IN THE PENNSYLVANIA SUPREME COURT
MIDDLE DISTRICT

No. 27 MAP 2012

JOHN E. BUTLER AND MARY JOSEPHINE BUTLER, Appellants,

v.

CHARLES POWERS ESTATE, BY CHARLES A. WARREN, ADMINISTRATOR OF THE ESTATE OF CHARLES POWERS, AND CHARLES POWERS, INDIVIDUALLY, HIS HEIRS (WILLIAM PRITCHARD AND CRAIG L. PRITCHARD) AND ASSIGNS GENERALLY, EXECUTORS, ADMINISTRATORS, LEGATEES, GRANTEES AND ALL OTHER PERSONS CLAIMING BY OR THROUGH THE SAID PARTIES AND ALL OTHER PERSONS INTERESTED IN SAID PROPERTY, Appellees.

On allowance of appeal from the May 7, 2011 order and opinion of Superior Court in No. 1795 MDA 2010, reversing the January 27, 2010 decision of the Court of Common of Susquehanna County, Civil Division No. 2009-1141.

BRIEF FOR *AMICI CURIAE* PENNSYLVANIA INDEPENDENT OIL & GAS ASSOCIATION AND THE AMERICAN PETROLEUM INSTITUTE IN SUPPORT OF APPELLANTS

Kevin J. Moody, Esquire
PA Attorney ID No. 34367
Vice President & General Counsel
Pennsylvania Independent Oil & Gas Association
212 Locust Street, Suite 300
Harrisburg, PA 17101-1510
717-234-8525, ext. 113
717-234-8812 (fax)
kevin@pioga.org
Counsel for PIOGA

Harry M. Ng, General Counsel
Benjamin Norris, Counsel
American Petroleum Institute
1220 L St., N.W.
Washington, D.C. 20005
(202) 682-8251
(202) 682-8033 (fax)
Counsel for API

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QUESTION PRESENTED

As set forth in this Court's order granting the Petition for Allowance of Appeal, the question presented is:

> 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.

Suggested response: Yes.

INTRODUCTION

In 1881 Charles Powers conveyed a fee simple interest in land to the predecessors of John E. and Mary Josephine Butler ("Landowners"), "[e]xcepting one-half the minerals and Petroleum Oils to said Charles Powers his heirs and assigns forever . . . ." In a declaratory judgment motion filed in November 2009, the heirs of Charles Powers ("Heirs") claimed title to one-half the *natural gas* in the Marcellus shale – *not* the Marcellus shale – through the reservation of "minerals" by Charles Powers.

In a series of decisions beginning with *Gibson v. Tyson*, 5 Watts 34, 1836 Pa. LEXIS 9 (Pa. 1836) and culminating with *Silver v. Bush*, 213 Pa. 195, 62 A. 832 (1906), this Court enunciated a rule of construction, in the form of a rebuttable presumption known as the "*Dunham* rule,"[1] that parties to a property conveyance or reservation do not intend for the term "minerals" to include oil or natural gas. In these decisions, the Court explained that "[n]othing is thought by [the bulk of mankind] to be [a mineral] unless it be of a metallic nature, such as gold, silver, iron, copper, lead, &c" (*Gibson*) and that the common understanding of mankind is that neither oil nor natural gas is a "mineral" when that term is used in a grant or reservation of property rights (*Silver*). As stated by this Court in *Silver*, the *Dunham* rule reflects the "commercial sense" of the term "minerals" as "most commonly used in conveyances and leases of land."

When reaffirming the *Dunham* rule in 1960, this Court succinctly described the rule: "[I]f, in connection with the 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." *Highland v. Com.*, 400 Pa. 261, 276, 161 A.2d 390, 398 (1960). Six times between 1836 and

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1 *Dunham and Shortt v. Kirkpatrick*, 101 Pa. 36 (1882), hereinafter *Dunham*.

1960 this Court conclusively stated, restated and reaffirmed the understanding of the bulk or mass of mankind that the use of the term "minerals" to convey or reserve a property interest is limited to metallic substances or, as stated in *Hendler v. Lehigh Valley Railroad Company*, 209 Pa. 256, 260, 58 A. 486, 487 (1904),[2] substances that "have a value of their own, apart from the rest of the land, sufficient to induce the expense and labor of severance for their own sakes" – unless shown by the words used or parol evidence of actual intent to include non-metallic substances, other than oil or natural gas. In none of these cases, or their progeny, was a distinction made between "conventional" and "unconventional" natural gas and, as explained below, *United States Steel Corp. v. Hoge*, 503 Pa. 140, 468 A.2d 1380 (1983), neither requires nor supports such a distinction.

The *Dunham* rule renders unnecessary an evidentiary inquiry into whether the plain meaning or common understanding of the term "minerals" in a grant or reservation includes oil or natural gas. Consequently, scientific or historic evidence that, in the absence of the *Dunham* rule, might have been considered by a court in order to establish the plain meaning or common understanding of the term "minerals" at the time of the conveyance is no longer relevant as a matter of law. The only relevant evidence is that which shows that the parties to a particular conveyance "actually intended" for the term "minerals" to be given a meaning other than the plain, common meaning determined by this Court.

