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IN THE SUPREME COURT OF PENNSYLVANIA

Middle District

NO. 5 MAP 2015

HERDER SPRING HUNTING CLUB,

Appellee,

v.

HARRY KELLER and ANNA KELLER, his wife; J. ORVIS KELLER; ELLIS O. KELLER; HENRY HARRY KELLER; WILLIAM H. KELLER; MARY EGOLF; JOHN KELLER; HARRY KELLER; ANNA BULLOCK; ALLEN EGOLF; MARTIN EGOLF; ROBERT S. KELLER; BETTY BUNNELL; ANN K. BUTLER; MARGUERITE TOSE; HENRY PARKER KELLER; PENNY ARCHIBALD; HEIDI SUE HUTCHISON; REBECCA SMITH; ALEXANDRA NILES CALABRESE; CORRINE GRAHAM FISHERMAN; JENNIFER LAYTON MANRIQUE, DAVID KELLER; MICHAEL EGOLF, and their heirs, successors, executors, administrators and assigns,

Appellants.

REPLY BRIEF OF APPELLANTS

Appeal from the Superior Court's Judgment entered on May 9, 2014, at No. 718 MDA 2013 and reported at 93 A.3d 465, with reargument and reconsideration denied on July 11, 2014, reversing the Judgment entered on March 25, 2013 by the Court of Common Pleas of Centre County at No. 2008-3434

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SUMMARY OF ARGUMENT

The purported Pandora's Box that Appellee Herder Spring Hunting Club and its Amici[1] attempt to evoke in their briefs is meant to distract this Court from choosing a clear and just resolution in this case based on a strict construction of the tax statutes governing the 1935 tax sale. An individual's interest in his or her property is one of the most sacred rights protected since the founding days of this Commonwealth and the United States. Thus, regardless of the seated or unseated nature of the estate being sold, a tax sale conveys to the purchaser only that interest owned by the titleholder and covered by the assessment which led to the sale. Herder would have this Court condone the divestiture of the Kellers' property interests by a narrow legal construct misapplied by modern-day lawyers and the Superior Court below to the facts presented by this case. The result Herder hopes to achieve ignores the instant record, which confirms that (1) the Kellers duly recorded their reserved non-producing oil and gas estate approximately 35 years before the 1935 tax sale and related assessment took place, and (2) the 1935 tax sale was based on an assessment in the name of only the then surface estate owner. That result opens the "Box" to the true injustice in this case and must not be somehow lost in the midst of the unsubstantiated conjecture of chaos that Herder seeks to interject on appeal.

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[1] Unless otherwise indicated, Appellee and its amici will be referred to as "Herder."

A ruling in the Keller heirs' favor is consistent with this Court's prior jurisprudence and will reduce the litigation that Pennsylvania surface estate owners, like Herder, have recently filed in an effort to use early 20th century tax sales to divest duly recorded reservations of nonproducing oil and gas estates that were severed years before any tax sales of the unseated surface estate took place. Reinstating the trial court's decision in favor of the Keller heirs will inject clarity into a field of the law that has been rendered murky by the Superior Court's incorrect ruling that tax sales involving unseated (but not seated) "lands" can strip an unsuspecting owner of his or her properly recorded nonproducing oil and gas interests even if they were never assessable or otherwise taxable.

The Keller heirs have provided this Court with a clear path to resolve this dispute: namely, a strict construction of the Act of 1806[2] and the related unseated land tax statutes necessitates a finding that the Kellers and their heirs did not lose their property rights during a "gotcha" tax sale in 1935. That path is warranted by due process and is not barred by any statute of repose or limitations or concerns over waiver. Accordingly, this Court should reverse the Superior Court's decision and reinstate the trial court's summary judgment in this case.

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[2] **Act of March 28, 1806, 4 Sm.L. 346, *repealed and restated by* 72 P.S. § 5020-409** ("Act of 1806").

ARGUMENT

I. NEITHER THE UNSEATED LAND TAX STATUTES NOR THIS COURT'S JURISPRUDENCE PROVIDE THAT A DULY RECORDED RESERVATION OF A NONPRODUCING OIL AND GAS ESTATE CAN BE DIVESTED THROUGH A SUBSEQUENT "TITLE-WASHING" OF THE UNSEATED SURFACE ESTATE.

