IN THE SUPREME COURT OF PENNSYLVANIA

CASE NO. 27 MAP 2012

JOHN E. AND MARY JOSEPHINE BUTLER,

Appellants,

v.

CHARLES POWERS ESTATE, *et al.*,

Appellees.

BRIEF OF *AMICUS CURIAE* MARCELLUS SHALE COALITION

Michael L. Kichline, Esq. (PA #62293)
Karen C. Daly, Esq. (PA #207879)
Argia J. DiMarco, Esq. (PA #312308)
William T. McEnroe, Esq. (PA #308821)

DECHERT LLP
Cira Centre
2929 Arch Street
Philadelphia, PA 19104-2808
Tel: (215) 994-2439

Attorneys for Amicus Curiae
Marcellus Shale Coalition

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTES

OTHER AUTHORITIES

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Marcellus Shale Coalition ("MSC") is a Pennsylvania non-profit (non-stock) association founded in 2008. The MSC's headquarters are located in Canonsburg, Pennsylvania. The MSC's mission is to foster the responsible economic development of natural gas from the Marcellus Shale geological formation in order to enhance the benefits of the Marcellus Shale industry to the Commonwealth's citizens.

The MSC's membership consists of 44 "full" member companies that are directly involved in the exploration, production, processing and/or transportation of Marcellus Shale gas from its source to interstate transmission pipelines. The MSC's members also include 252 "associate" members, all entities that support and facilitate the exploration, production, processing and/or transportation of Marcellus Shale gas. Associate members include drilling companies, manufacturers of steel and steel products, equipment suppliers, civil and environmental engineering firms, law firms, and real estate brokerages.[1]

The resolution of this case may impact the MSC's membership as a whole and the entire Marcellus Shale industry throughout Pennsylvania. Preservation of the *Dunham* rule – which has served the Commonwealth well for more than 130 years – will provide continued legal certainty to landowners and their lessees and foster the continued growth of the Marcellus Shale industry, a major economic driver for Pennsylvania.

---

[1] For a complete list of the MSC's membership and additional background information on its members, *see* Exhibit A or the MSC's website: www.marcelluscoalition.org.

STATEMENT OF JURSIDICTION

The Supreme Court has jurisdiction over this appeal pursuant to 42 Pa. C. S. § 724.

ORDER IN QUESTION

The order and opinion in question were rendered by the Superior Court on September 7, 2011, wherein the Superior Court reversed the trial court's order granting Appellants' preliminary objections in the nature of a demurrer. *See Butler v. Charles Powers Estate*, 29 A.3d 35, 43 (Pa. Super. Ct. 2011), attached as Exhibit B ("Order reversed; case remanded for further proceedings. Jurisdiction is relinquished.").

STATEMENT OF SCOPE AND STANDARD OF REVIEW

The MSC accepts the Appellants' statement of the scope and standard of review.

STATEMENT OF THE QUESTION INVOLVED

In its order granting allocatur, this Court framed the question presented as:

> In interpreting a deed reservation for "minerals," whether the Superior Court erred in remanding the case for the introduction of scientific and historic evidence about the Marcellus shale and the natural gas contained therein, despite the fact that the Supreme Court of Pennsylvania has held (1) a rebuttable presumption exists that parties intend the term "minerals" to include only metallic substances, and (2) only the parties' intent can rebut the presumption to include non-metallic substances.

Butler v. Charles Powers Estate ex rel. Warren, No. 760 MAL 2011, --- A.3d ----, 2012 WL 1087928, at *1 (Pa. Apr. 3, 2012).

STATEMENT OF THE CASE

The instant case involves a quiet title action filed by John and Mary Butler ("the Butlers" or "Appellants"). Members of the Butler family have owned the subject property in Susquehanna County, Pennsylvania for more than a century. The deed to the land, which was recorded in 1881, contains the following reservation:

> [O]ne half the minerals and Petroleum Oils to said Charles Powers his heirs and assigns forever together with all and singular the buildings, water courses ways waters water courses rights liberties privileges hereditaments and appurtenances whatsoever there unto belonging or in any wise appertaining and the reversions and remainders rents issues and profits thereof; And also all the estate right, title interest property claimed and demand whatsoever there unto belonging or in any wise appertaining in law equity or otherwise however of in to or out of the same . . . .

Butler, 29 A.3d at 37.

On July 20, 2009, the Butlers filed a complaint in an action to quiet title in the Court of Common Pleas of Susquehanna County. *See Butler*, 29 A.3d at 37. Two putative heirs of Charles Powers, William and Craig Pritchard (hereinafter "the Pritchards," and together with certain other supposed heirs who have since come forward, "Appellees"), filed a counterclaim seeking, *inter alia*, a declaration that the reservation of "minerals" in the deed included natural gas contained in Marcellus Shale. *See id.*

On November 20, 2009, the Butlers filed preliminary objections in the nature of a demurrer challenging the Pritchards' counterclaim based on the *Dunham* rule set forth by this Court in *Dunham & Shortt v. Kirkpatrick*, 101 Pa. 36 (1882), and subsequent cases, which creates a rebuttable presumption that a reservation of "mineral" rights in a deed does not include natural gas. Application of the *Dunham* rule – a clear and 130-year-old tenet of Pennsylvania property law – dictates that the Pritchards' rights to "one-half the minerals" in the Butlers' land did not include Marcellus Shale gas because the Pritchards had plainly failed to allege any facts

sufficient to show an intent by Charles Powers to reserve rights to natural gas. The trial court applied the *Dunham* rule and in an Order and Opinion dated January 27, 2010 sustained the Butlers' demurrer and dismissed the Pritchards' motion for declaratory judgment. *See Butler*, 29 A.3d at 37-38.

The Pritchards appealed the trial court's decision on the demurrer on November 1, 2010. *See Butler*, 29 A.3d at 38. On appeal to the Pennsylvania Superior Court, the Pritchards argued that the *Dunham* rule applies only to "conventional" gas, and that the gas found within Marcellus Shale is "unconventional." *Id*. at 40. On September 7, 2011, the Superior Court reversed the trial court and remanded the case, acknowledging the *Dunham* rule and the legal presumption that a reservation of mineral rights does not include natural gas, but stating that it could not decide whether the presumption applied to natural gas extracted from Marcellus Shale "at this point in the proceedings" because it required:

> a more sufficient understanding of whether, *inter alia* (1) Marcellus shale constitutes a "mineral"; (2) Marcellus shale constitutes the type of conventional natural gas contemplated in *Dunham* and *Highland*; and (3) Marcellus shale is similar to coal to the extent that whoever owns the shale, owns the shale gas. On this record, we are unable to say with certainty that [the Pritchards] have no cognizable claim based on the facts averred. Consequently, the parties should have the opportunity to obtain appropriate experts on whether Marcellus shale constitutes a type of mineral such that the gas in it falls within the deed's reservation.

Id. at 43 (internal citations omitted).[2]

On October 7, 2011, the Butlers filed a petition for allocatur, arguing that the Superior Court's decision was in conflict with *Dunham* and its progeny. On April 3, 2012, this Court granted the Butlers' petition.

---

[2] Judge Susan Peikes Gantman authored the opinion for the Superior Court, which was also joined by President Judge Correale F. Stevens and Senior Judge James J. Fitzgerald, III.

SUMMARY OF THE ARGUMENT

The Marcellus Shale industry has delivered significant and widespread economic benefits throughout the Commonwealth. The billions of dollars spent directly and indirectly by Marcellus Shale companies, not to mention billions more paid in taxes and fees, have revitalized struggling sectors of the state, such as agriculture and steel; created a large number of high paying jobs overwhelmingly filled by Pennsylvanians; and reduced utility bills for consumers and businesses in all regions of the state.

The Superior Court's decision is legally erroneous. It would replace the *Dunham* rule, a straightforward legal presumption that natural gas is not a mineral for purposes of land conveyances, with an expert-intensive and case-specific legal inquiry whenever the natural gas in question happens to be contained in Marcellus Shale rather than some other geologic formation. This contradicts both the *Dunham* rule, which has always been based on common understanding instead of scientific technicalities, and the commercial treatment of natural gas extracted from Marcellus Shale.

The Superior Court's decision evades the application of a long-settled rule of property that this Court has repeatedly affirmed and upon which the public relies. By disturbing the long-settled *Dunham* rule, the Superior Court's decision risks a wave of litigation throughout the Commonwealth, as individual landowners may find themselves sued over existing leases and royalty agreements. Preservation of the *Dunham* rule will provide legal certainty and foster the continued economic growth of the Marcellus Shale industry.

ARGUMENT

I. THE MARCELLUS SHALE INDUSTRY DELIVERS SIGNIFICANT AND WIDESPREAD BENEFITS TO PENNSYLVANIA'S ECONOMY.

The Marcellus Shale industry injects *billions* of dollars into the Commonwealth's economy. Direct spending by the industry is expected to reach $14.6 billion in 2012 and the indirect benefits are multiplied. These tangible benefits flow from the energy companies that are the MSC's direct members to constituencies throughout the state, putting money into the pockets of property owners and small businesses, creating high-wage jobs, generating tax revenue and usage fees from the township level on up to the Commonwealth itself, and reducing consumers' utility bills. For all of these reasons, the MSC believes – and the data confirms – that the Marcellus Shale industry is an "economic game changer" in Pennsylvania.[3]

Less than a year ago, Pennsylvania State University released a comprehensive study on the economic impact the Marcellus Shale industry has had in Pennsylvania since 2008.[4] According to the study, direct industry spending, which the report defines as capital spending for purposes of natural gas "exploration, leasing, drilling, and pipeline construction," has almost quadrupled in the past four years: from $3.2 billion in 2008 to $12.7 billion in 2011. Penn State Report at 1-2. That direct spending includes $2.06 billion in lease and bonus payments, as well as $346 million in royalty payments, made to thousands of Pennsylvania landowners such as the Butler family. *See id.* at 11.

---

[3] *See* Press Release, Marcellus Shale Coalition, *Who Says We Don't Make Anything In America Anymore?* (Oct. 13, 2011), *available at* http://marcelluscoalition.org/2011/10/who-says-we-don%e2%80%99t-make-anything-in-america-anymore/.

[4] *See* Timothy J. Considine, Ph.D., et al., *The Pennsylvania Marcellus Natural Gas Industry: Status, Economic Impacts and Future Potential* (July 20, 2011), at 1, *available at* http://marcelluscoalition.org/wp-content/uploads/2011/07/Final-2011-PA-Marcellus-Economic-Impacts.pdf (the "Penn State Report").

Standing alone, the billions of dollars in direct spending make the development of Marcellus Shale a "substantial industry in the Commonwealth." Penn State Report at 1. However, $14.6 billion in direct spending (as projected for 2012, *see id*.), is only one component of the benefits that the Marcellus Shale industry delivers to Pennsylvania's economy. As the Penn State Report explains:

> Producing natural gas [from Marcellus Shale] requires exploration, leasing, drilling, and pipeline construction. These activities generate additional business for other sectors of the economy. For example, leasing requires real estate and legal services. Exploration crews purchase supplies, stay at hotels, and dine at local restaurants. Site preparation requires engineering studies, heavy equipment and aggregates. Drilling activity generates considerable business for trucking firms and well-support companies now based in Pennsylvania that in turn buy supplies, such as fuel, pipe, drilling materials, and other goods and services. Likewise, construction of pipelines requires steel, aggregates, and the services of engineering construction firms. Collectively, these business-to-business transactions create successive rounds of spending and re-spending throughout the economy. These higher sales generate greater sales tax revenues. Moreover, as businesses experience greater sales they hire additional workers. Greater employment increases income and generates higher income taxes.

