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THIRD CIRCUIT FINDS OIL FIELD SERVICE INDUSTRY TRUCK DRIVERS ARE NOT EXEMPT FROM OVERTIME PAY

On May 23, 2016, the United States Court of Appeals for the Third Circuit upheld a finding that two trucking companies violated the federal Fair Labor Standards Act (FLSA) and the Pennsylvania Minimum Wage Act (PMWA) after they failed to produce sufficient evidence to show that the Motor Carrier Act (MCA) exemption to the overtime provisions applied to their employee truck drivers.

In *Mazzarella v. Fast Rig Support, LLC*, a group of truck drivers who haul water to gas well drill sites within Pennsylvania brought a class action lawsuit against their employers. The drivers alleged that they were not properly paid overtime for hours worked in excess of forty hours per week. The truck drivers hauled fresh water from Pennsylvania water sources to natural gas drilling sites located within Pennsylvania. The water was then used to fracture the wells and eventually transported by different truck drivers to Ohio for disposal.

The employers in *Mazzarella* argued that the truck drivers were properly excluded from overtime pay under the MCA exemption. The MCA exemption provides that certain interstate employment activity, most notably involving truck drivers, is exempt from the overtime provisions of the FLSA and the PMWA. The problem with the employers' argument was that the truck drivers who brought the suit only performed transportation services within a single state.

The Third Circuit explained that the MCA exemption only applies to the transportation of property within a single state if the employer can demonstrate that the truck driver's work involves a "practical continuity of movement across state lines." In other words, truck drivers performing transportation services in a single state must be part of a larger, continuous stream of multi-state commerce to fall under the MCA exemption. The Third Circuit listed a four-factor test for addressing continuity of movement across state lines. The employers failed to meet the four factors.

The *Mazzarella* case serves as a stark reminder to employers that the specific details of a business's operations are critical to determining whether its employees are exempt from federal and state overtime requirements. A one size fits all approach will not work. As noted by the Third Circuit, even "minor

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INSIDE SGK

Congratulations to the following Shareholders and Directors for their inclusion in the 2017 Edition of *The Best Lawyers in America*

Edward B. Gentilcore
· Construction Law
· Litigation – Construction

Gary Philip Nelson
· Bankruptcy and Creditor Debtor Rights/Insolvency and Reorganization Law and Litigation – Bankruptcy

John M. Tedder
· Construction Law
· Litigation – Construction

Kenneth J. Yarsky
· Litigation – Real Estate
· Real Estate Law

Best Lawyers Lawyer of the Year 2017

Kenneth J. Yarsky, Shareholder and Director, has been named the Best Lawyers' 2017 Litigation- Real Estate "*Lawyer of the Year*" for the Pittsburgh region. A single lawyer in the noted practice area in each community is honored as a "Lawyer of the Year."

Shareholder, Director and Chair of the Construction Services Group, **Edward B. Gentilcore**, was again recognized and named by Super Lawyers as one of the "Top 50 Lawyers in Pittsburgh" for the year 2016. He was previously named to the "Top 50 Lawyers in Pittsburgh" list in 2015.

Director, **Beverly A. Block**, has been elected to the Board of Governors for the Allegheny County Bar Association. The Allegheny County Bar Association is a legal professional association with more than 6,100 members of lawyers, judges, and legal administrators. The Board of Governors oversees the operation of the Bar Association by coordinating education, advocacy and professional services; promoting equality and diversity among bar association membership; fostering collegiality; advancing the public image of the profession and the highest standards of professional ethics; supporting and advocating for a fair and effective judicial system; and exercising leadership on a local, state, and national level so as to further these goals. Ms. Block focuses her practice on business litigation, employment litigation and employment counseling.

Pennsylvania Supreme Court UPHOLDS TITLE WASHING

In *Herder Spring Hunting Club v. Keller*, 2016 WL 3909038 (Pa. July 19, 2016), the Supreme Court of Pennsylvania concluded that a 1935 tax sale extinguished a prior oil and gas reservation and rejoined the surface and subsurface estates of a tract of land in Centre County. In so ruling, Pennsylvania's highest court upheld a practice commonly known in oil and gas circles as "title-washing."

