownership to the subject property. We reject Appellants' attempt to bootstrap the royalty lease to the instant action.

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/13/2013