However, the deed language in the case singularly relied upon by the Superior Court as authority for its remand, *Hoge*, did not invoke the *Dunham* rule because the conveyance was of coal and the reservation was "the right to drill and operate *through* said coal for oil and gas without being held liable for any damages." (Emphasis added.) In the *Hoge* conveyance and

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[2] *Hendler* was overruled on other grounds in *Hall v. Delaware, Lackawanna & Western Railroad Co.*, 270 Pa. 468, 113 A. 669 (1921).

reservation, the terms "mineral" or "minerals" were not used, and oil and gas were specifically mentioned. Nonetheless, based on *Hoge*, the Superior Court remanded the case for the introduction of scientific and historical evidence of whether *Marcellus shale* is a mineral – the type of evidence this Court on numerous occasions has determined is insufficient to rebut the *Dunham* rule – even though the claim of the Heirs in the trial court was to *the natural gas* in the Marcellus shale, *not* the Marcellus shale *itself*.

By stating in *Hoge* that the case involved questions of first impression, this Court indicated that *Hoge* was not controlled by the *Dunham* rule. The Superior Court's use of *Hoge* as a means to attempt to overrule or eviscerate the *Dunham* rule is clear legal error. Even if Marcellus shale is determined to have been intended by the parties to the original conveyance to be included in the term "minerals" – which would be a misapplication of *Hoge* – that determination only gets the Heirs half the way to where they want to be, because the *Dunham* rule nonetheless prevents them from getting all the way there because inclusion of "shale" in the reservation of "minerals" still doesn't include the natural gas *in* the shale because the *natural gas* – unlike the Petroleum Oils – was not specifically reserved as required by the *Dunham* rule.

The *Dunham* rule, having been "long recognized and relied upon," became fixed in the law by the doctrine of *stare decisis* and has become a rule of property that binds and controls the instant dispute, as the trial court determined. As this Court has emphasized: "It is our duty to apply the rules governing the titles of real property according to the precedents that have become rules of property, and to avoid unsettling them." *Malamed v. Sedelsky*, 367 Pa. 353, 359, 80 A.2d 853, 856 (1951). Such rules of property "should not be overthrown except of compelling reasons of public policy or the imperative demands of justice." *Smith v. Glen Alden Coal Co.*, 347 Pa. 290, 302, 32 A.2d 227, 234 (1943).

The matter before this Court provides neither case nor cause to overrule or even revisit a rule of property that, to borrow words of this Court from a similar context, has been "consistently followed by an appellate court over so long a period that is has become fundamentally imbedded in the common law of the Commonwealth. . . . Otherwise the law would become the mere football of the successively changing personnel of the court, and 'the knowne certaintie of the law', which Lord Coke so wisely said 'is the safetie of all', would be utterly destroyed." *Burtt Will*, 353 Pa. 217, 231-32, 44 A.2d 670, 677 (1945). The circumstances of this case cry out for this Court's reaffirmation of the application of the doctrine of *stare decisis* to the *Dunham* rule. The Superior Court decision under review here has raised significant legal and practical concerns about the legality of tens of thousands of oil and gas leases through which the development of natural gas resources and the payment of royalties has occurred and continues to occur.

STATEMENT OF INTEREST OF *AMICI*

The Pennsylvania Independent Oil and Gas Association of Pennsylvania ("PIOGA") is the principal nonprofit trade association representing more than 800 independent oil and natural gas producers, drilling contractors and service companies in Pennsylvania. PIOGA's members own and operate the majority of the oil and natural gas wells in Pennsylvania, including wells extracting gas from the Marcellus and other shale formations. PIOGA's members also include manufacturers, professional firms and consultants, royalty owners, and others with interests in Pennsylvania's oil and gas industry.

The American Petroleum Institute ("API") is a national trade association representing more than 500 companies involved in all aspects of the oil and natural gas industry. America's oil and natural gas industry comprises more than 7.7% of the U.S. economy, supports 9.2 million domestic jobs, delivers more than $86 million a day in revenue to the U.S. government, and since 2000 has invested more than $2 trillion in U.S. capital projects to advance all forms of energy,

including alternatives. API's member companies include natural gas producers, processors, suppliers, pipeline operators, and service and supply companies. API's members have invested billions of dollars in Pennsylvania in order to develop the natural gas found buried deep within the Marcellus Shale.

Natural gas extraction, especially from the Marcellus shale formation, is creating jobs, spurring local spending, and generating millions of dollars in tax revenue for the Commonwealth – and, as a result of Act 13 of 2012, hundreds of millions of dollars of new local impact fees are anticipated to directly benefit the people of this Commonwealth, state agencies and local governments. It is clear that natural gas extraction is playing a key role in Pennsylvania's recovery from the recent economic downturn. In 2010, natural gas companies paid over $1.6 billion in lease and bonus payments to Pennsylvania landowners, and, by 2020, the natural gas industry is expected to provide a total economic impact of $20.2 billion and 256,000 jobs for the Commonwealth, with more than $2 billion in state and local tax revenues. Timothy J. Considine, *et al.*, The Pennsylvania Marcellus Natural Gas Industry: Status, Economic Impacts and Future Potential (July 20, 2011).[3] The Governor's Marcellus Shale Advisory Commission Report confirms the significant role of shale gas extraction in Pennsylvania's economy:

> The development of vast natural gas resources trapped beneath more than half of Pennsylvania has created tens of thousands of new jobs, generated billions of dollars in tax and lease revenues for the Commonwealth and its citizens, infused billions of additional dollars in bonus lease and royalty payments to landowners, and significantly expanded access to clean, affordable energy sources for residential, commercial and industrial customers.