Id. at 1-2.[5]

Because the "construction of pipelines requires steel," Pennsylvania's venerable steel industry has been reinvigorated by Marcellus Shale activity. About 20% of the steel sheets produced by U.S. Steel's Allegheny County plant are now made into pipe used to transport Marcellus Shale natural gas and U.S. Steel's Tubular Division has doubled its workforce to meet

[5] *See also* Marcellus Shale Coalition, *The Marcellus Multiplier* 1 (retrieved Apr. 26, 2012), *available at* http://marcelluscoalition.org/wp-content/uploads/2011/08/Marcellus-Multiplier.pdf (mapping out the supply chain for natural gas wells, each of which requires 125 tons of locally produced cement, 25 rail cars of sand, 5,000 tons of aggregate, and pipelines to transport the gas). Due to this lengthy supply chain, each mile of Marcellus Shale pipeline represent more than $1 million of investment into Pennsylvania's economy.

demand from the Marcellus Shale industry.[6] The MSC is working actively to involve a wide range of businesses around the state in supplying the industry.[7]

In 2010, the Marcellus Shale industry's direct and indirect spending encouraged Pennsylvania households to purchase $5.7 billion in additional goods and services. *See* Penn State Report at 16. For example, the Marcellus Shale industry has created a "robust demand for cars – especially trucks" throughout northern and western Pennsylvania.[8] One managing partner at a car dealership in Lycoming County elaborated on the influx of drillers, contractors, and engineers employed in connection with the industry, as well as the "tide of locals" receiving royalties from gas leases: "'They are everywhere. They are all over . . . . There is a lot of money in our area. They aren't crying anymore. They have CDs and cash on hand . . . even the local restaurants. Everybody is doing better.'"[9]

This money is not only spent, it is also *invested* in Pennsylvania's future. For example, Community Bank Systems Inc., which operates bank branches throughout Pennsylvania, has seen a 20% growth in deposits in regions where there is shale drilling versus about 5% elsewhere, and is now offering wealth management seminars to advise customers who have enjoyed a

---

6 Kim Leonard, *Marcellus pumps up steelmaker*, Pittsburgh Tribune-Review, Mar. 20, 2012, at 1, *available at* http://www.pittsburghlive.com/x/ pittsburghtrib/business/s_787325.html; Eric Slagle, *Local steel key to growth in shale boom, Cawley says in West Mifflin*, Pittsburgh Tribune-Review, Mar. 20, 2012, at 1-2, *available at* http://www.pittsburghlive.com/x/ dailynewsmckeesport/s_787386.html.

7 The MSC's "Marcellus on Main Street" initiative is designed to connect the natural gas industry with small- and medium-sized businesses across Pennsylvania. *See, e.g.*, Press Release, Marcellus Shale Coalition, *MSC Launches Marcellus on Main Street Initiative* (Mar. 6, 2012), *available at* http://marcelluscoalition.org/2012/03/msc-launches-marcellus-on-main-street-initiative/ (discussing unveiling of this initiative at five simultaneous events in Philadelphia, Johnstown, Williamsport, Washington, and Cranberry Township).

8 *Drilling spurs demand for cars in struggling areas*, The Erie Times-News, Feb. 26, 2012, at 1, *available at* http://www.goerie.com/article/20120226/NEWS06/302269894/Drilling-spurs-demand-for-cars-in-struggling-areas.

9 *Id*.

sudden influx of money from natural gas licenses and royalties.[10] An accountant from Bradford County who works with many farmers in the northern tier of the state observed: "Today, these farmers are making investments in their farms that were just dreams before the Marcellus Shale. Also because of these new investments by farmers, I see a rebuilding of the northern tier agriculture infrastructure that was at risk."[11] Thus, Marcellus Shale royalties have helped enable the preservation of family farms.[12]

Moreover, consumers and businesses across the state have benefited from the lower natural gas prices resulting from an increased supply of natural gas extracted from Marcellus Shale in Pennsylvania. Between 2008 through December 2011, the major utilities serving the Philadelphia metropolitan area significantly reduced the amount they charge consumers and businesses for natural gas, reflecting the steady fall in market prices that experts attribute to new supplies of shale gas.[13] This decrease in monthly utility bills puts more money in the wallets of Pennsylvania's individual citizens and companies.

---

[10] *See* Russell Gold, *Oil and Gas Boom Lifts U.S. Economy*, Wall St. J., Feb. 8, 2012, at A-1.

[11] Harold Moyer, *Hope for Farmers*, The Daily Item (Sunbury, PA), July 28, 2010, at 1, *available at* http://dailyitem.com/0109_opinion/x1079910511/Hope-for-farmers/print.

[12] For example, the New York Times recounted the benefits of a natural gas lease impact of Marcellus Shale for Robert Deiseroth, a then-63-year-old farmer and auctioneer from Hickory, Pennsylvania, who explained that, "[Marcellus Shale] was a godsend for me. If it weren't for this I would have to sell off some of my land to get some money for retirement." *See* Clifford Krauss, *There's Gas in Those Hills*, N.Y. Times, Apr. 8, 2008, *available at* http://www.nytimes.com/2008/04/08/business/08gas.html. In addition to the direct economic benefits from leasing their land – which has allowed many farmers to hold on to their family farms and invest in new equipment – Pennsylvania's 63,000 farming families also benefit from development of the Marcellus Shale through lower energy costs, stable fuel prices, and more affordable fertilizers. *See* Press Release, Marcellus Shale Coalition, *MSC Participates in 96th Annual Pennsylvania Farm Show*, at 1 (Jan. 13, 2012), *available at* http://marcelluscoalition.org/2012/01/msc-participates-in-96th-annual-pennsylvania-farm-show/.

[13] These price reductions have cut gas bills anywhere from 37% to 52% percent. *See* Andrew Maykuth, *Shale gas is shaving bills*, Philadelphia Inquirer, Dec. 23, 2011, at 1, *available at* http://articles.philly.com/2011-12-23/news/30551359_1_shale-gas-gas-portion-gas-cost; *see*

In these ways and others, every dollar of direct spending by the Marcellus Shale industry has a ripple effect through the state, resulting in roughly another dollar of indirect and primarily local spending by businesses or citizens. Due to this positive ripple effect, the total economic impact of the Marcellus Shale industry in Pennsylvania in 2010 was $20.46 billion even though direct spending was "merely" $10.4 billion. *See* Penn State Report at 16.

The money spent in Pennsylvania as a direct or indirect result of the Marcellus Shale industry does not take into account state and local tax revenue, which amounted to $1.084 billion in 2010. *See* Penn State Report at 17-18. According to the Pennsylvania Department of Revenue, since 2006, Marcellus Shale producers have paid more than $1 billion in taxes.[14] This does not include impact fees authorized by the state legislature earlier this year, which are

---

also Newsroom, Marcellus Shale Coalition, *Philadelphia Inquirer: Shale gas is shaving bills*, at 1 (Dec. 23, 2011), *available at* http://marcelluscoalition.org/2011/12/philadelphia-inquirer-shale-gas-is-shaving-bills/; Andrew Maykuth, *Consumer alert: Electricity-price discounts heat up*, Philadelphia Inquirer, Feb. 12, 2012, at 1, *available at* http://articles.philly.com/2012-02-12/business/31052351_1_conedison-solutions-competitive-suppliers-gas-prices (discussing the "full-scale price war" that has broken out amongst competitive gas suppliers in the Philadelphia area due to "'all that good [Marcellus] shale gas'").

[14] Marcellus Shale Coalition, *10 Fast Facts About the Marcellus Shale*, at 1 (retrieved Apr. 26, 2012), *available at* http://marcelluscoalition.org/wp-content/uploads/2011/10/MSC_Fast_Facts_Large.pdf. Localities can expect to receive additional tax revenue from the Marcellus Shale "impact fees" authorized by the February 2012 amendments to the Pennsylvania Oil and Gas Act. *See* 58 Pa. C. S. § 2302 (2012) (authorizing counties to impose impact fees against Marcellus gas well operators). These impact fees are estimated to generate at least $94 million for local governments in 2012, $154 million in 2013, and $213 million in 2014, as estimated by the Pennsylvania Senate. *See* Senate Appropriations Committee Fiscal Note on H.B. 1950, Dec. 13, 2011, at 8. The Governor's Office reports higher revenues are possible: up to $180 million for local governments in 2012, climbing to $211 million in 2013, and $264 million in 2014. *See* Press Release, Pennsylvania Office of the Governor, *Governor Corbett Signs Historic Marcellus Shale Law* (Feb. 14, 2012), *available at* http://www.governor.state.pa.us/portal/server.pt/community/news_and_media/2999/news_ releases.

projected to generate hundreds of millions of dollar of revenue for localities over the next few years.[15]

The industry's benefit to the Commonwealth may also be measured in terms of a large number of high-paying jobs. In 2010, the most recent year for which state-wide statistics are available, the Marcellus Shale industry created approximately 140,000 jobs in Pennsylvania. *See* Penn State Report at 17-18. By 2020, the Penn State Report estimates that the Pennsylvania Marcellus industry will be *directly* responsible for more than 250,000 jobs statewide. *See id*. at 3. Based on current numbers, this forecast for 2020 appears easily attainable. The Pennsylvania Department of Labor and Industry has estimated that by the end of 2011, 239,000 Pennsylvanians already were working in jobs directly or indirectly related to the Marcellus Shale industry.[16]

The average salary for core jobs in the Marcellus Shale industry was $73,150 in 2010, and the average salary for jobs ancillary to the Marcellus Shale industry was $61,871, compared to the average statewide salary of $45,747.[17] Accordingly, labor leaders, such as the secretary-treasurer for the Pennsylvania AFL-CIO, recognize that development by the Marcellus Shale

---

[15] According to estimates from the state legislature, these impact fees will generate at least $94 million for local governments in 2012, $154 million in 2013, and $213 million in 2014, as estimated by the Pennsylvania Senate. *See* Senate Appropriations Committee Fiscal Note on H.B. 1950, Dec. 13, 2011, at 8. The governor's office projects an even larger amount of local revenue resulting from impact fees. *See* Press Release, Pennsylvania Office of the Governor, *Governor Corbett Signs Historic Marcellus Shale Law* (Feb. 14, 2012), *available at* http://www.governor.state. pa.us/portal/server.pt/community/news_and_media/2999/news_ releases

[16] *See* Pennsylvania Dep't of Labor & Industry, Ctr. for Workforce Info. & Analysis, *Marcellus Shale Fast Facts* 4 (March 2012), *available at* http://www.paworkstats.state.pa.us/ admin/gsipub/htmlarea/uploads/Marcellus_Shale_Fast_Facts_Viewing.pdf.