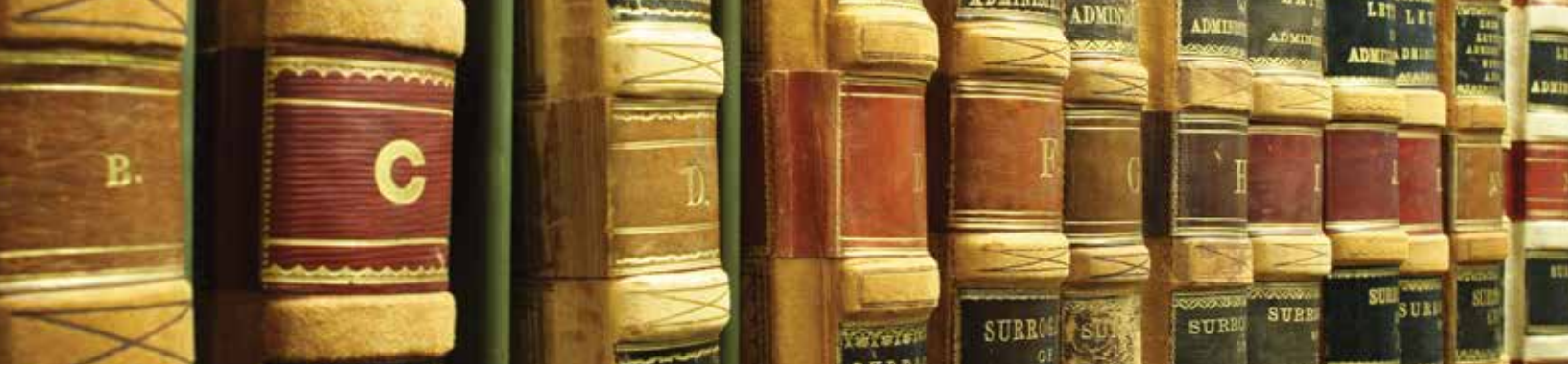
Title-washing, as a practice, emerged from Pennsylvania's past categorization and tax treatment of land. As Pennsylvania's Supreme Court noted in *Herder Spring*, prior to 1947, land in Pennsylvania was categorized as either seated or unseated. Seated land was property that had been developed with residential structures, had personal property upon it that could be levied, or was made profitable via cultivation, lumbering or mining. Unseated land was any land that was not seated, and was best described as "wild." If land was seated, taxes on such land were assessed against the owner thereof, who was personally liable for the payment of such taxes. By contrast, because it was not always practical to identify the owner of unseated land (deeds were not always recorded and there would be no one making active use of the land), it was the land itself that was liable for taxes due for unseated land. Unseated land, like seated land, could be severed into surface and subsurface estates, which could be separately assessed, taxed and, if necessary, sold at tax sale.

The sale of unseated land for unpaid taxes was governed by the Act of 1804, which was amended by the Acts of 1806 and 1815. The Act of 1806 required persons who became owners of unseated land to notify the county commissioners so that taxes on the land could be properly and accurately assessed. The county commissioners were under no obligation to search through deed records in order to determine the current ownership of unseated land.

Because it was the duty of the holder of unseated land to notify the county commissioners of a change in ownership, and because taxes were imposed upon unseated land itself, the failure to notify the county commissioners of an oil and gas severance would result in both the surface and subsurface estates being assessed together. In such a scenario, if the property was sold for unpaid taxes, the oil and gas severance would be extinguished and the surface estate would be reunited with the subsurface estate upon purchase at the tax sale, a process which became known as title-washing. In *Herder Spring*, the Court noted that Pennsylvania had long accepted the concept of a tax sale reuniting severed estates of unseated property.

In *Herder Spring*, the Supreme Court of Pennsylvania analyzed the effect of a 1935 tax sale on an 1899 oil and gas reservation. In 1894, Harry and Anna Keller, ancestors of the Appellants, bought a tract of land in Centre County known as the Eleanor Siddons Warrant. In 1899, the Kellers sold the surface rights to Isaac Beck and family, reserving the subsurface rights, including the oil and gas. Following the sale, the Becks failed to provide notice to the county commissioner of their purchase of the surface rights, as required under the Act of 1806; nor did the Kellers notify the county commissioner of their reservation of the subsurface rights, although this was not required. After various transfers of the surface rights, the Centre County Commissioners acquired title in 1935 as the result of a tax sale, and subsequently sold the property.