In its briefs, Herder goes to great lengths to convince this Court that the Act of 1806 and the related unseated land laws support the Superior Court's decision in this case. However, like the Superior Court below, Herder does not engage in any statutory construction of the Act of 1806 or the other tax statutes.[3] Nor do Herder dispute this Court's repeated admonition that a local authority's power to tax is statutory and that tax laws "shall be strictly construed" and cannot be extended by implication or construction to things not identified as the subject of taxation. ***Greenwood Gaming & Entertainment, Inc. v. Com., Dep't of Revenue*, 90 A.3d 699, 710-711 (Pa. 2014).** Moreover, such lack of statutory construction is noteworthy, since the very first question that this Court asked the parties to address

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[3] Amicus Range Resources accuses the Keller heirs of "nitpick[ing] around the edges of the statute" but does not itself construe the Act of 1806. Instead, Range Resources relies on ***Bannard v. New York State Natural Gas Corp.*, 293 A.2d 41 (Pa. 1972)** and ***Duquesne Natural Gas Co. v. Fefolt*, 198 A.2d 608 (Pa. Super. 1964)**, to argue that a severance of oil and gas constitutes an estate in "land." (Range Resources Br., pp. 13-14). However, in neither case did the courts engage in any statutory analysis. ***Bannard*, 293 A.2d at 47-49**; ***Duquesne Natural Gas*, 198 A.2d at 610**. As such, these cases provide no authority to the meaning of the term "lands" or the proper construction of the Act of 1806 and related tax laws. ***Allebach v. Dep't of Fin. Revenue*, 683 A.2d 625, 628 (Pa. 1996)** (rejecting reliance on case law when the tax statute's plain meaning is clear).

is whether the Superior Court erred by failing to engage in such an analysis. ***Herder Spring Hunting Club v. Keller,* 108 A.3d 1279 (Pa. 2015).**

Herder's failure to engage in any statutory construction of the Act of 1806 and the related tax laws makes sense, though, because it exposes the fallacy of its position. A plain reading of the critical terms of these tax statutes clearly establishes that (1) the term "lands" refers to only the surface estate and not subsurface oil and gas interests; (2) only the party "becoming" the owner of the unseated surface estate has an obligation to report his or her subsequently acquired interest and not the previous owner of the whole fee that reserves an interest in the nonproducing oil and gas; and (3) the four-fold tax penalty is the only remedy contemplated by the statute for failing to report one's subsequent interest in the unseated surface estate, rather than divesture of one's recorded subsurface oil and gas interest based on an assessment made in the name of only the then surface estate owner.[4] *See* Brief of Appellants, pp. 20-25; Brief Of Amici Curiae Trustees

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[4] Herder argues that if this Court were to actually enforce the Act of 1806 as written (which it must), then the Kellers never would truly incur a penalty for refusing to pay the tax. (Appellee's Br. at 25.) This logic is tortured. The Act of 1806 is clear that the four-fold tax, once assessed, is to be collected in the same manner as the procedures that apply to the assessment and collection of taxes for unseated lands. **72 P.S. § 5020-409.** That part of the statute, like others, seems to be lost on Herder.

Also, Amicus Seneca Resources seeks to conflate the Act of 1806's four-fold penalty collection clause with the reporting duty that is imposed upon those "becoming a holder of unseated lands." (Seneca Resources Br., p. 11). However, as written, the Act of 1806 clearly provides that the sole remedy for failure to report is the assessment of the four-fold tax which, once assessed, can be enforced "in the manner that other taxes on unseated lands may be assessed and collected."

Of The Thomas E. Proctor Heirs Trust, Trustees Of The Margaret O.F. Proctor Trust, Hoyt Realty, LLC, and Thorne Heritage Resources, LLC, pp. 11-20.