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[3] *Available at* http://marcelluscoalition.org/category/library/studies-and-reports/.

The Governor's Marcellus Shale Advisory Commission Report, p. 7 (July 22, 2011).[4] It is expected that the impact fees generated by Act 13 will exceed $650 million over the next three years.[5]

Members of PIOGA and API have a significant investment in developing natural gas across the Commonwealth. As part of the surge in natural gas development associated with production from the Marcellus shale, vast property interests have been acquired, correspondingly large investments have been made, thousands of employees have been hired, and materials, equipment and other resources have been deployed across the Commonwealth. The natural gas industry is playing a key role in Pennsylvania's recovery from the economic downturn by creating jobs.

The issues now before this Court are of critical importance to PIOGA and API – and to the continued improvement of Commonwealth's economy. The decision under review, which contradicts longstanding Supreme Court precedent, threatens the integrity of tens of thousands of property interest arrangements negotiated and executed over more than 100 years. To eliminate the unwarranted uncertainty created by the Superior Court's decision, and to restore predictability in the rule of law in this Commonwealth, the question to be decided must be answered "YES."

By this brief, *Amici* PIOGA and API support Appellant Landowners (the Butlers) and explain why the *Dunham* rule governs and controls the result in this appeal, as the trial court correctly determined. *Amici* respectfully submit that this Court should restore necessary and

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[4] The Governor's Marcellus Shale Advisory Commission Report can be found at http://pa.gov/portal;server.pt/community/marcellus_shale_advisory_commission/20074.

[5] February 14, 2012 press release by Governor Corbett, *available at* http://www.governor.state.pa.us/portal/server.pt?open=18&objID=1224373&mode=2 (last visited May 6, 2012).

essential stability in the oil and natural gas industry by reaffirming that the *Dunham* rule controls whenever the question is whether the parties to a conveyance or reservation of "minerals" intended to grant or reserve oil or natural gas.

ARGUMENT

I. DERIVATION OF THE *DUNHAM* RULE

In a series of decisions from 1836 to 1906, this Court enunciated a rule of property, in the form of a rebuttable presumption that became known as the *Dunham* rule, that parties to a property conveyance or reservation do not intend for the term "minerals" to include oil or natural gas. In the first of these decisions, the Court explained that "[n]othing is thought by [the bulk of mankind] to be [a mineral] unless it be of a metallic nature, such as gold, silver, iron, copper, lead, &c". *Gibson*, 5 Watts at 41, 1836 Pa. LEXIS at *19. In the last of these decisions, this Court determined that the common understanding of mankind is that natural gas is not a "mineral" when that term is used in a grant or reservation of property rights. *Silver*, 213 Pa. at 199, 62 A. at 833-34. A couple of years before *Silver*, this Court described the scope of substances included in a grant or reservation of "minerals" as substances that "have a value of their own, apart from the rest of the land, sufficient to induce the expense and labor of severance for their own sakes." *Hendler*, 209 Pa at 260, 58 A. at 487. In *Silver*, this Court stated that *Hendler* "announced no new principle, nor any departure from the line of previous decisions," and explained that the *Dunham* rule reflects the "commercial sense" of the term "minerals" as "most commonly used in conveyances and leases of land." *Silver*, 213 Pa. at 199, 62 A. at 833.

This rule of property became known as the *Dunham* rule, based upon this Court's decision in *Dunham and Shortt v. Kirkpatrick*, 101 Pa. 36 (1882), which involved a claim to oil under a reservation of "all minerals." 101 Pa. at 43. Pointing out that the claim to the oil "can be sustained only under the hypothesis that the word 'minerals' in the reservation included

petroleum," this Court proceeded to ascertain the common understanding of the word "minerals." Based on the rule first enunciated in *Gibson*, this Court concluded that the common understanding of the word "minerals" when used in a grant or reservation of property rights does not include oil. The Court first determined that if the reservation was as broad as claimed, "it is as extensive as the grant, and therefore void." 101 Pa. at 43. Accordingly, the Court was required to determine the scope of the interest reserved:

> If, then, anything at all is to be retained for the vendor, we must, by some means, limit the meaning of the word 'minerals.' But the rule by which this may be done is well stated by Chief Justice Gibson in the case of the *Schuylkill Navigation Co. v. Moore*, 2 Whart. 477, as follows: 'The best construction is that which is made by viewing the subject of the contract as the mass of mankind would view it; for,' continues the learned chief justice, 'it may be safely assumed that such was the aspect in which the parties themselves viewed it.'

Id. Accordingly, this Court concluded that: "Certainly, in popular estimation petroleum is not regarded as a mineral substance any more than is animal or vegetable oil, and it can, indeed, only be so classified in the most general or scientific sense." 101 Pa. at 44. This Court reaffirmed prior determinations that parties to grants or conveyances of property rights "think and write" not as scientists, but "as business men, using the language and governed by the ideas of every-day life." This Court also explained the situation in *Dunham*, in words equally applicable to the situation now before this Court:

> [The parties to the contract] were, doubtless, at that time unaware of the character of the property as oil territory. But if they did entertain such an idea, and expected to reserve oil under the general term "mineral," they were mistaken, and should have known that they were using that word in a manner not sanctioned by the common understanding of mankind, hence, in a manner that could not be approved by the courts of justice.