[17] *See* Pennsylvania Office of the Governor, Marcellus Shale Advisory Commission Report (July 22, 2011) at 89, *available at* http://files.dep.state.pa.us/PublicParticipation/MarcellusShale AdvisoryCommission/MarcellusShaleAdvisoryPortalFiles/MSAC_Final_Report.pdf.

industry has provided "some of the most positive economic news for the working families of Western Pennsylvania in over a generation,"[18] particularly since more than 70% of those hired for Marcellus Shale-related jobs hail from all over Pennsylvania.[19]

In sum, the Marcellus Shale industry has proved itself to be a significant positive force in Pennsylvania's economy and one that benefits a large number of individual citizens and a wide array of businesses throughout the Commonwealth. In these uncertain economic times, there is every reason to preserve legal clarity and enable this industry to continue to grow.

II. THE SUPERIOR COURT'S PROPOSED APPROACH TO THE *DUNHAM* RULE FOR MARCELLUS SHALE IS LEGALLY ERRONEOUS.

The *Dunham* rule "may be briefly stated: if, in connection with a conveyance of land, there is a reservation or 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." *Highland v. Commonwealth*, 400 Pa. 261, 276, 161 A.2d 390, 398 (1960). "[C]lear and convincing evidence that the parties to the conveyance intended to include natural gas or oil" within a reservation of mineral rights is necessary to overcome the *Dunham* presumption. *Id.* at 277, 161 A.2d at 399.

Although popularly known as the *Dunham* rule, after the decision in *Dunham & Shortt v. Kirkpatrick*, where this Court held that "we cannot regard petroleum as a mineral," 101 Pa. 36,

---

[18] *Huge boost seen from gas plant*, Butler Eagle, Mar. 16, 2012, at 2, *available at* http://www.butlereagle.com/article/20120316/NEWS01/703169882/-1/rssnews.

[19] *See supra* note 14. The MSC and America's Natural Gas Alliance recently hosted a job fair in Philadelphia, the state's largest labor market, to discuss natural gas training programs and workforce development. Press Release, Marcellus Shale Coalition, *Community Discussion in Philadelphia Gives Residents Insight into Jobs Training, Workforce Development in the Marcellus Shale* (Aug. 2, 2011), *available at* http://marcelluscoalition.org/2011/08/ community-discussion-in-philadelphia-gives-residents-insight-into-jobs-training-workforce-development-in-the-marcellus-shale/.

44, the genesis for the *Dunham* rule is an even earlier decision by this Court in *Gibson v. Tyson*, 5 Watts 34 (Pa. 1836), where the Court looked to the understanding "by the bulk of mankind" as to what "is considered as a mineral[.]" *Dunham*, 101 Pa. at 43-44 (citing *Gibson*). Because that 19th century understanding of the term "minerals" did not include petroleum, the *Dunham* court held that – absent evidence of specific intent to the contrary – a deed could not "reserve oil under the general term 'mineral'" because that was "using that word in a manner not sanctioned by the common understanding of mankind[.]" *Id*. at 44. In *Silver v. Bush*, 213 Pa. 195, 199, 62 A. 832, 833 (1906), this Court noted that the *Dunham* rule extends to natural gas: because "petroleum was not within the intent of the parties in reserving the minerals," then "*a fortiori*, natural gas would not be so included" in a reservation of mineral rights.

The 1881 deed at the center of this appeal reserved to Charles Powers and his heirs "one-half the minerals and Petroleum Oils" in the Butlers' property. Under a straightforward application of the *Dunham* rule, the Butlers own any natural gas extracted from Marcellus Shale on the property, because Charles Powers only reserved a 50% interest in minerals and petroleum and Appellees have not come forward with any evidence – let alone clear and convincing evidence – that their progenitor intended to reserve natural gas rights for himself or his heirs. The Superior Court acknowledged the *Dunham* presumption and its applicability to natural gas, *see Butler*, 29 A.3d at 42 ("a reservation [of mineral rights] in a deed does not include natural gas"), but remanded to the trial court for expert testimony as to whether Marcellus Shale gas should be classified as natural gas or a mineral under the *Dunham* rule. *See id.* at 43 ("Consequently, the parties should have the opportunity to obtain appropriate experts on whether Marcellus shale constitutes a type of mineral such that the gas in it falls within the deed's reservation.").

As an initial matter, the Superior Court's decision misinterprets the plain language of the Powers deed, which expressly reserves rights to minerals and oil – *but not natural gas*. Even without invoking the *Dunham* rule, basic rules of contractual interpretation dictate that Charles Powers gave up any rights to natural gas for himself or his heirs. More broadly, the Superior Court's legal reasoning is flawed for at least two additional reasons. *First*, it ignores that the *Dunham* rule is a rule of commercial interpretation, one specifically crafted and applied by this Court precisely to avoid esoteric expert debates about what is and is not a "mineral." *Second*, the *Dunham* rule indisputably applies to natural gas, and the ownership of natural gas rights is what is at issue between the parties to this appeal (and, more broadly, what will be at issue in litigation throughout the Commonwealth if the Superior Court's decision stands). It should make no difference in the application of the *Dunham* rule whether the natural gas is extracted from Marcellus Shale versus some other underground geologic formation.

A. A Reservation of "Minerals" and "Oil" Presumptively Does Not Include Natural Gas.

As a threshold matter, this Court's decision in *Bundy v. Myers* requires reversal of the Superior Court. In *Bundy*, this Court was called on to adjudicate a party's right to drill a well for natural gas based on a reservation of rights that included "'the oil, coal, fire clay and minerals of every kind and character.'" 372 Pa. 583, 584, 94 A.2d 724, 725 (1953). This Court, in addition to applying the *Dunham* rule, expressly rejected the argument this reservation encompassed natural gas based on the legal maxim of *expressio unius est exclusio alterius*. As the Court cogently observed, "If the oil and gas were intended to be included in the 'minerals' reserved, then why was the oil expressly reserved?" *Id.* at 587, 94 A.2d at 726. The same question can be asked here, where the deed reserves "one half the minerals and Petroleum Oils," and answered the same way as in *Bundy*: the expressed reservation of oil and mineral rights inescapably leads

to the conclusion that no rights were reserved as to natural gas. This does not even require application of the *Dunham* rule as to the parties' intent.[20]

B. The *Dunham* Rule Is a Commerce-Oriented Presumption.

From the inception of the *Dunham* rule, the Court has understood that when parties negotiate for oil, natural gas, minerals, and other rights granted by deed, they do so not "[a]s scientists," but "as business men, using the language and governed by the ideas of every-day life." *Dunham*, 101 Pa. at 44; *see also Silver*, 213 Pa. at 198, 62 A. at 833 ("[W]hile the word 'mineral' has a very broad meaning, already alluded to, and also a more restricted scientific use, it has also a commercial sense, in which it is most commonly used in conveyances and leases of land, and in which it may be presumed to be used in such instruments.").

This Court is fully cognizant that "all inorganic substances are classed under the general name o[f] minerals," but has rejected that scientific classification in the context of land conveyances in favor of the commercial or "popular understanding" that oil and natural gas are not minerals. *Dunham*, 101 Pa. at 43-44; *see also Silver*, 213 Pa. at 198, 62 A. at 833 ("Certainly such gas is a mineral in the broadest sense of the term, but no evidence was given or offered to show that the parties so understood or intended the word 'mineral' or even that it had acquired a usage in conveyancing which would include gas."). Thus, pursuant to the *Dunham* rule, the relevant inquiry is one of ordinary understanding, rather than scientific classification or usage.

There are valid reasons for framing the relevant inquiry in terms of ordinary commercial usage or understanding, as well as the parties' express intent. Not only does that resonate more

---

[20] As a procedural matter, the Superior Court also erred by allowing the Pritchards to raise issues of intent through legal argument in their opposition to preliminary objections instead of a verified pleading. *See Bundy v. Myers*, 372 Pa. 583, 588, 94 A.2d 724, 726 (1953) ("Presumptively, the reservation was not intended to include natural gas. If the actual intent of the parties was otherwise, it is incumbent upon the defendants to so aver which necessarily calls for an answer raising the issue.").

with the individuals and commercial enterprises entering into property transactions, it also avoids the expense and uncertainty that comes from injecting scientific hypotheses into contracts and deeds negotiated by laypeople as opposed to scientists. As this Court has long-recognized, a clear rule of property such as the *Dunham* rule makes sense from a commercial policy standpoint because it allows contracting parties to avoid potentially protracted and expensive litigation over the interpretation of the deed or contract. *See* Section III *infra*; *cf. Bannard v. New York State Natural Gas Corp*., 448 Pa. 239, 252, 293 A.2d 41, 49 (1972) ("Attempts to prove that assessors did or did not know of the presence of oil or gas when they assessed 'minerals' at some point in the case would lead to protracted collateral investigation and litigation.").

The Superior Court's ruling that expert testimony is somehow necessary to ascertain whether Marcellus Shale is a mineral is contrary not only to an unbroken line of at least seven Supreme Court cases extending from 1882 to present,[21] but also to the common-sense, pro-commerce rationale underlying those decisions.

[21] *See Dunham v. Kirkpatrick*, 101 Pa. 36 (1882); *Silver v. Bush*, 213 Pa. 195, 62 A. 832 (1906); *Preston v. S. Penn Oil Co.*, 238 Pa. 301, 304, 86 A. 203, 204 (1913) ("*Dunham v. Kirkpatrick* has been the law of this state for thirty years and very many titles rest upon it."); *Bundy*, 372 Pa. at 585, 94 A.2d at 725 ("[T]he law of Pennsylvania recognizes the existence of a rebuttable presumption that the word 'mineral,' when used in a deed reservation or exception, does not include oil or natural gas."); *Highland v. Commonwealth*, 400 Pa. 261, 276, 161 A.2d 390, 398 (1960) ("The Dunham rule . . . is based upon the popular conception of the word 'minerals.'"); *Bannard v. N.Y. State Natural Gas Corp*., 448 Pa. 239, 250, 293 A.2d 41, 47 (1972) ("In a normal conveyance between private parties, whether use of the term 'minerals' includes or excludes oil and natural gas depends upon application of the rule laid down in *Dunham*[.]"); *Huntley & Huntley, Inc. v. Borough Council of Oakmont*, 600 Pa. 207, 213, 964 A.2d 855, 858 (2009) (noting the *Dunham* rule provides a "rebuttable presumption in the context of private deed conveyances that the term 'mineral' does not include oil or gas").

C. The *Dunham* Rule Should Apply to Natural Gas Extracted from Marcellus Shale.

As a commercial and legal matter, Marcellus Shale gas is natural gas, period. When landowners and companies (many of them MSC members) enter into leases and royalty agreements, the subject matter is natural gas – not shale.