In order to divert this Court's attention from the fact that a strict statutory construction is fatal to their position, Herder argues that this Court has previously ruled that due to the *in rem* nature of an unseated land tax sale, any prior recorded severance of an oil and gas estate or mineral interest passes to the tax sale purchaser unless affirmative evidence exists of the subsurface owner's compliance with the Act of 1806. *See* Herder's Brief, pp. 7-26; Brief of Amicus Curiae SWN Production Company, LLC, pp. 11-26; Brief of Amicus Curiae Seneca Resources Corporation, pp. 5-21. However, an examination of this Court's earlier decisions concerning the title that one acquires from an unseated land tax sale reveals that this argument is without merit.

A. *"Title Washing" Is A Judicial Construct That Remedies Defective Titles Held By Unseated Landowners But Does Not Divest Third-Party Estates or Interests, Including Nonproducing Oil and Gas Estates, That Are Separately Held And Recorded Before The Tax Assessment.*

Because early taxation of unseated lands was an *in rem* obligation, this Court declared that an unseated landowner could default on the payment of real estate taxes and purchase the assessed property at the treasurer's sale as may be done by a

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72 P.S. § 5020-409. *See also* ***Harper v. Farmers' & Mechanics' Bank,*** **7 Watts. & Serg. 204, 213 (Pa. 1844).**

stranger to the title. ***Powell v. Lantzy*, 34 A. 450, 451 (Pa. 1896).** Further, the subsequent payment of the assessed taxes by the defaulting owner/now tax sale purchaser was not considered to be a redemption. ***Id.*** More importantly, because the unseated land tax laws provided that "[s]ales of unseated lands for taxes ... shall be, in law and equity, valid and effectual, to all intents and purposes, to vest in the purchaser or purchasers of the land sold as aforesaid, all the estate and interest therein, that the real owner or owners thereof had at the time of such sale, although the land may not have been taxed or sold in the name of the real owner thereof," *see* **Act of Apr. 3, 1804, P.L. 517, 522 § 5, 4 Sm. 203**, this Court declared that "there is nothing in reason or law to prevent a man who holds a defective title [in unseated lands] from purchasing a better [one] at a treasurer's sale for taxes" and that '[i]t is a very common remedy for defective titles." ***Coxe v. Gibson*, 27 Pa. 160, 165 (1856).**

Hence, "title washing" in early Pennsylvania tax parlance was a means by which an unseated landowner could cure any defects in his former title by defaulting on the real estate taxes and then purchasing the assessed property at the subsequent tax sale, having vested in him all "estate and interest" sold. ***Id.*** In such circumstance, the title was "washed," because the tax sale "extinguishes all previous titles" in the assessed unseated land. ***Reinboth v. Zerbe Run Improv. Co.*, 29 Pa. 139, 145 (1858).**

However, "title washing" **does not** wipe out or destroy estates or interests that are recorded and held by others and thus not part of the assessment. Rather, "[i]t is the 'estate and interest . . . [of] the real owner or owners' of the land sold, which passes by the sale, and not some other estate or interest, which the 'real owner or owners' did not have." ***Tide-Water Pipe Co. v. Bell*, 124 A. 351, 355 (1924).** Consequently, the title which a purchaser acquires under the unseated land tax laws is limited to that of the "real owner or owners" of the property assessed and sold at the tax sale. ***Id.***[5]

This Court reached this conclusion because, unless altered by legislation, courts must strictly adhere to property rules. ***Tide-Water*, 124 A. at 354.** Moreover, whether the duly recorded estate or interest is separately taxed is immaterial. ***Id.*** Indeed, in *Tide-Water*, this Court expressly rejected the failure to have one's prior recorded estate or interest separately taxed as a basis to extend "title washing" to divest such third-party estates or interests. ***Id.*** ("it is evident that if [ground rent] was 'an estate and interest ... [in the land] that the real owners thereof had at the time of such sale,' it would be divested because of the Act of

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[5] Herder attempts to distinguish *Tide-Water* by arguing that there is a difference between an easement and a reserved oil and gas estate. However, this Court made clear that the nature of the interest is not important in determining what title is held by the unseated land tax sale purchaser ***Tide-Water*, 124 A. at 353**. Rather, the pertinent question is what is the title of the "real owner or owners" of the taxed and sold property, for it is only that title which the tax sale purchaser acquires and not "an interest of some other owner, not taxed or referred to in the statute." ***Id.* at 355.**

1804, whether or not it was separately taxed, and if it was not such an estate or interest it would not be divested, whether or not separately taxed.").