The complete absence of any facts to show the intent of Charles Powers with respect to the original property reservation now before the Court makes clear that Charles Powers was "doubtless, at that time unaware" if the Marcellus shale located more than a mile beneath the

surface had value to justify being mined or, more importantly, whether there was natural gas within the shale that could be recovered. As in *Dunham*, if Charles Powers was aware of the possibility of recovering natural gas from the Marcellus shale, and expected to reserve the natural gas under the general term "minerals," he was mistaken.

As stated above, relying on the common understanding of "minerals" enunciated in *Dunham* as not including oil, this Court in *Silver* concluded that "a fortiori, natural gas would not be so included." *Silver*, 213 Pa. at 199, 62 A. at 833. This Court explained that "[t]o take any case out of [the *Dunham* rule's] operation[,] the evidence must be clear and convincing that the parties [to the conveyance] used the words in a different sense." *Id.* at 199, 62 A. at 833-34.

Seven years after *Silver*, in *Preston v. South Penn Oil Company*, 238 Pa. 301, 86 A. 203 (1913), this Court considered a claim to oil and gas under an 1876 reservation of "all mineral and mining rights and the incidents thereto, whatever." 238 Pa. at 302, 86 A. at 203. This Court stated that the claim "was squarely ruled by the decision in *Dunham*" and rejected the claim because "[t]here was no evidence at trial to show that the parties to the deed intended the word mineral to include petroleum or gas or that the word had acquired a meaning in conveyancing which would include them." *Id.* This Court concluded its decision by stating: "*Dunham v. Kirkpatrick* has been the law of this State for thirty years and very many titles to land rest upon it. It [the *Dunham* rule] has become a rule of property **and it will not be disturbed.**" 238 Pa. at 304, 86 A. at 204 (emphasis added). Forty years after *Preston*, this Court again reaffirmed the *Dunham* rule in *Bundy v. Myers*, 372 Pa. 583, 587 94 A.2d 724, 726 (1953): "*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."

Most recently, this Court reaffirmed the *Dunham* rule in *Highland v. Commonwealth*, 400 Pa. 261, 276, 161 A.2d 390, 398 (1960), concisely stating the rule: "[I]f, 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." In rejecting a claim that two conveyances of "other minerals" conveyed natural gas, this Court applied the *Dunham* rule because "[a]s a rule of property long recognized and relied upon, the *Dunham* rule binds and controls this situation." 400 Pa. at 276-77, 161 A.2d at 398-99.[6]

In none of these cases did this Court distinguish between different "types" of natural gas, such as the distinction between "conventional" and "unconventional" natural gas that the Heirs rely upon. Moreover, the Heirs' distinction is a fallacy. While it may be correct to refer to a production method or even a formation as "conventional" or "unconventional,"[7] there is no "conventional" or "unconventional" natural gas *per se*. And despite the similarities between coalbed gas and "traditional" natural gas noted in *Hoge*, this Court distinguished coalbed gas in *Hoge* based upon the unique nature of coal and the problems created for coal owners by the natural gas found therein – considerations not present in the appeal now before the Court:

> Coalbed gas is found in and around coal veins, having long been recognized by the mining industry as a highly combustible and deadly poisonous gas which must be, at all times during the active coal mining process, ventilated to prevent

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6 *Highland* did not, as Superior Court postulated in *Butler*, "expand[] the *Dunham* rule." *Butler v. Charles Powers Estate*, 29 A.3d 35, 41 (2011). Rather, in *Highland*, this Court, once again, reaffirmed the *Dunham* rule as the long-settled law of Pennsylvania that controls a claim to natural gas under a conveyance of "minerals."

7 For example, Act 13 of 2012 imposes a new local impact fee on production from an "unconventional formation", which is defined in 58 Pa. C.S. § 2301 by formation (Marcellus and other shale) and by production method ("vertical or horizontal well bores stimulated by hydraulic fracture treatments or by using multilateral well bores or other techniques to expose more of the formation to the well bore").

explosion or inhalation; hence, the gas has traditionally been wasted into the atmosphere.

503 Pa. at 145, 468 A.2d at 1382. As explained below, this Court's distinction in *Hoge* between coalbed gas and conventional natural gas is based upon the unique nature of coal and the problems created for coal owners by the natural gas found therein – considerations not present in the appeal now before the Court. Accordingly, *Hoge* is limited by its facts and provides no valid basis for the Superior Court's decision. The *Hoge* case involved an ambiguous reservation to extract gas and not the meaning of the term "minerals."

II. THE *DUNHAM* RULE APPLIES TO THE RESERVATION BEFORE THIS COURT

The reservation at issue in this case should – as in *Silver*, *Preston*, *Bundy* and *Highland* – be controlled by the *Dunham* rule, and the claim of the Heirs to the natural gas in the Marcellus shale denied and the Superior Court's decision reversed or vacated.

As stated above, this appeal involves a claim by the Heirs of the original grantor to natural gas within the Marcellus shale under a deed reservation to "one-half the minerals and Petroleum Oils." As the Heirs were "of the opinion that the above reservation DOES include the gas which may be recovered from Marcellus Shale,"[8] the trial court applied the *Dunham* rule, sustained the Butlers' demurrer to the Heirs' claim, and dismissed the Heirs' declaratory judgment motion, with prejudice. Superior Court quoted an extended portion of the trial court opinion, in which *Dunham* and *Highland* were discussed, but instead of explaining why these precedents did not control, Superior Court simply said, "We respectfully disagree with the [trial] court's decision at this point in the proceedings." *Butler v. Charles Powers Estate*, 29 A.3d 35, 43 (2011). Making no effort to distinguish *Dunham* and its progeny, or to explain why they did

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[8] Heirs' Motion for Declaratory Judgment (¶4 of allegations) (capitalization in original).

not apply, the Superior Court simply disagreed that the *Dunham* rule controlled and "ended the analysis." *Id.* Superior Court, as noted in the issue this Court identified for resolution, then remanded "for the introduction of scientific and historic evidence about the Marcellus shale and the natural gas contained therein." Superior Court erred because this is exactly the type of evidence this Court has concluded, in numerous decisions, is insufficient as a matter of law to rebut the *Dunham* rule.