For example, this Court's recent decision in *Kilmer v. Elexco Land Services, Inc.*, 605 Pa. 413, 990 A.2d 1147 (2010), illustrates that *natural gas* is the subject matter of such conveyances. In *Kilmer*, this Court construed the term "royalty," as used in the Pennsylvania Guaranteed Minimum Royalty Act, 58 P. S. § 33, as applied to "leases between Pennsylvania landowners and *gas* companies seeking to drill *natural gas* wells into Pennsylvania's Marcellus Shale deposits." 605 Pa. at 415, 990 A.2d at 1149 (emphasis added).[22]

As a legal matter, there is no basis to distinguish between natural gas extracted from Marcellus Shale and natural gas extracted from other geologic formations. The plain terms of the *Dunham* rule make no exception for certain types of natural gas based on the method of extraction. Nonetheless, the Superior Court was apparently persuaded by the Pritchards' argument that there is a difference between "conventional gas reservoirs involv[ing] '*ferae naturae*,' or free flowing 'wild' gas," as compared to gas found in Marcellus Shale. *Butler*, 29 A.3d at 40. The focus of this purported distinction is that "the recovery techniques for Marcellus Shale gas differ from those used to recover conventional natural gas." *Id.*

---

[22] In the *Kilmer* decision, this Court also reproduced the lease at issue, which provided for a one-eighth royalty payment "'[f]or all Oil and Gas Substances that are produced and sold from the leased premises.'" *Kilmer v. Elexco Land Servs., Inc.*, 605 Pa. 413, 417, 990 A.2d 1147, 1150 (2010) (quoting lease). This Court also described that lease – which makes no mention of Marcellus or any other type of shale – as containing "[s]imilar royalty provisions [to] . . . many other leases across the Commonwealth" governing royalty arrangements for natural gas obtained from Marcellus Shale. *Id.*

The *Dunham* rule, however, plainly focuses on the nature of the substance – mineral, oil, or gas – and not the method of extraction. There is no basis in *Dunham* itself or its progeny to carve out certain categories of natural gas based on the method of extraction. The Superior Court's suggestion that expert discovery is needed to ascertain whether "Marcellus shale gas constitutes the type of conventional natural gas contemplated in *Dunham* and *Highland*" was made up out of whole cloth by the lower court and finds no support in this Court's precedents. *Id*. at 43. Indeed, *Dunham* itself did not contemplate any sort of natural gas – conventional or unconventional – but instead dealt solely with petroleum. The precedents drawn from *Dunham* that expressly address natural gas (*Silver v. Bush*, *Bundy v. Myers*, and *Highland*) provide no basis for distinguishing between types of natural gas, based on the method of extraction or in any other way.

Moreover, when *Bundy* was decided in 1953 and *Highland* was decided in 1960, this Court was well aware of hydrofracturing, which is the method used to extract natural gas from Marcellus Shale. *See U.S. Steel Corp. v. Hoge*, 503 Pa. 140, 145, n.1, 468 A.2d 1380, 1382 (1983) ("Developed by the drilling industry in the late 1940s, hydrofracturing was initially utilized to recover natural gases from strata other than coal veins, and has more regularly been so used."). Certainly in 2009, when this Court most recently discussed the *Dunham* rule as providing a "rebuttable presumption in the context of private deed conveyances that the term 'mineral' does not include oil or gas," it was well aware that the Marcellus Shale industry was extracting natural gas from shale. *Huntley & Huntley, Inc. v. Borough Council of Oakmont*, 600 Pa. 207, 213, 964 A.2d 855, 858 (2009). Yet this Court has never suggested that the *Dunham* rule applies only to certain types of natural gas, based on the method of extraction or otherwise.

The Superior Court's approach is an outlier and is mistakenly informed by its reliance on *Hoge*, a case involving a different type of conveyance (a coal severance deed) and natural resource (coalbed gas, which was viewed as a dangerous waste product at the time of the conveyance in *Hoge*). This Court's decision in *Hoge* does not question the viability of the *Dunham* rule with respect to *natural* gas, but merely declined to apply that presumption to *coalbed* gas. *See U.S. Steel Corp. v. Hoge*, 450 A.2d 162, 169 (Pa. Super. 1982) ("Although the *Dunham* rule specifically applies to natural gas, as distinguished from coalbed gas, we see no reason why we cannot employ it here by analogy[.]"), *rev'd*, 503 Pa. 140, 468 A.2d 1380 (1983). This Court's implicit rejection of this analogy between natural gas and coalbed gas in its *Hoge* decision underscores the Superior Court's error here in relying on *Hoge* to sidestep the *Dunham* rule.

Compounding that error, the Superior Court's attempt to differentiate between "wild" and "conventional" natural gas is expressly foreclosed by this Court's precedents. In 1925 this Court held that any comparison of oil or natural gas to a wandering wild animal, or "minerals *ferae naturae*," an analogy drawn in *Westmoreland Natural Gas Co. v. DeWitt*, 130 Pa. 235, 249, 18 A. 724, 725 (1889), was inappropriate in the context of conveying a property interest. This analogy "does not determine that oil and gas are not capable of ownership . . . or may not be the subject of a grant. On the contrary, in this state these matters are firmly established otherwise." *Hamilton v. Foster*, 272 Pa. 95, 102, 116 A. 50, 52 (1922). Accordingly, oil and natural gas could be readily conveyed and leased, subject of course to rules of property and construction such as the *Dunham* rule. *See id.* at 103, 116 A. at 52 ("It is, of course, true that *there is a distinction, upon questions of interpretation, between an oil and gas lease* and an agricultural *and even a coal lease*, the reason being that leases, like all other instruments relating to a

particular business, must always be construed with due regard to the known characteristics of the business.") (emphasis added) (internal citations omitted).

As a matter of commercial custom and usage in Pennsylvania, Marcellus Shale gas is natural gas – irrespective of the method of extraction – making scientific testimony on this point wholly unnecessary.

III. THE SUPERIOR COURT'S DECISION DISTURBS A CENTURY OF FOUNDATIONAL PENNSYLVANIA PROPERTY LAW.

The Superior Court's decision evades the application of a long-settled rule of property that this Court has repeatedly affirmed and upon which the public relies. This Court has long recognized that stable property rights relating to natural resources in Pennsylvania are "essential to our common prosperity." *Chartiers Block Coal Co. v. Mellon*, 152 Pa. 286, 297–98, 25 A. 597, 599 (1893). Indeed, as one of "the original oil and gas jurisdictions," this Court's 19th century precedents "formed the foundation for the law in other oil and gas jurisdictions."[23] This Court has recently begun to re-affirm and build on that foundation with two recent decisions applying long-established oil and gas rights in the context of Marcellus Shale,[24] and should continue developing that jurisprudence through its decision in this case.

If the Superior Court's decision is allowed to stand, there is a substantial risk of a far-reaching and detrimental impact on Pennsylvania's citizens and businesses. Affirming the

---

[23] George A. Bibikos & Jeffrey C. King, *A Primer on Oil and Gas Law in the Marcellus Shale States*, 4 Tex. J. Oil Gas & Energy L. 155, 171 (2008-2009). The article notes, however, that "[s]ince the turn of the twentieth century, however, Pennsylvania oil and gas jurisprudence has not developed at the rate the jurisprudence has developed in other oil and gas jurisdictions." *Id.* This has created "a very significant challenge" for Marcellus Shale developers in seeking to "comply with the law of a state when . . . its most recent leading cases are over one hundred years old[.]" *Id.* at 156.

[24] *See Kilmer*, 65 Pa. 413, 990 A.2d 1147, discussed *supra*, and *T.W. Phillips Gas & Oil Co. v. Jedlicka*, No. 19 WAP 2009, --- A.3d ----, 2012 WL 1033691 (Pa. Mar. 26, 2012), discussed *infra*.

Superior Court's decision would likely unleash a wave of litigation in the Commonwealth, as the grantors of existing natural gas leases seek to quiet title or are subject to lawsuits to disgorge lease and royalty payments previously received because some third party has a reservation of mineral rights. Moreover, the Superior Court's decision demonstrates a lack of respect for long-standing property rights that is contrary to this Court's precedents.

A. Retreat From the *Dunham* Rule Will Foster Unnecessary and Expensive Litigation Throughout the Commonwealth.

Prior to the Superior Court's decision, parties entering into a natural gas lease could and did depend on the *Dunham* rule to presume that a reservation of "mineral" rights did not preclude the current owners from entering into agreements relating to natural gas found in Marcellus Shale. This clear rule provided certainty of title, and allowed developers of Marcellus Shale gas (many of them MSC members) to contract with property owners throughout Pennsylvania, such as the Butlers, without having to undertake the burdensome expert scientific and/or historical analysis contemplated by the Superior Court.

This was a good thing, but has now been called into question by the Superior Court's decision: "As it currently stands, the *Butler* [Superior] court's decision represents a possible upending of established case law on which stakeholders could have reasonably relied prior to the decision, thereby potentially destabilizing the Marcellus Shale legal regime."[25] Indeed, prior to

[25] Alisa Newman Hood, *We Shale Overcome? A US Court Issues an Unsettling Decision on Marcellus Property Rights*, 5 J. World Energy L. & Bus. 78, 81 (2012). Other commentators have echoed this concern. *See, e.g.*, Joel R. Burcat, et al., *Butler v. Charles Powers Estate: Recent Pennsylvania court decision could upset 130 years of oil and gas conveyances* (Sept. 2011), *available at* http://www.saul.com/media/alert/2593_pdf_3034.pdf ("A recent decision of the Pennsylvania Superior Court has thrown into turmoil oil and gas ownership in Pennsylvania."); Russell L. Schetroma, *Superior Court Challenges Dunham Rule for Marcellus Shale* (Sept. 16, 2011), *available at* http://www.steptoe-johnson.com/news/news/Superior-Court-Challenges-Dunham-Rule-for-Marcellus-Shale,1164.aspx ("*Butler* is a very unfortunate decision, and it is hard to imagine a more unfortunate time for an appellate court to introduce uncertainty into a fundamental issue of property law."). While the Marcellus Shale Coalition believes that

the Superior Court's surprising decision, the *Dunham* rule rendered *Butler* an "open and shut case."[26] And, unfortunately, the burden of this legal instability, if allowed to continue, will fall primarily on individual landowners who may find themselves embroiled in litigation over existing leases and royalty agreements, or unable to enter into natural gas leases and/or royalty arrangements with companies in the Marcellus Shale industry, due to the uncertainty that the Superior Court has created with respect to some number of conveyances throughout the Commonwealth.

A significant number of existing natural gas leases have been thrown into question by the Superior Court's decision.[27] The Superior Court's decision also opens the door to lawsuits against these landowners. *Cf. Hoffman v. Arcelormittal Pristine Resources, Inc.*, No. 11cv0322, 2011 WL 1791709, at *5 (W.D.Pa. May 10, 2011) (rejecting the plaintiff's "creative" arguments to acquire Marcellus Shale gas ownership rights). Property owners who previously entered into natural gas leases and received payments and royalties for natural gas – based on good faith reliance on the *Dunham* rule by all of those involved – may now be sued for unjust enrichment,

---

some of this concern is exaggerated, there is no doubt that the Superior Court's decision – if allowed to stand – will create uncertainty about the validity of some percentage of conveyances relating to Marcellus Shale, with the burden on that uncertainty falling primarily on individual property owners.