The same conclusion holds true when the rule of property concerns a landowner's right to dispose of nonproducing oil and gas rights by severance via a recorded deed. ***F. H. Rockwell & Co. v. Warren County*, 77 A. 665 (1910).** Indeed, in *Rockwell*, this Court held that the argument that the right of severance for taxation purposes is different depending on whether the property is seated versus unseated is "unsound and results from a confusion of the rights of owners in dealing with their own estates and the power of taxing authorities in the levy and assessment of taxes." ***Id.*** As this Court explained:

> The authority to tax and the manner of its exercise has nothing to do with the right of the owner either to hold his tract of land entire or to sever it by the grant of different estates therein. The tax is assessed upon the property to be taxed, and that property may consist of the entire tract, or of the surface, or of the minerals, ***depending upon whether or not there has been a severance.*** ... For convenience growing out of the difficulties of ascertaining the owners, and other like considerations, the legislature provided a somewhat different method of making assessments of unseated lands and of collecting taxes levied against them, but ***these tax laws were not intended to and did not interfere with the right of the owner to dispose of his lands by severance or otherwise as to him might seem most advantageous. Most certainly the legislature did not intend by and through tax laws to make a distinction between the owners of seated and unseated lands as to the right of severance.***

***Rockwell*, 77 A. at 665-666** (emphasis added). Accordingly, this Court declared:

> [W]here there is a divided ownership in unseated lands, the surface being owned by one party and the minerals by another party, the surface is subject to assessment for taxes as unseated land and a tax deed would convey the title to the surface only if the tax was assessed against the surface only, and the minerals severed are subject to separate assessment in the same manner as the surface and a tax title to the minerals when properly assessed and sold for the payment of taxes would convey a good title to the minerals.

***Id.* at 666.**

In light of the above, as well as this Court's further holding in *Rockwell* that a mere deed reservation of oil and gas rights does not create a taxable estate without production,[6] Pennsylvania state and federal courts have rejected the arguments advocated by Herder as to the divesture of a severed nonproducing oil and gas estate based on an unseated surface estate tax sale for an assessment that was made after the severance's recording. *See, e.g.*, ***Day v. Johnson*, 31 Pa. D. & C. 3d 556, 558-561 (C.C.P. Warren C'ty 1983); *New Shawmut Mining Co. v. Gordon*, 43 Pa. D. & C. 2d 477, 488-494 (C.C.P. Clearfield C'ty 1963); *New York State Nat'l Gas Corp. v. Swan-Finch Gas Devel. Corp. ("Swan-Finch")*, 173 F. Supp. 184, 191 (W.D. Pa. 1959), *aff'd* 278 F.2d 577, 579-580 (3d Cir. 1960).** As the trial court below correctly noted, because Herder admits that the Kellers' severed

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[6] ***Rockwell*, 77 A. at 666.**

oil and gas interests were not assessed prior to the 1935 tax sale and "because the property was undisputedly unseated and was not under production at any time prior to the tax sale to Max Herr, the subsurface rights were not conveyed to Max Herr as the prior owner did not possess the subsurface rights." (09/29/10 Tr. Ct. Op. & Or. [Ap. C], pp. 7 & 9). As such, the *in rem* nature of 1935 tax sale does not lead to a different result than that mandated by a strict statutory construction of the Act of 1806 and the related tax statutes.

B. *The Cases Relied Upon By Herder Concern Severances That Were Made After The Unseated Land Assessment Or Involve Actual Mineral Estate Assessments, Neither Of Which Are Present In This Case.*

Herder also tries to evade the clear terms of the Act of 1806 and the related unseated land tax laws by directing this Court to the decisions of ***Powell, Proctor v. Sagamore Big Game Club*, 265 F.2d 196 (3d Cir. 1959)**, ***Wilson v. A. Cook Sons Co.*, 148 A. 63 (Pa. 1929)**, and ***Moore v. Com., Dep't of Environmental Resources*, 566 A.2d 905 (Pa. Cmwlth. 1989)**. Herder contends that these decisions allow the divestiture of a severed nonproducing oil and gas estate based on an unseated surface estate tax sale for an assessment that was made after the severance's recording. However, none of these cases necessitate a result different than the one advanced by the Keller heirs in this case.