In 1959, the Appellee, Herder Spring Hunting Club ("Herder Spring"), purchased the property "subject to all exceptions and reservations as are contained in the chain of title," but without specific reference to the Keller subsurface reservation. In 2008, Herder Spring filed an action to quiet title, claiming that the 1935 tax sale extinguished the Kellers' subsurface reservation. The primary question in the case



was whether the 1935 tax sale included both the surface and subsurface estates.

The Keller heirs first argued that the 1899 deed creating the oil and gas severance was properly filed of record and therefore, placed Centre County on notice of the severance. As a result, they argued, the tax sale only conveyed the surface of the property. As further support for this argument, the Keller heirs noted that the 1936 deed referenced the land "surveyed to Ralph Smith," the surface owner at the time. The Court agreed with the Keller heirs that the Kellers were not required to report the oil and gas severance under the Act of 1806 since they did not "become" a holder of unseated land by selling the surface and reserving the oil and gas. However, because neither the Kellers nor the Becks (the surface purchasers) notified the county commissioners of the change in ownership, the Court concluded that the county commissioners would have assessed the property in its entirety. The Court stated that the county commissioners were under no obligation to search deed records to determine current ownership of unseated land.

The Court also rejected the argument by the Keller heirs that the reference to the surface owner in the 1936 deed indicated that the conveyance was limited to the surface estate. The Court stated that unseated land was assessed and taxed in the name of the Warrant, and any reference to a purported present owner was used only for descriptive purposes.

The Court then dismissed the contention that the tax sale did not include the oil and gas rights because those rights did not have taxable value in 1935, stating that the potential assessable value of the oil and gas is irrelevant as to whether the Warrant was assessed as a whole or not, and that the Kellers' challenge to the assessment should have been brought within the two-year redemption period provided by the Act of 1815. The Court ultimately concluded that the surface estate and the subsurface estate of the Eleanor Siddons Warrant was assessed as a whole, resulting in the sale of both estates and therefore the extinguishment of the Kellers' oil and gas severance.

The Keller heirs also argued that the lack of actual notice of the tax sale violated the due process rights of the Kellers and their heirs. In support of their argument, the Keller heirs cited the U.S. Supreme Court's decisions in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) and *Mennonite Bd. Of Missions v. Adams*, 462 U.S. 791 (1983), which led to greater scrutiny of providing notice by publication in cases involving real property. Under the Act of 1815, notice by publication was permitted as a matter of course. Pennsylvania's Supreme Court, in dismissing this argument, noted that its prior decisions found the notice requirement of the Act of 1815 to be reasonable in light of the difficulty in determining ownership of unseated land and the protection afforded delinquent owners by the redemption period. The Court also assumed for the sake of argument that the U.S. Supreme Court's decisions in *Mullane* and *Mennonite* applied retroactively, and concluded that constructive notice prescribed by the Act of 1815 complied with the mandates of those decisions.

Finally, the Keller heirs argued that Herder Spring could not assert a claim to the subsurface rights because the 1959 deed to it was made "subject to all exceptions and reservations as are contained in the chain of title." On this point, the Court ruled that because the tax sale extinguished the Kellers' reservation, the chain of title contained no reservations at the time of the 1959 deed.

The Court cautioned that its holding would only apply to cases involving quiet title actions for unseated land sold at tax sale prior to 1947, and only where those tax sales did not specify whether the assessment involved the surface or the mineral rights. Despite its limited application, *Herder Spring* illustrates the importance of carefully evaluating the implications of tax sales of land occurring prior to 1947, as these tax sales could affect the present day ownership of the oil and gas rights underlying the property.

If you have any questions or would like more information on the issues discussed above, please contact W. Richard Hathaway, Esquire, or Samuel J. Toney, Esquire at 412-355-0200 or email us at wrh@sgkpc.com or sjt@sgkpc.com.