[26] Newman Hood, *supra* note 25 at 79–80 ("The *Butler* trial court, like so many Pennsylvania courts before it, applied the *Dunham* Rule, which essentially rendered *Butler* an open and shut case.").

[27] In recent years, thousands of gas leases have been recorded in Pennsylvania. *See, e.g., Chesapeake Appalachia, LLC v. Golden*, 35 A.3d 1277, 1279 (Pa. Commw. Ct. 2012); Ross H. Pifer, *What A Short, Strange Trip It's Been: Moving Forward After Five Years Of Marcellus Shale Development*, 72 U. Pitt. L. Rev. 615, 628 n.79 (2011). As of 2009, these leases and corresponding bonuses have resulted in more than $1.7 *billion* being paid to Pennsylvania landowners. *See, e.g.*, Rachel Weaver, *Marcellus Gas Wells Generate an Amazing Bounty for Landowners*, Pittsburgh Tribune Rev. (Feb. 27, 2011), *available at* http://www.uppermon.org/news/Pgh-Alleg/PTR-Marcellus_Bounty-27Feb11.html; *see also supra* note 25 (noting the widespread uncertainty resulting from the Superior Court's decision).

conversion, and/or disgorgement of money previously received by opportunistic individuals whose ancestors reserved "mineral" rights. This type of litigation would pose a significant financial and emotional stress to those individuals who are sued, as well as imposing a considerable burden on the court system.

There is also a substantial risk that the expert-intensive inquiry suggested by the Superior Court will lead to inconsistent results in courtrooms throughout the Commonwealth, depending on the relative persuasiveness of the competing expert witnesses; historical factors specific to counties or even localities (such as the understanding of the value of Marcellus Shale or existence of natural gas deposits); and even the date of the deed (for example, whether or not hydrofracturing technology enabling the extraction of natural gas from shale existed when "mineral" rights were reserved).

At a minimum, the Superior Court's decision – if allowed to stand – will create a future burden on individual citizens seeking to capitalize on natural gas reserves contained in the Marcellus Shale underlying their property. Any property owner whose deed contains a reservation of mineral rights will no longer be able to engage in a straightforward negotiation and lease agreement with prospective developers, but instead will be forced to engage experts in order to quiet title. This elaborate legal procedure is beyond the means of most ordinary Pennsylvania families.

B. The Superior Court's Ruling Violates this Court's Respect for Long-Standing Rules of Property.

In order to avoid these types of pernicious results, this Court has long-recognized and adhered to predictable rules of law, especially with respect to property rights. "'A rule of property long acquiesced in should not be overthrown except for compelling reasons of public policy or the imperative demands of justice.'" *Highland*, 400 Pa. at 277, 161 A.2d at 398-99 &

n.5 (quoting *Smith v. Glen Alden Coal Co.*, 347 Pa. 290, 302, 32 A.2d 227, 234 (1943)). Disregarding a well-established principle like the *Dunham* rule not only shows "a manifest disregard of the principle of *stare decisis*," it also risks "an alarming violation of the right of property, and a disastrous disturbance of the quiet of the community." *Hole v. Rittenhouse*, 25 Pa. 491, 493 (1855) (discussing the doctrine of adverse possession).

This Court most recently reaffirmed this principle earlier this year in *T.W. Phillips Gas & Oil Co. v. Jedlicka*, No. 19 WAP 2009, --- A.3d ----, 2012 WL 1033691 (Pa. Mar. 26, 2012), when it confirmed the viability and utility of a 1899 decision, *Young v. Forest Oil Co*., 194 Pa. 243, 45 A. 121 (1899), governing the interpretation of oil and gas leases. *Young* held that a lessee's good faith judgment was relevant to whether an oil or gas well was producing in paying quantities and this Court's decision in *T.W. Phillips* made it clear that is still the case. *See id.* at *12. This Court so held notwithstanding its recognition "that our decision in *Young* is more than a century old [and] thus, there is bound to be uncertainty as to how such precedent applies to disputes involving an industry that has changed rapidly over that same time period." *Id.* at *8. Notwithstanding such rapid changes in the oil and gas industry, this Court has consistently held that application of existing precedent provides legal stability as a beneficial backdrop to evolving industries. *See also Jacobs v. CNG Transmission Corp*., 565 Pa. 228, 240, 772 A.2d 445, 452 (2001) (answering certified question from the U.S. Court of Appeals for the Third Circuit by confirming, based on prior decisions dating back to 1889, that Pennsylvania law recognizes an implied covenant to develop and produce oil or gas from property leased for that purpose).

Moreover, "[c]onsiderations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved," as is indisputably the case with the *Dunham* rule. *Payne v. Tennessee*, 501 U.S. 808, 828 (1991). The *Dunham* rule is "a

rule of property long recognized and relied upon," *Highland*, 400 Pa. at 276–77, 161 A.2d at 398–99, and in particular is a "rule of property on which many titles in western Pennsylvania" and have rested for more than a century. *Silver*, 213 Pa. at 199, 62 A. at 833–34.

That mineral-rich half of the state is, not coincidentally, the epicenter of the Marcellus Shale industry, underscoring the importance of the *Dunham* rule today. The U.S. District Court for the Western District of Pennsylvania so held last year in *Hoffman*, rejecting a plaintiff's attempt to avoid a reservation of "all gas and oil" to the defendants and obtain rights to natural gas in Marcellus Shale through a misreading of this Court's decision in *Hoge*. 2011 WL 1791709 at *4-5. The federal district court properly recognized the importance of the clear, bright lines drawn by the *Dunham* rule in the Marcellus Shale context: "To rule in plaintiffs' favor would be tantamount to an eradication of countless oil and gas estates and leases recorded in the history of this Commonwealth, and would profoundly change the landscape of property law as it has developed over hundreds of years." *Id.* at *1.

The *Dunham* rule has explicitly been re-affirmed by this Court on multiple occasions in recognition of the importance of consistent rules of property. *See Preston v. South Penn Oil Co.*, 238 Pa. 301, 304, 86 A. 203, 204 (1913) ("*Dunham v. Kirkpatrick* has been the law of this State for 30 years, and very many titles to land rest upon it. It has become a rule of property, and it will not be disturbed."); *Bundy*, 372 Pa. at 587, 94 A.2d at 726 ("*Dunham v. Kirkpatrick* has now been the law of this State for seventy years and is still no less a rule of property which is not to be disturbed."). In its most recent holding based on the *Dunham* rule, "a rule of property long recognized and relied upon," this Court stated that the rule "should not be overthrown except for compelling reasons of public policy or the imperative demands of justice." *Highland*, 400 Pa. at

276-77, 161 A.2d at 398-99 & n.5 (internal quotation marks omitted). Here, compelling reasons of public policy and justice counsel in favor of upholding the *Dunham* rule once more.

Dunham v. Kirkpatrick has now been the law of this State for more than *one hundred and thirty years*. It has attained the status of a rule of property – one upon which countless Pennsylvania titles are based – and therefore should not be disturbed. Reversal of the Superior Court's decision is necessary to prevent legal uncertainty and instability in connection with countless titles and transactions throughout the Commonwealth and to avoid costly litigation based on "creative" arguments of ownership to valuable Marcellus Shale gas.

* * *

As a matter of sound public policy, adherence to long-established precedent, particularly in the property context, fosters legal certainty and economic development. *Cf. Kilmer*, 605 Pa. at 418-19, 990 A.2d at 1151 (granting petition for extraordinary jurisdiction out of concern "that uncertainty would stymie economic development"). This Court therefore should affirm the continued viability of the *Dunham* rule and its applicability to Marcellus Shale natural gas and reverse the Superior Court's departure from this long-established precedent.

CONCLUSION

The Commonwealth's interest in stable property rights and facilitating productive development of Pennsylvania's natural resources strongly favors application of the *Dunham* rule to Marcellus Shale gas. Accordingly, the MSC respectfully urges the Court to reverse the Superior Court.

Respectfully submitted,

/s/ Michael L. Kichline
Michael L. Kichline, Esq. (PA #62293)
Karen C. Daly, Esq. (PA #207879)
Argia J. DiMarco, Esq. (PA #312308)
William T. McEnroe, Esq. (PA #308821)

DECHERT LLP
Cira Centre
2929 Arch Street
Philadelphia, PA 19104-2808
Tel: (215) 994-2439

Attorneys for Amicus Curiae
Marcellus Shale Coalition

May 15, 2012

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this, the 15th day of May, 2012, I caused two true and correct copies of the foregoing Brief of *Amicus Curiae* Marcellus Shale Coalition to be served upon the following counsel in a manner that satisfies the requirements of Pa. R. App. P. 121:

Service via Federal Express addressed as follows:

Thomas F. Meagher III
LAW OFFICE OF MICHAEL
J. GIANGRIECO
60 Public Avenue
P.O. Box 126
Montrose, PA 18801
(570) 278-4026
Co-Counsel for Appellants John E. and Mary Josephine Butler

Gregory J. Krock
BUCHANAN INGERSOLL & ROONEY, P.C.
One Oxford Centre
301 Grant Street, 20th Floor
Pittsburgh, PA 15219
(412) 562-3983
Co-Counsel for Appellants John E. and Mary Josephine Butler

Laurence M. Kelly
KELLY LAW OFFICE
65 Public Avenue
Montrose, PA 18801
(570) 278-3861
Counsel for Appellees Charles Powers Estate, William Pritchard, and Craig L. Pritchard

/s/ William T. McEnroe
William T. McEnroe (PA #308821)
DECHERT LLP
Cira Centre
2929 Arch Street
Philadelphia, PA 19104-2808
Tel: (215) 994-4000

EXHIBIT A

Marcellus Shale Coalition

Board Members

- AkA Energy Group
- Anadarko Petroleum Corp.
- Atlas Energy, L.P.
- Burnett Oil Company
- Cabot Oil and Gas Corporation
- Carrizo Oil & Gas, Inc.
- Chesapeake Energy Corporation
- Chevron
- Chief Oil and Gas LLC
- CONSOL Energy
- DTE Pipeline Company
- Energy Corporation of America
- Enerplus Resources USA
- EOG Resources, Inc.
- EQT Corporation
- EXCO Resources (PA), LLC
- Hess, Inc.
- Hunt Marcellus Operating Company, LLC
- Inflection Energy, LLC
- MarkWest Liberty Midstream & Resources, LLC
- Mitsui E&P USA
- Newfield Exploration Company
- NiSource Gas Transmission & Storage
- Noble Energy, Inc.
- PDC Mountaineer, LLC
- Penn Virginia Oil & Gas Corporation
- Pennsylvania General Energy Company, LLC
- Peoples Natural Gas
- PVR Midstream
- Range Resources
- Rex Energy Corporation
- Seneca Resources Corporation

- Shell Appalachia
- Southwestern Energy
- Statoil
- Sumitomo Corporation of America
- Talisman Energy USA, Inc.
- Tenaska
- Triana Energy
- UGI Energy Services
- Ultra Resources
- Williams Companies
- WPX Energy
- XTO Energy, Inc.