A. The *Dunham* Rule Supplies the Common Understanding of "Minerals" in a Conveyance, Rebuttable Only by Evidence of Actual Intent

In *Dunham*, this Court applied traditional rules of deed construction to determine that the common understanding of the term "minerals," in a conveyance of "minerals" does not encompass oil. In *Silver*, this Court recognized that if the common understanding of "minerals" in a conveyance did not include oil, it even more conclusively (i.e., *a fortiori*) did not include natural gas. As recognized by this Court in *Silver* and subsequent decisions, this common understanding that a conveyance of "minerals" does not include oil or natural gas is a long-standing rule of property law applicable to any conveyance or reservation of "minerals." *See Preston, Bundy, Highland.* As a rule of law, it places the burden on the party so claiming to show, by clear and convincing evidence, that a conveyance of "minerals" was intended to include oil or natural gas. *See Silver, Preston, Bundy, Highland.* Stated another way, the *Dunham* rule only invites evidence regarding the intent of the parties; it is wholly unconcerned with historical, scientific, and other extraneous evidentiary matters.

1. Traditional Rules of Construction

As this Court recognized in *Dunham*, "[t]he best construction is that which is made by viewing the subject of the contract, as the mass of mankind would view it; for it may be safely assumed that such was the aspect in which the parties themselves viewed it." 101 Pa. at 43

(quoting *Schuylkill Navigation Co. v. Moore*, 2 Whart. 477, 491 (1837)). "Absent the plain meaning rule, nary an agreement could be conceived which, in the event of a party's later disappointment with his stated bargain, would not be at risk to having its true meaning obfuscated under the guise of examining extrinsic evidence of intent." *Steuart v. McChessney*, 498 Pa. 45, 52, 444 A.2d 659, 663 (1982).

2. The *Dunham* Rule as a Legal Presumption

As a rule of law, the *Dunham* rule has the characteristic feature of a presumption. As this Court explained in *Watkins v. Prudential Insurance Co.*: "A presumption is in its characteristic feature a rule of law laid down by the judge, and attaching to one evidentiary fact certain procedural consequences as to the duty of production of other evidence by the opponent. 315 Pa. 497, 501, 173 A. 644, 647 (1934). As a rebuttable presumption, the *Dunham* rule establishes, as a matter of law, that the common understanding (*i.e.*, the plain meaning) of the term "minerals" in a conveyance of minerals does *not* include oil or natural gas.

The presumption created by the *Dunham* rule may be overcome *only* by evidence that the parties to a particular transaction actually intended the term "minerals" to grant or reserve oil or natural gas. As this Court stated in *Silver*, "clear and convincing" evidence is needed "[t]o take any case out of [the *Dunham* rule's] operation." 213 Pa. at 199, 62 A. at 833-34; *Bundy*, 392 Pa. at 588, 94 A. at 726 (same); *Highland*, 400 Pa. at 279, 161 A.2d at 400 (same).

The *Gibson* case shows the character of evidence required to rebut the *Dunham* rule:

> But it has been objected, that according to the ordinary and common acceptation of the term "mineral," chrome is not included within the exception, because, although properly a mineral, yet, not being a metallic substance, it is not considered by the great mass of mankind as a mineral, and embraced within that term. This objection would certainly have great weight, and perhaps could not be easily overcome, **were it not for the parol evidence, and the facts established by it**. This evidence, however, shows, very clearly, that it was that which is now known to be chrome, that, on the first taking up of the land in which it is found, gave to it the name of "mine land;" **that it was thought to be a metallic ore of**

> **some kind**, and spoken of frequently as containing some gold or silver. From the testimony of Field himself, **it is plain that this is the same material to which Brown had particular reference, when Field talked of buying the land of him; and it cannot be doubted, I think, that he had the term "minerals" introduced into the exception contained in the article of agreement, for the especial purpose, it would seem, of embracing it,** let it be what it might, so it were a mineral of more than ordinary value. **Vincent Field says that Brown called it the precious stuff, when he first proposed buying the land of him.**

Gibson, 5 Watts at 42, 1836 Pa. LEXIS at *21-22 (emphasis added).

On the other hand, this Court's evaluation of the record in *Highland* shows the type of evidence that is not sufficient to rebut the *Dunham* rule:

> Neither the language of the deeds, the surrounding circumstances nor the successors in title demonstrate such intent. Any implications which are to be gathered from the language of subsequent conveyances [by the grantor and his successors] as to what was intended in the [conveyances at issue] are wholly negative and lacking entirely of the character of evidence envisioned by our courts as necessary to overthrow the well-established presumption.

Highland, 400 Pa. at 279-80, 161 A.2d at 400.