INSIDE SGK

SGK assisted its long-time client II-VI Incorporated with a syndicated credit facility in the total amount of $425 million ($325 million under a revolving line of credit loan and $100 million under a term loan). The transaction closed on July 28, 2016. The financing transaction was led internally by SGK attorney **Eric C. Springer**, Managing Shareholder and Director, along with **Jeffrey M. Friedrich**, Associate Attorney. Lenders involved in the transaction included PNC Bank, Bank of America, Citizens Bank of Pennsylvania, JPMorgan Chase Bank, and Manufacturers and Traders Trust Company. II-VI Incorporated, a global leader in engineered materials and optoelectronic components and devices, is a vertically integrated manufacturing company that develops innovative products for diversified applications in the industrial, optical communications, military, life sciences, semiconductor equipment, and consumer markets. Headquartered in Saxonburg, Pennsylvania, with research and development, manufacturing, sales, service, and distribution facilities worldwide, the Company produces a wide variety of application specific photonic and electronic materials and components. II-VI Incorporated is a public company, traded on the NASDAQ under the stock symbol IIVI. SGK congratulates II-VI Incorporated and everyone involved in the transaction.

John R. Whipkey, Senior Associate, has been elected to serve a three-year term as a delegate of Zone 12 (Allegheny County) in the Pennsylvania Bar Association's House of Delegates. The PBA's House of Delegates is charged with setting forth the policy of the PBA.

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THIRD CIRCUIT FINDS HYDRAULIC FRACKING RELATED TRUCK DRIVERS ARE NOT EXEMPT FROM OVERTIME PAY

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differences in timing, title to the property being transported, and a predetermined destination for the items being transported can be dispositive of whether the MCA exemption applies." Moreover, there are many other minefields employers must navigate before assuming an employee is exempt from overtime. For instance, the MCA exemption does not apply to "small vehicles", *i.e.* transportation vehicle with a gross vehicle weight rating of 10,000 pounds or less. Given the nuanced issues surrounding the overtime exemptions, employers would do well to reassess their overtime policies on a frequent basis.

If you have any questions or would like more information on the issues discussed above, please contact Suzanne L. DeWalt, Esquire, or Curtis M. Schaffner, Esquire at 412-355-0200 or email us at sld@sgkpc.com or cms@sgkpc.com.

GOVERNMENT CONTRACTORS BARRED FROM DISCRIMINATING AGAINST LGBTQ EMPLOYEES

On April 7, 2016, Pa. Governor Tom Wolf signed an executive order that bars contractors and entities who have been awarded government contracts or grants from discriminating against workers on the basis of sexual orientation or gender identity. Gov. Wolf explained that the order is a first step in explicitly and decisively ending discrimination based on sexual orientation, gender expression, and identity in the Commonwealth. The order also bars any agency under the Governor's jurisdiction (*i.e.* workers in the executive branch of the state government) from discriminating against an employee or applicant on the basis of race, color, religious creed, ancestry, union membership, age, gender, sexual orientation, gender expression or identity, national origin, AIDS or HIV status, or disability. Previously, the law, as applied to all employers in Pennsylvania, only prohibited discrimination on the basis of race, color, religion, ancestry, age, sex, national origin, or disability.

These new measures went into effect immediately and provide protection to tens of thousands of employees in companies that do business with the Commonwealth and who work for the executive branch. Companies that do business with the Commonwealth should be aware that they will be subject to additional scrutiny when it comes to their employment decisions with regard to LGBTQ individuals.

SHERRARD, GERMAN & KELLY, P.C. PROUD SPONSOR OF THE PITTSBURGH VINTAGE GRAND PRIX

Once again Sherrard, German & Kelly, P.C. was a proud sponsor of the 34th annual Pittsburgh Vintage Grand Prix, held each year in beautiful Schenley Park. The attorneys who participated in the sponsorship were **Eric C. Springer**, **Walter R. "Bob" Bashaw**, **Edward G. Rice**, **Matt A. Jarrell**, **Kenneth J. Yarsky**, **Christopher Passodelis**, **W. Chad Pociernicki**, **Timothy R. Stock**, and **Curtis M. Schaffner**.