Associate Members

- Acorn Energy
- Accutest Laboratories
- Advanced GeoServices, Corp.
- AECOM
- Aerotek
- AES Drilling Fluids LLC
- Allan A. Myers, Inc.
- ALS Environmental
- AMEC
- Amerimar Realty Company
- Appalachia Oil Purchasers, Inc.
- Aqua America, Inc.
- Aquatech
- ARCADIS-US, Inc.
- ARCHER, The Well Company
- ARM Group
- Altela Inc.
- AVT, Inc.
- Babst Calland Clements & Zomnir
- Baker Hughes

- Barrett Industries (IA Construction)
- Benchmark Analytics
- Benesch
- Bergmann Associates
- Bishop Brothers Construction
- Blackhawk Specialty Tools
- BL Companies
- Boots & Coots
- Borton-Lawson
- Bravo Group
- Bruce & Merrilees Electric Company
- Buchanan, Ingersoll & Rooney, PC
- Buchart Horn, Inc.
- Burleson LLP
- Capstone Turbine Distributor/E-Finity
- Casella Waste Services
- CDM Smith
- CESI Chemical, a Flotek Company
- CHA
- Chapman Corporation
- Chester Engineers
- Civil & Environmental Consultants, Inc.
- Clean Harbors
- Cleveland Brothers Equipment Co.
- Coldwell Banker Real Estate Services
- Conestoga-Rovers & Associates
- Contech Construction Products, Inc.
- Contract Land Staff (CLS)
- Crescent Directional Drilling, LP
- CSD (Carnegie Strategic Design)
- CUDD Energy Services
- Cummings/Riter Consultants, Inc.
- Dawood Engineering, Inc.
- Dawson & Associates

- Dechert
- Dell Fastener Corporation
- Deloitte Consulting LLP
- Dewberry
- Drill Baby Drill Staffing
- Dixie Construction Company, Inc.
- DLA Piper
- Duncan Land Services
- Eckert Seamans Cherin & Mellott, LLC
- Edgen Murray
- Emera Energy
- Entech Engineering, Inc.
- Environmental Drilling Solutions
- Environmental Service Laboratories
- Environmental Standards, Inc.
- ERM
- Eureka Resources Inc.
- Express Energy Services
- Exterran
- Falcon Drilling
- Fisher Associates
- FMC Corporation
- Force Incorporated
- Fox Rothschild
- FTS International
- Fulbright & Jaworski
- G4S Secure Solutions USA
- G.A. & F.C. Wagman, Inc.
- GAI Consultants, Inc.
- Gannett Fleming, Inc.
- Gas Technology Institute
- Geosyntec
- Gilmore & Associates
- Glenn O. Hawbaker, Inc.

- Golder Associates, Inc.
- Groundwater & Environmental Services
- Greenberg Traurig, LLP
- Greenhorne & O'Mara, Inc.
- H20 Resources/WaterTrac
- Halliburton Energy Services
- Hart Resource Technologies, Inc. & PA Brine Treatment, Inc.
- Hartman & Hartman
- Hatch Mott MacDonald
- HDR Engineering, Inc.
- Henkels & McCoy
- Herbert, Rowland & Grubic, Inc.
- Herschell Environmental LLC
- High Industries/High Real Estate Group
- Hoffman Construction Services
- Holcim
- Holloman
- Homewaters Retreats
- Honeywell Safety Products
- HRI, Inc.
- Hull & Associates, Inc.
- Independence Excavating
- INTERTECH Security
- IPS Engineering/EPC
- Jackson Kelly, PLLC
- JMC Steel Group
- JMT Johnson, Mirmiran & Thompson
- John T. Boyd Company
- K&L Gates
- Keane Frac
- Key Energy Services, Inc.
- Kleinfelder
- KPMG
- Kroff Well Services, Inc.

- LJ Stein & Company, Inc.
- L.R. Kimball & Associates, Inc.
- Lafarge North America
- Lancaster Laboratories
- Langan Engineering and Environmental Services
- Lanxess
- Larson Design Group
- Laurel Aggregates
- Layne Christensen Company
- Lowe's Home Improvement
- M. Davis & Sons Inc.
- Manko, Gold, Katcher & Fox, LLP
- Mascaro Construction Company, LP
- MATCOR Inc.
- McCarl's
- McClure Company
- McGuireWoods, LLP
- McKissack & McKissack
- McNees Wallace & Nurick, LLC
- McTish, Kunkel & Associates
- Michael Baker Corporation
- M-I SWACO a Schlumberger Company
- ModSpace
- Moody and Associates, Inc.
- MSA
- MWH
- Nalco Company
- National Vacuum Corp.
- National Oilwell Varco (NOV)
- Nemacolin Woodlands Resort/84 Lumber
- New Enterprise Stone Lime Co., Inc.
- New Pig Corporation
- New Tech Engineering
- O'Brien & Gere

- Ogletree, Deakins, Nash, Smoak & Stewart
- Orion Drilling
- Oxford Development Company
- PB Energy Storage Services, Inc.
- Pace Analytical Services, Inc.
- ParenteBeard, LLC
- Penn E&R
- Pennoni Associates, Inc.
- Pennsylvania American Water
- Pennsy Supply, Inc.
- Penn United Technologies
- Pepper Hamilton LLP
- Percheron Acquisitions LLC
- Petroleum Products, Inc.
  Maxum Petroleum
- PGT Trucking
- Pipeco Services, LP
- PJ Dick-Trumbull Corporation
- P. Joseph Lehman, Inc., Consulting Engineers
- PPG
- PwC (PriceWaterhouseCoopers)
- Protechnics (division of Core Laboratories)
- Prudential Preferred Realty
- ReedSmith, LLP
- Reserved Environmental Services, LLC
- RETTEW
- Ridge Global
- RPM Industries LLC
- River Chemical and Energy, a River Development Corporation
- Russell Standard Corporation
- Saul Ewing
- Schlumberger Oilfield Services
- SAIC Science Applications International Corporation
- Saxon Drilling
- Schramm

- Sci-tek Consultants Inc.
- Select Energy Services, LLC
- SGC Engineering, LLC (Member of The Senergy Group)
- Sevenson Environmental Services
- Shallenberger Construction, Inc.
- Skelly and Loy, Inc.
- SSM Group
- Stallion Oilfield Services
- Stahl Sheaffer Engineering, LLC
- Stantec Consulting Corporation
- Steptoe & Johnson
- STRAD Oilfield Services
- Suit-Kote Corporation
- Sunnyside Supply, Inc.
- Superior Energy Services
- Superior Well Services, Ltd.
- Sustainable Resources Group
- T & M Associates
- Taylor Wiseman & Taylor
- Tensar International Corporation
- TerrAqua Resource Management (TARM)
- Terra Services LLC
- TestAmerica Laboratories, Inc.
- Tetra Tech
- The Chartwell Law Offices
- The EADS Group
- The Gateway Engineers
- The Lane Construction Corporation
- The Sadler Law Firm
- The Shaw Group
- The West Firm
- THP Gas Field Services
- T&M Associates
- TMK IPSCO

- Total Equipment Company
- Total Safety U.S., Inc.
- TRC
- Trican Well Service, L.P.
- Twilight Services
- United States Steel Corporation
- UniversalPegasus International
- Universal Well Services, Inc.
- URS Corporation
- Urban Engineers Inc.
- USA Compression
- Utility Line Services
- Valerus
- Vallourec & Mannesmann USA
- Veolia Environment North America
- Wallace & Pancher Inc. (WPI)
- WSP Environment & Energy
- Waste Management
- Weatherford International Ltd.
- Weavertown Environmental Group
- Weston Solutions, Inc.
- West Penn Energy Services, LLC
- West Physics
- Willbros Engineering
- Williams Scotsman
- Wilkinson & Associates
- Womble Carlyle Ecology Innovations
- Womble Carlyle Sandridge & Rice LLP
- WorleyParsons

EXHIBIT B

ineffectiveness claims will not be considered at this time. Therefore, we dismiss these claims with no prejudice to Funk, who may raise them, as well as any additional PCRA claims, in a timely filed PCRA petition.

Judgment of sentence affirmed.

John E. and Mary Josephine BUTLER, Appellees

v.

CHARLES POWERS ESTATE et al., William H. Pritchard and Craig L. Pritchard.

Appeal of William H. Pritchard and Craig L. Pritchard.

Superior Court of Pennsylvania.

Submitted May 9, 2011.

Filed Sept. 7, 2011.

Background: Owner of land in fee simple filed action to quiet title. Heirs of predecessor owner of the land filed request for a declaratory judgment that shale gas was included in the reservation or rights to heirs in predecessor's deed. The Court of Common Pleas, Susquehanna County, Civil Division at No. 2009–1141, Seamans, J., entered judgment, granting owner's preliminary objections in the nature of a demurrer. Heirs appealed.

Holding: The Superior Court, No. 1795 MDA 2010, Gantman, J., held that as a matter of first impression, factual issue as to whether shale on owner's land constituted a type of mineral precluded granting owner's preliminary objections.

Reversed and remanded.

1. Appeal and Error ⚿863

The Superior Court's review of a trial court's sustaining of preliminary objections in the nature of a demurrer is plenary.

2. Pleading ⚿193(5)

Preliminary objections in the nature of a demurrer should be sustained only if, assuming the averments of the complaint to be true, the plaintiff has failed to assert a legally cognizable cause of action.

3. Appeal and Error ⚿960(1)

The Superior Court will reverse a trial court's decision to sustain preliminary objections only if the trial court has committed an error of law or an abuse of discretion.

4. Appeal and Error ⚿917(1)

For the purposes of assessing a challenge sustaining preliminary objections in the nature of a demurrer, all material facts set forth in the complaint as well as all inferences reasonably deductible therefrom are admitted as true.

5. Pleading ⚿193(5), 218(1)

The question presented by a demurrer is whether, on the facts averred, the law says with certainty that no recovery is possible; where a doubt exists as to whether a demurrer should be sustained, this doubt should be resolved in favor of overruling it.

6. Declaratory Judgment ⚿393

The Superior Court's standard of review in a declaratory judgment action is narrow; the court reviews the decision of the trial court as it would a decree in equity and will set aside factual conclusions only where they are not supported by adequate evidence, but gives plenary review to the trial court's legal conclusions.

7. Declaratory Judgment ⚿393, 394

In reviewing a declaratory judgment action, the Superior Court is limited to determining whether the trial court clearly abused its discretion or committed an error of law.

8. Appeal and Error ⚿946

Judicial discretion requires action in conformity with law on facts and circumstances before the trial court after hearing and consideration, and consequently, the court abuses its discretion if, in resolving the issue for decision, it misapplies the law or exercises its discretion in a manner lacking reason.

9. Deeds ⚿93

When interpreting a deed, a court's primary object must be to ascertain and effectuate what the parties themselves intended.

10. Deeds ⚿120

Evidence ⚿433(4), 434(3)

When determining the intention of the parties to a deed, the nature and quantity of the interest conveyed must be ascertained from the deed itself and cannot be orally shown in the absence of fraud, accident or mistake.

11. Deeds ⚿93, 95

Courts seek to ascertain not what the parties may have intended by the language in a deed but what is the meaning of the words they used.

12. Deeds ⚿93, 95

When determining the intent of the parties to a deed, effect must be given to all the language of the instrument, and no part shall be rejected if it can be given a meaning.