Likewise, in *Silver*, this Court reviewed offers of proof that had been made to show that a conveyance of "minerals" included gas and, like the trial court, found them wanting:

> The only effort [to show the intent of the parties] was ... that any substance mined or extracted from the land for its own sake is necessarily included in the word "mineral." Under this view offers were made to show that at the date of the deeds the land in that vicinity was already being developed for natural gas, which was known as a marketable commodity. These offers, however, even if proved, were not evidence that the parties used the term 'mineral' in the sense contended for. They could only be ground for inference that the parties might have so intended, while, on the other hand, the offers themselves implied that the including of gas under the term 'mineral' would be a new use of the term, and the inference would be strong that, if the parties intended to include gas, they would have said so expressly.

213 Pa. at 199, 62 A. at 834.

It is clear that the Superior Court remanded for submission of the same type of evidence this Court has rejected numerous times as insufficient to establish whether a grant or reservation of "minerals" includes natural gas.

B. No Averments of Actual Intent Were Made Here

The record before this Court is devoid of evidence or allegations of actual intent necessary to overcome the *Dunham* rule. The trial court correctly concluded that the Heirs made no averments and offered no facts that, if true, would constitute the clear and compelling evidence of actual intent of the parties to the conveyance and reservation at issue needed to rebut the presumption that the reservation does not include natural gas.

A review of the relevant pleadings filed by the Heirs – answer to the Butlers' complaint; motion for declaratory relief, and answer to demurrer – reveals a complete absence of factual allegations concerning the intent of the parties to the conveyance and reservation at issue. This dispute began when the Butlers filed a quiet title action. In response, the Heirs filed a declaratory judgment motion asking the trial court to declare that "Marcellus shale *gas* contained within the shale beneath the Butler lands … is included in the reservation" based solely on the Heirs' statement that they are "of the opinion that the above reservation DOES include the gas which may be recovered from Marcellus Shale." Heirs' Motion for Declaratory Judgment (¶4 of allegations, ¶2 of prayer for relief) (capitalization in original). The trial court applied the *Dunham* rule and sustained the Butler's demurrer to the motion because the Heirs averred absolutely no facts whatsoever in support of their "opinion." *See* Trial Court's January 27 (docketed January 28), 2010 opinion. The Heirs' position was – and is – based solely on legal argument and references to governmental reports and definitions from the late 1800s and early 1900s for the proposition that gas and shale are minerals and likely considered as such by the parties to the conveyance with the reservation of "minerals." *See, e.g.,* Heirs' Superior Court Brief and Reproduced Record.

The Heirs' argument and support are deficient and provide no valid basis for the Superior Court's decision. While governmental reports and definitions from the time period of the deed

might be relevant for purposes of discerning the common understanding of ambiguous language in a conveyance in a case of first impression, this type of evidence is not relevant to rebut the *Dunham* rule that the word "minerals" in the Charles Powers' reservation does not include natural gas. The *Dunham* rule has already established the common understanding and the rule of property that the word "minerals" in a conveyance or reservation does not include natural gas, absent clear and convincing evidence that the parties' actual intent was to include natural gas. Moreover, *Dunham* explicitly built upon this Court's earlier ruling that, for purposes of interpreting the term "minerals" in a land conveyance, absent clear evidence to the contrary, a substance that is "not a metallic substance...is not considered by the great mass of mankind as a mineral, and embraced within that term." *Gibson*, 5 Watts at 42, 1836 Pa. LEXIS at *21-22, cited in *Dunham*, 101 Pa. at 44. Natural gas clearly is not a mineral under this test.

In light of the foregoing, Superior Court necessarily erred when it remanded this matter to the trial court for an evidentiary hearing and submission of scientific and historical evidence and expert testimony whether Marcellus shale is a mineral. While Superior Court referenced this Court's decisions applying and reaffirming the *Dunham* rule as a longstanding rule of property, it concluded without explanation that these cases did not control its decision. *Butler*, 29 A.3d at 43. However, the evidence the Superior Court determined necessary to decide whether the reservation of "minerals" included the natural gas within the Marcellus shale has nothing to do with whether the parties to the conveyance and reservation actually intended the word "minerals" to include either the Marcellus shale or natural gas. The scientific and historical evidence deemed necessary by the Superior Court is a legal nullity for purposes of the *Dunham* rule.

As stated above, the Superior Court's singular reliance on this Court's decision in *Hoge* is misplaced for several reasons. *Hoge* did not involve the meaning of the term "minerals" in a

deed; the decision is unique to conveyances of coal; and it has no application to the type of evidence needed to rebut the presumption of the *Dunham* rule that the word "minerals" in a conveyance does not include natural gas. The Superior Court's erroneous application of *Hoge* to construe the term "minerals" erodes the *Dunham* rule and ignores the intent of the parties to the conveyance before the court as expressed in the words they used.

Hoge involved the construction of a conveyance of coal with a reservation of "the right to drill and operate *through* said coal for oil and gas without being held liable for any damages." 503 Pa. at 144, 468 A.2d at 1381 (emphasis added). The dispute was who had the right to the gas within the coal – the owner of the coal estate or the holder of the reservation. As stated by this Court, "[t]he ownership of, and right to develop, coalbed gas are questions of first impression." Using traditional rules of deed construction, this Court, based in large part on the unique nature of coal and the significant dangers coalbed gas presents to the extraction of coal, concluded that the coal estate included the coalbed gas.