13. Deeds ⚿90

If a doubt arises concerning the interpretation of a deed, it will be resolved against the party who prepared it.

14. Deeds ⚿93, 95, 100

To ascertain the intention of the parties, the language of a deed should be interpreted in the light of the subject matter, the apparent object or purpose of the parties and the conditions existing when it was executed.

15. Contracts ⚿152

Words of a contract are to be given their ordinary meaning.

16. Mines and Minerals ⚿55(8)

Quieting Title ⚿41

In quiet title action, a factual issue as to whether shale underneath the surface of owner's land constituted a type of mineral such that the gas in it fell within the deed's reservation of rights of one half the minerals to grantor's heirs, precluded granting owner's preliminary objections in the nature of a demurrer to heirs' request for a declaratory judgment that shale gas was included in the reservation.

Laurence M. Kelly, Montrose, for appellants.

Michael J. Giangrieco, Montrose, for appellees.

BEFORE: STEVENS, P.J., GANTMAN, and FITZGERALD *, JJ.

OPINION BY GANTMAN, J.:

Appellants, William H. Pritchard and Craig L. Pritchard, heirs to the estate of Charles Powers, appeal from the order entered in the Susquehanna County Court

* Former Justice specially assigned to the Superior Court.

of Common Pleas, sustaining the preliminary objections of Appellees, John E. Butler and Mary Josephine Butler, and dismissing Appellants' request for declaratory judgment. For the following reasons, we reverse and remand for further proceedings.

The relevant facts and procedural history of this case are as follows. Appellees are the owners in fee simple of two-hundred and forty-four (244) acres of land in Apolacon Township, Susquehanna County, Pennsylvania. Appellees' deed to the land contains the following exception reserving:

> [O]ne half the minerals and Petroleum Oils to said Charles Powers his heirs and assigns forever together with all and singular the buildings, water courses ways waters water courses rights liberties privileges hereditaments and appurtenances whatsoever there unto belonging or in any wise appertaining and the reversions and remainders rents issues and profits thereof; And also all the estate right, title interest property claimed and demand whatsoever there unto belonging or in any wise appertaining in law equity or otherwise however of in to or out of the same. . . .

(Complaint to Quiet Title, filed 7/20/09, at 7–8) (citing reservation in a deed in the chain of title to the 244 acres at issue, from the Estate of Charles Powers to Patrick Fitzmartin, recorded October 25, 1881).

On July 20, 2009, Appellees filed a complaint to quiet title, naming the defendants as Charles Powers' estate, and the estate's heirs and assigns. Appellees alleged ownership of the land in fee simple, and ownership of all "minerals and petroleum oils" based on adverse possession. On July 21, 2009, Appellees filed an affidavit stating that the identity and whereabouts of the defendants, their heirs and assigns, are unknown; and filed a motion for publication. That same day, the court granted Appellees' motion for publication. On September 18, 2009, Appellees filed a motion for judgment because the defendants failed to file an answer or any other pleading. The court scheduled a hearing for September 22, 2009. Appellants surfaced, and Appellees subsequently filed a motion for a continuance. The court continued the hearing until October 27, 2009. On October 26, 2009, Appellees filed another motion for continuance. On October 27, 2009, Appellants filed preliminary objections claiming, *inter alia*, lack of jurisdiction and improper service. That same day, the court stayed the scheduled hearing pending disposition of Appellants' preliminary objections. Appellants later withdrew their preliminary objections.

On November 2, 2009, Appellants filed for a declaratory judgment, claiming the reservation of rights in the deed's exception included Marcellus shale gas and disputing Appellees' claim of adverse possession. On November 4, 2009, Appellants filed an answer to the complaint. On November 20, 2009, Appellees filed preliminary objections to Appellants' request for a declaratory judgment, claiming Appellants (1) lacked standing; (2) failed to conform to rule or law by filing a motion for declaratory judgment instead of a separate declaratory judgment action; and (3) failed to state a claim upon which relief can be granted.

On November 24, 2009, Appellants filed an answer to Appellees' preliminary objections. On January 19, 2010, the court held a hearing on Appellants' "motion" for declaratory judgment. On January 27, 2010, the court (1) sustained the preliminary objections in the nature of a *demurrer* and dismissed with prejudice Appellants' request for a declaratory judgment that natural gas is included in the reservation of the deed; (2) stayed the preliminary objections regarding standing and ordered the

parties to file depositions, interrogatories, and affidavits, or request an evidentiary hearing on the issue; and (3) dismissed Appellants' "motion" for declaratory judgment and found moot Appellees' preliminary objections for failure to conform to rule or law, based on the court's ruling on the *demurrer*. On February 9, 2010, Appellants filed a motion for reconsideration, which the court denied.

On February 16, 2010, Appellants filed a notice of appeal. On appeal, Appellants challenged only the portion of the court's order sustaining Appellees' preliminary objections in the nature of a *demurrer* and dismissing with prejudice Appellants' request for a declaratory judgment that natural gas is included in the reservation of the deed. On October 22, 2010, this Court remanded the case, with one dissent. *See Butler v. Charles Powers Estate*, 15 A.3d 538 (Pa.Super.2010) (unpublished memorandum). The panel majority determined the record contained no findings regarding standing, and standing was a threshold issue that must be resolved before the case could proceed. The dissent took the position that this Court could resolve the matter without first determining the standing issue because the deed does not mention natural gas, and Pennsylvania law clearly states there is a rebuttable presumption that a deed creating an estate for minerals and oils does not convey natural gas, absent an express reference to the contrary. Due to its disposition, the panel majority did not reach the merits of Appellants' claims. *See id.*

During the pendency of that appeal, Appellees filed a *praecipe* requesting that the court sustain Appellees' preliminary objections related to the standing issue or, alternatively, conduct an evidentiary hearing. Consequently, the court held a hearing on September 24, 2010. By order filed September 29, 2010, with notice sent to the parties on October 1, 2010, the court overruled Appellees' preliminary objections, expressly stating that Appellants had standing. Given that the court had decided the standing issue favorably to Appellants, they timely filed a notice of appeal on Monday, November 1, 2010, again raising the issue asserted in their first appeal that this Court had declined to address until resolution of the standing issue. The court did not order Appellants to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b), and Appellants did not file one.

Appellants raise one issue for our review:

> WHETHER ... [THE TRIAL COURT] ERRED IN DETERMINING THAT THE ... RESERVATION IN THE CHAIN OF TITLE TO THE SURFACE LAND CURRENTLY OWNED BY ... APPELLEES DID NOT INCLUDE A RESERVATION OF ONE HALF OF SUCH UNCONVENTIONAL MARCELLUS SHALE GAS AS MIGHT BE FOUND UNDER THE LAND[.]

(Appellants' Brief at 3).

[1–8] The relevant scope and standard of review are as follows:

> Our review of a trial court's sustaining of preliminary objections in the nature of a *demurrer* is plenary. Such preliminary objections should be sustained only if, assuming the averments of the complaint to be true, the plaintiff has failed to assert a legally cognizable cause of action. We will reverse a trial court's decision to sustain preliminary objections only if the trial court has committed an error of law or an abuse of discretion.

Kramer v. Dunn, 749 A.2d 984, 990 (Pa.Super.2000) (internal citations omitted).

> All material facts set forth in the complaint as well as all inferences reasonably [deducible] therefrom are admitted as true for [the purpose of this review]. The question presented by the *demurrer* is whether, on the **facts** averred, the law says with certainty that no recovery is possible. Where a doubt exists as to whether a *demurrer* should be sustained, this doubt should be resolved in favor of overruling it.

Wawa, Inc. v. Alexander J. Litwornia & Associates, 817 A.2d 543, 544 (Pa.Super.2003) (quoting *Price v. Brown,* 545 Pa. 216, 221, 680 A.2d 1149, 1151 (1996)) (emphasis added). Regarding a *demurrer,* this Court has held:

> A *demurrer* is an assertion that a complaint does not set forth a cause of action or a claim on which relief can be granted. A *demurrer* by a defendant admits all relevant facts sufficiently pleaded in the complaint and all inferences fairly deducible therefrom, but not conclusions of law or unjustified inferences. In ruling on a *demurrer,* the court may consider only such matters as arise out of the complaint itself; it cannot supply a fact missing in the complaint.

Binswanger v. Levy, 311 Pa.Super. 41, 457 A.2d 103, 104 ([Pa.Super.] 1983) (internal citations omitted). Where the complaint fails to set forth a valid cause of action, a preliminary objection in the nature of a *demurrer* is properly sustained. *McArdle v. Tronetti,* 426 Pa.Super. 607, 627 A.2d 1219, 1221 ([Pa.Super.] 1993), *appeal denied,* 537 Pa. 622, 641 A.2d 587 (1994).

Lerner v. Lerner, 954 A.2d 1229, 1234–35 (Pa.Super.2008). Additionally,

> Our standard of review in a declaratory judgment action is narrow. We review the decision of the trial court as we would a decree in equity and set aside factual conclusions only where they are not supported by adequate evidence. We give plenary review, however, to the trial court's legal conclusions.

Universal Health Services, Inc. v. Pennsylvania Property and Cas. Ins. Guar. Ass'n, 884 A.2d 889, 892 (Pa.Super.2005) (internal citations omitted). "In reviewing a declaratory judgment action, we are limited to determining whether the trial court clearly abused its discretion or committed an error of law." *Bianchi v. Bianchi,* 859 A.2d 511, 515 (Pa.Super.2004).

> Judicial discretion requires action in conformity with law on facts and circumstances before the trial court after hearing and consideration. Consequently, the court abuses its discretion if, in resolving the issue for decision, it misapplies the law or exercises its discretion in a manner lacking reason.

Miller v. Sacred Heart Hosp., 753 A.2d 829, 832 (Pa.Super.2000) (internal citations omitted).

Jarl Investments, L.P. v. Fleck, 937 A.2d 1113, 1121 (Pa.Super.2007).

Appellants argue that Appellees' predecessors intended to distinguish surface rights from subterranean rights upon conveying the land by way of the exception in Appellees' deed. Appellants assert Marcellus shale is a mineral consistent with the reservation of rights in Appellees' deed, because a mineral is any inorganic object that can be removed from soil and used for commercial purposes; and no Pennsylvania decision has decided that mineral rights exclude Marcellus shale.

Appellants further aver that prior to the Pennsylvania Supreme Court's decision in *Dunham v. Kirkpatrick,* 101 Pa. 36 (1882), the ordinary meaning of the word "miner-

als" included natural gas. Appellants maintain the decisions in *Dunham* and *Highland v. Commonwealth,* 400 Pa. 261, 161 A.2d 390 (1960), *cert. denied,* 364 U.S. 901, 81 S.Ct. 234, 5 L.Ed.2d 194 (1960), are not controlling in this case. In *Dunham* and *Highland,* the Pennsylvania Supreme Court held that a reservation or exception in a deed reserving "minerals," without any specific mention of natural gas or oil, creates a rebuttable presumption that the grantor did not intend for "minerals" to include natural gas or oil. Appellants insist the Court decided *Dunham* in 1882, after the scrivener had created the deed at issue, and he could not have anticipated Pennsylvania courts would depart from past precedent and impose a new interpretation of what constitutes a mineral. Appellants claim *Highland* interpreted a deed created in 1900, when the scrivener had the benefit of the "*Dunham* Rule" in drafting the deed in that case. Appellants assert *Dunham* and *Highland* are also distinguishable from this case because those cases dealt with conventional gas; Marcellus shale gas is an unconventional gas. Appellants submit conventional gas reservoirs involve "*ferae naturae,*" or free flowing "wild" gas, while Marcellus shale contains unconventional gas reservoirs. Appellants explain the recovery techniques for Marcellus shale gas differ from those used to recover conventional natural gas.