The distinction between a conveyance of coal in *Hoge* and a conveyance of natural gas is critical because the conveyance in *Hoge* also included *"the right of ventilation,"* which allowed the grantee to capture or otherwise dispose of the dangerous coalbed methane.[9] In other words, it was the conveyance of the right of ventilation, not the rights to "all the coal," that would have been determinative of the ownership of the coalbed methane, and why conveyances of coal are fundamentally different than conveyances of natural gas. Coalbed methane can present a safety hazard to coal miners. Indeed, *Hoge* characterized coalbed methane as "a waste product with well-known dangerous propensities[.]" 503 Pa. at 145-46, 468 A.2d at 1382. That practical consideration may have warranted allowing the coal owner to ventilate or capture gas in the coal

[9] *Hoge* relied on scientific and factual evidence that, at the time of the conveyance, the mining industry viewed coalbed gas as dangerous. 503 Pa. at 145-46, 468 A.2d at 1382.

seam – but that consideration is not present here, because no one is mining the Marcellus shale, and ventilation rights are not the subject of conveyance in the natural gas context. Accordingly, there are no comparable dangers associated with the natural gas within shale formations. And, as stated above, the *Dunham* rule cases make no distinction between different "types" of natural gas, such as the "conventional" or "unconventional" distinction asserted by the Heirs and accepted by the Superior Court.

In *Hoge* this Court relied upon *Dunham* for the rules of construction it used to determine the meaning of the language of the conveyance and reservation. *Hoge* at 148-49, 468 A.2d at 1384. Had this Court intended to discard the *Dunham* rule, presumably the Court would have done so in its *Hoge* opinion. That this Court left *Dunham* intact indicates that the Court did not intend to take natural gas out of the realm of "minerals" governed by the *Dunham* rule.

To construe the conveyance and reservation in *Hoge*, this Court had no need to apply the *Dunham* rule nor to distinguish *Dunham* because the conveyance was not one of "minerals" under which the right to oil or gas was claimed, and there was no presumption of common understanding to be rebutted. In *Hoge*, this Court distinguished coalbed methane for reasons totally unique to coal mining, and it therefore holds no guidance for addressing other natural gas conveyances or reservations. Nonetheless, *Hoge* can be viewed as consistent with the *Dunham* rule cases because the explicit reservation to drill *through* the coal for oil and gas clearly did not show an intent to include the right to drill *into* the coal to get the gas.[10]

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[10] "We find more logical and reasonable the interpretation offered by the Appellant that the reservation intended only a right to drill through the seam to reach the unconveyed oil and natural gas generally found in strata deeper than the coal." *Hoge* at 150, 468 A.2d at 1385.

III. THIS COURT SHOULD ONCE AGAIN REAFFIRM THE *DUNHAM* RULE

The *Dunham* rule controls when a claim to natural gas is made based on the conveyance or reservation of "minerals." Under the principle of *stare decisis*, the *Dunham* rule is entitled to the security this Court accords settled law, especially settled rules of property that this Court has applied for well over 100 years and reaffirmed numerous times. This Court's decisions make clear that the *Dunham* rule applies no matter when the transaction occurred. There is neither a reason of compelling public policy nor an imperative demand of justice here to suggest this Court should consider overturning the rule of property now known as the *Dunham* rule. In fact, just the opposite is true. For over 175 years, citizens of this Commonwealth, including the members of the *amici* here, have relied on the principles underlying the *Dunham* rule when acquiring, selling, and developing natural gas and oil reserves throughout Pennsylvania.

Stare decisis is a bedrock principle of Pennsylvania law. "The rule of *stare decisis* declares that for the sake of certainty, a conclusion reached in one case should be applied to those which follow, if the facts are substantially the same, even though the parties may be different." *Commonwealth v. Tilghman*, 543 Pa. 578, 673 A.2d 898, 903 n. 9 (1996); *see also Burtt Will*, 353 Pa. 217, 230, 44 A.2d 670, 677 (1945 (same). "'[*S*]*tare decisis* promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.'" *Stilp v. Commonwealth*, 588 Pa. 539, 600, 905 A.2d 918, 954 n. 31 (2006) (quoting *Randall v. Sorrell*, 548 U.S. 230, 244 (2006)).

This Court has specifically recognized the importance of the reliance fostered by *stare decisis* in connection with judicial decisions involving real property. In *Davis v. Penn. Co. for Insurances on Lives and Granting Annuities*, this Court, in what it termed a "trenchant exposition of the doctrine of stare decisis," stressed:

> We are bound to adhere to a determination of this court settling a rule of property, which has been so often recognized and affirmed. There would be no security for titles, nor could counsel advise with confidence if we were ready to listen to suggestions for the reconsideration of points solemnly determined by our predecessors whenever the courts of some other state or country have adopted a different rule.

337 Pa. 456, 464, 12 A.2d 66, 70 (1940). In *Malamed v. Sedelsky*, this Court reinforced this concept, stating: "It is our duty to apply the rules governing the titles of real property according to the precedents that have become rules of property, and to avoid unsettling them, no matter how morally undeserving the defendants may be." 367 Pa. 353, 359, 80 A.2d 853, 856 (1951). *See also Payne v. Tennessee*, 501 U.S. 808, 827-28 (1991) ("considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved") (internal citations and quotations omitted).

The *Dunham* rule has been long recognized as a rule of property. In *Silver*, 213 Pa. at 199, 62 A. at 834 ("[*Dunham v. Kirkpatrick*] had become a rule of property on which many titles in Western Pennsylvania rested."); *Preston*, 238 Pa. at 304, 86 A. at 204 ("*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."); *Highland*, 400 Pa. at 276-77, 161 A.2d at 398-99 ("As a rule of property long recognized and relied upon, the *Dunham* rule binds and controls this situation."). As this Court stated in *Smith v. Glen Alden Coal Co.*, "[a] rule of property long acquiesced in should not be overthrown except for compelling reasons of public policy or the imperative demands of justice." 347 Pa. at 302, 32 A.2d at 233-34.

As a common law rule of property, the *Dunham* rule is applied to all cases involving conveyances of "minerals," regardless of the date of the transaction. As this Court has

recognized, "judicial decisions have had retrospective operation for near a thousand years." *Gibson v. Commonwealth*, 490 Pa. 156, 163-164, 415 A.2d 80, 84 (1980) (citing *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 372 (1910)) ("I know of no authority for this court to say that ... decisions shall make law only for the future.") (Holmes, J. dissenting). Under this Court's direction, appellate courts are to apply the law in effect at the time an appellate decision is made. *Blackwell v. Commonwealth, State Ethics Commission*, 527 Pa. 172, 182, 589 A.2d 1094, 1099 (1991) ("The general rule followed in Pennsylvania is that we apply the law in effect at the time of the appellate decision. This principle applies with equal force to both civil and criminal proceedings.") (internal citations omitted). *See also Warburton v. White*, 176 U.S. 484, 496 (1900) (when "state court decisions establish a rule of property," the United States Supreme Court will apply that decision to cases before it, even if "the decisions of the state court, from which the rule of property arises, may have been for the first time announced subsequent to the period when a particular contract was entered into").

This retroactive application is illustrated by *First Penn. Bank, N.A. v. Lancaster County Tax Claim Bureau*, 504 Pa. 179, 470 A.2d 938 (1983), which concerned a requirement of notice by publication for a pending tax sale. This Court vacated its earlier decision and remanded for reconsideration in light of the United States Supreme Court decision in *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983), which held that "[w]hen the mortgagee is identified in a mortgage that is publicly recorded, constructive notice by publication must be supplemented by notice mailed to the mortgagee's last known available address, or by personal service." The tax sale at issue in *First Penn. Bank* had occurred more than five years before the decision in *Mennonite Board. See also DiDio v. Philadelphia Asbestos Corp.*, 642 A.2d 1088, 1093 (Pa. Super. Ct. 1994) (applying a decision that asymptomatic pleural thickening was not compensable

as a matter of law to action filed before that decision); *Dempsey v. Pacor, Inc.*, 632 A.2d 919, 924 (Pa. Super. Ct. 1993) (retroactively applying a decision of this Court that abolished recovery of damages for fear of cancer and increased risk of cancer).

Dunham & Shortt v. Kirkpatrick was decided in 1882. The *Dunham* rule was recognized as a rule of property no later than 1906 in *Silver*, 213 Pa. at 199, 62 A. at 834. This Court, in its 1913 decision in *Preston*, implicitly followed the rule that an appellate court is to apply the law in effect at the time of decision, when it applied the *Dunham* rule to an 1876 conveyance. 238 Pa. at 302, 86 A. at 203.

There is no reason of public policy or imperative demand of justice that would compel an overthrow of the *Dunham* rule. Just the opposite is true. The reliance placed on the principles underlying the *Dunham* rule as a rule of property for the last 175 years compels its reaffirmance.

CONCLUSION

For the reasons stated above, this Court should once again reaffirm the *Dunham* rule and reverse or vacate the Superior Court order that remands the matter to the trial court for the submission of scientific and historic evidence that is insufficient as a matter of law either to rebut the Dunham rule or to support overruling it.

Respectfully submitted,

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Kevin J. Moody, Esquire
PA Attorney ID No. 34367
Vice President & General Counsel
Pennsylvania Independent Oil & Gas Association
212 Locust Street, Suite 300
Harrisburg, PA 17101-1510
(717) 234-8525, ext. 113
(717) 234-8812 (fax)
kevin@pioga.org

Harry M. Ng, General Counsel
Benjamin Norris, Counsel
American Petroleum Institute
1220 L St., N.W.
Washington, D.C. 20005
(202) 682-8251
(202) 682-8033 (fax)

CERTIFICATE OF SERVICE

I certify that on May 15, 2012, I caused two copies of the foregoing Brief to be served on the following by first class mail:

Thomas F. Meagher III
Law Office of Michael J. Giangrieco
60 Public Avenue
P.O. Box 126
Montrose, PA 18801
Co-Counsel for John E. and Mary Josephine Butler

Gregory J. Krock
Buchanan Ingersoll & Rooney PC
One Oxford Centre
301 Grant Street, 20th Floor
Pittsburgh, PA 15219-1410
Co-Counsel for John E. and Mary Josephine Butler

Laurence M. Kelly
Kelly Law Office
65 Public Avenue
Montrose, PA 18801
Counsel for Charles Power Estate, William Pritchard and Craig L. Pritchard (the "Heirs")

May 15, 2012

Kevin J. Moody, Esquire
PA Attorney ID No. 34367
Vice President & General Counsel
Pennsylvania Independent Oil & Gas Association
212 Locust Street, Suite 300
Harrisburg, PA 17101-1510
717-234-8525, ext. 113
717-234-8812 (fax)
kevin@pioga.org