Appellants also rely on *U.S. Steel Corp. v. Hoge,* 503 Pa. 140, 468 A.2d 1380 (1983), to support their proposition that "whoever owns the shale, owns the gas." In *Hoge,* the Court stated that such gas as is present in coal belongs to the owner of the coal, coal bed gas that migrates into surrounding property belongs to owner of the surrounding property. Appellants suggest Marcellus shale is similar to coal in that both contain natural gas that can be extracted only while the coal or shale is in the ground by a process known as "hydrofracturing," or pumping water under pressure into the vein to fracture the coal or Marcellus shale, which releases the gas. Appellants conclude the court erred by sustaining Appellees' preliminary objections in the nature of a *demurrer* and by dismissing their request for declaratory judgment, and this Court must vacate the court's order and remand for further proceedings. For the following reasons, we agree with some of Appellants' contentions.

[9–15] When interpreting a deed:

> [A] court's primary object must be to ascertain and effectuate what the parties themselves intended. The traditional rules of construction to determine that intention involve the following principles. First, the nature and quantity of the interest conveyed must be ascertained from the deed itself and cannot be orally shown in the absence of fraud, accident or mistake. We seek to ascertain not what the parties may have intended by the language but what is the meaning of the words they used. Effect must be given to all the language of the instrument, and no part shall be rejected if it can be given a meaning. If a doubt arises concerning the interpretation of the instrument, it will be resolved against the party who prepared it. To ascertain the intention of the parties, the language of a deed should be interpreted in the light of the subject matter, the apparent object or purpose of the parties and the conditions existing when it was executed.

Consolidation Coal Co. v. White, 875 A.2d 318, 326–27 (Pa.Super.2005) (internal citations omitted). "[W]ords of a contract are to be given their ordinary meaning." *Kripp v. Kripp,* 578 Pa. 82, 90, 849 A.2d 1159, 1163 (2004).

When construing the term "minerals," as used in a deed, our Supreme Court has stated:

> Mineral is not *per se* a term of art or of trade, but of general language, and presumably is intended in the ordinary popular sense which it bears among English speaking people. It may in any particular case have a different meaning, more extensive or more restricted, but such different meaning should clearly appear as intended by the parties.... [T]he word "mineral" has a very broad meaning ... and also a more restricted scientific use, it has also a commercial sense, in which it is most commonly used in conveyances and leases of land, and in which it may be presumed to be used in such instruments. In that sense[,] it may include any inorganic substance found in nature having sufficient value separated from its situs as part of the earth to be mined, quarried, or dug for its own sake or its own specific uses. But, though it may include all such substances, it does not necessarily do so.... The cardinal test of the meaning of any word in any particular case is the intent of the parties using it....

Silver v. Bush, 213 Pa. 195, 197–98, 62 A. 832, 833 (1906) (internal citations omitted) (holding reservation of minerals underlying land did not include natural gas; even though natural gas constitutes "mineral" in broadest sense of word, appellant failed to present evidence that parties understood "minerals" to include natural gas).[1]

In *Dunham*, *supra*, the Pennsylvania Supreme Court interpreted a deed containing the following clause: "Excepting and reserving all the timber suitable for sawing; also, all minerals; also, the right of way to take off such timber and minerals." *Dunham*, *supra* at *1. The defendants had argued the deed's reservation of "all minerals" included a right to petroleum oil. The Court rejected the defendants' argument, holding a reservation of "all minerals" does not reserve petroleum oil under the plain, ordinary and popular meaning of the word; and the scrivener would have expressly reserved oil if so intended.

In *Highland*, *supra*, the Court expanded the *Dunham* rule as follows:

> In [*Dunham*, *supra*] this Court enunciated a rule of construction of the word

1. Other jurisdictions have addressed the definition of "minerals" when interpreting a deed. *See e.g., Kalberer v. Grassham*, 282 Ky. 430, 138 S.W.2d 940 (1940) (holding conveyance of all minerals of every kind and character except coal and natural gas and coal oil, included conveyance of sandstone quarry, in absence of other qualifying words or restrictions); *McCombs v. Stephenson*, 154 Ala. 109, 44 So. 867 (1907) (stating "minerals," in conveyances of "minerals," means all substances in earth's crust, sought for and removed for substance itself, and is not limited to metallic substances, but includes salt, coal, clay, stone, etc.; deed conveying coal, ores and other minerals and metals in land included conveyance of shale; admission of expert's testimony as to meaning of "minerals" and whether shale at issue constituted "mineral" was proper). *But see Beury v. Shelton*, 151 Va. 28, 144 S.E. 629 (1928) (holding reservation of all metals and minerals of every kind and character whatsoever in and underlying entire body of land, did not include reservation of limestone where it was well-known that land where deed was to operate was "limestone country" and conveyance reserving limestone and right to remove it would reserve practically everything and grant nothing; each case must be decided upon language of grant or reservation, surrounding circumstances, and intention of grantor); *Rock House Fork Land Co. v. Raleigh Brick & Tile Co.*, 83 W.Va. 20, 97 S.E. 684 (1918) (holding conveyance of all coal and other minerals of every kind and description except gas and oil in underlying land, did not include conveyance of clay, where rights granted for removal of such minerals was for mining purposes; plaintiff failed to present evidence that clay fell within terms of grant).

> "minerals" to be applied when determining the inclusion therein or the exclusion thereform of natural gas or oil. This decision established a rule of property which was a recognized part of the law of this state . . . and is a rule upon which the validity of many titles has long since rested. The *Dunham* rule . . . is based upon the popular conception of the meaning of the word "minerals". The rule may be briefly stated: **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**. . . . As a rule of property long recognized and relied upon, the *Dunham* rule binds and controls this situation: that the word "minerals" appears in a grant, rather than an exception or a reservation, in nowise alters the rule. To rebut the presumption established in *Dunham, supra,* that natural gas or oil is not included within the word "minerals" there must be **clear and convincing evidence** that the parties to the conveyance intended to include natural gas or oil within such word.

Highland, supra at 276–77, 161 A.2d at 398–99 (internal citations and footnote omitted) (emphasis added). Additionally, a reservation in a deed does not include natural gas, where the reservation expressly lists oil and various other minerals. *See Bundy v. Myers,* 372 Pa. 583, 584–85, 94 A.2d 724, 725 (1953) (holding deed containing following reservation did not include natural gas: "Excepting and reserving, out of this land, the oil, coal, fire clay and minerals of every kind and character with rights of entry for the purpose of removal of the same . . .").

The *Hoge* case involved a dispute between two parties who owned distinct mineral rights on the same land; the dispute centered on whether the owner of the specific vein of coal, or the owner of oil and gas rights in the surrounding substrata was entitled to recover and develop coal bed gas located within a specific vein of coal. The *Hoge* Court explained:

> [A]s a general rule, subterranean gas is owned by whoever has title to the property in which the gas is resting. When a landowner conveys a portion of his property, in this instance coal, to another, it cannot thereafter be said that the property conveyed remains as part of the former's land, since title to the severed property rests solely in the grantee. In accordance with the foregoing principles governing gas ownership, therefore, **such 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. The landowner, of course, has title to the property surrounding the coal, and owns such of the coal bed gas as migrates into the surrounding property.

Hoge, supra at 147, 468 A.2d at 1383 (internal citations omitted) (emphasis in original).[2] Thus, the coal bed gas contained in the coal belonged to the owner of the coal. *Id.* at 147–48, 468 A.2d at 1383–84.

[16] Instantly, the trial court sustained Appellees' preliminary objections in the

2. Pennsylvania has yet to determine whether shale is analogous to coal in this context, but at least one other jurisdiction has found similarities between the two substances in this context. *See Cimarron Oil Corp. v. Howard Energy Corp.,* 909 N.E.2d 1115 (Ind.App. 2009) (comparing gas in coal and shale formations as similar gases; gas in shale is generally produced in same manner as gas in coal).

nature of a *demurrer,* and dismissed with prejudice Appellants' request for a declaratory judgment that shale gas was included in the reservation of the deed. The court reasoned:

> We are of the opinion that the Supreme Court case of [*Dunham, supra*] controls that issue raised in the trial court. The case held that a reservation in a deed of "all minerals" did not include petroleum oil.
>
> Such has now been the rule of property and conveyancing for over one hundred years. We further note that the deed in question filed in 1881 not having made specific reference to a reservation of natural gas rights, we cannot rely upon other evidence other than the plain language of the deed itself. Oral testimony would not be admissible in the absence of fraud, accident or mistake.
>
> In [*Highland, supra*], the Pennsylvania Supreme Court held that the presumption is that the word "minerals" in a conveyance does not include natural gas. In that case, "the only reservation in the Commonwealth deed was of the coal, fire clay, limestone, iron ore and other mineral that had been heretofore sold and conveyed to third parties." It not being specific as to natural gas the court determined natural gas rights were not conveyed prior thereto to third parties. In the instant matter although petroleum oil is specifically mentioned, there is no specific reservation of natural gas. As such, we deem it not to have been reserved in the Charles Powers' deed. Lastly, the pleadings do not indicate that any of Charles Powers' heirs and assigns made claim to the natural gas rights for a period in excess of one hundred years. We accept this as showing no intent to claim natural gas rights by Charles Powers or his successors, heirs or assigns.

(Trial Court Opinion, filed January 7, 2011, at 1–2) (some internal citations omitted). We respectfully disagree with the court's decision at this point in the proceedings.

The *Dunham* and *Highland* decisions do not end the analysis, absent a more sufficient understanding of whether, *inter alia* (1) Marcellus shale constitutes a "mineral"; (2) Marcellus shale gas constitutes the type of conventional natural gas contemplated in *Dunham* and *Highland;* and (3) Marcellus shale is similar to coal to the extent that whoever owns the shale, owns the shale gas. On this record, we are unable to say with certainty that Appellants have no cognizable claim based on the facts averred. *See Lerner, supra.* Consequently, the parties should have the opportunity to obtain appropriate experts on whether Marcellus shale constitutes a type of mineral such that the gas in it falls within the deed's reservation. *See Consolidation Coal Co., supra.* Accordingly, we reverse and remand for further proceedings.[3]

Order reversed; case remanded for further proceedings. Jurisdiction is relinquished.

3. On appeal, Appellees ask this Court to impose sanctions on Appellants pursuant to Pa. R.A.P. 2744 (stating appellate court may award counsel fees where court determines appeal is frivolous). We deny Appellees' requested relief.