First, none of the cases relied upon by Herder involve any statutory analysis. Moreover, *Powell* and *Proctor* are inapposite because the tax sales at issue in those cases involved severances of the underlying oil and gas interests ***after*** the unseated land tax assessments had taken place. ***Powell*, 34 A.2d at 541; *Proctor*, 265 F.2d at 200.** As a result, the subsequent tax sales in *Powell* and *Proctor* were held to impact all estates in the unseated land, despite the post-assessment severances. ***Powell*, 34 A.2d at 452; *Proctor*, 265 F.2d at 199, n.4**. As the Third Circuit itself noted in *Proctor*, if the severance of the nonproducing oil and gas estate had occurred prior to the assessment, then the tax sale would have conveyed title to only the particular estate to which the taxes were in default. ***Proctor*, 265 F.2d 199, n.4**. *See also* ***Swan-Finch*, 278 F.2d at 579-580** (the fact that a fee owner does not subsequently notify the assessment office of its retention of the underlying natural gas after severing other minerals that are then taxed and sold does not support the tax sale purchaser's claim of title to the natural gas since it was not the subject of the mineral tax assessment**).** As such, *Powell* and *Proctor* are inapplicable to this appeal which is focused solely on the severance of a nonproducing oil and gas estate that occurred 35 years before the subject tax sale.

In *Wilson*, the underlying assessment was made against the severed mineral estate itself after the deed reservation was recorded. ***Wilson*, 148 A. at 63.** Although the mineral estate owner argued that the tax assessment and sale of

"minerals" did not pass title to the subsurface oil and gas, this Court rejected those arguments and ruled, without engaging in any statutory analysis, that the mineral estate tax sale included the oil and gas, in part, because the mineral estate owner never raised any challenge to the assessment at the time he received notice of it. ***Id.* at 64-65.** Here, no assessment was ever made of the Kellers' nonproducing oil and gas estate after the severance was recorded in 1899. Instead, assessments were made only against the severed surface estate. Therefore, *Wilson* has no bearing on the issues raised by this appeal.

Moore, of course, is not binding on this Court. ***Harrison v. Cabot Oil & Gas Corp.*, 110 A.3d 178, 183 (Pa. 2015).** Further, as the Commonwealth Court itself acknowledged, "the effect of the tax sales from 1908 to 1926 is of no moment to our resolution of this dispute." ***Moore*, 566 A.2d at 908**. Therefore, the statement in *Moore* concerning those tax sales is dictum and not precedent. ***Horton v. Wash. County Tax Claim Bureau*, 81 A.3d 883, 887 n.8 (Pa. 2013)** (addressing an issue not to be decided in a case is dictum); ***Maloney v. Valley Med. Facilities, Inc.*, 984 A.2d 478, 490 (2009)** (dicta is not binding precedent).

Finally, like the Superior Court below, Herder relies upon the *per curiam* decision in ***Hutchinson v. Kline,* 199 Pa. 564, 49 A. 312 (1901)**. However, Herder does not dispute the fact that the only issues raised to this Court in *Hutchinson* were limited to: (1) whether the land was seated or unseated, and (2) whether the

defendant could purchase the oil and gas estate at the tax sale in violation of his contract to pay the assessed taxes that led to the sale. ***Hutchinson*, 49 A. at 318.** This Court has previously warned against extending its *per curiam* decisions to issues not raised on appeal. ***In re Stevenson*, 40 A.3d 1212, 1216, n. 5 (Pa. 2012); *Commonwealth v. Proetto*, 837 A.2d 1163, 1165 (2003)** (Newman, J., concurring). As such, Herder has misconstrued the precedential value of *Hutchinson*.[7]

In the end, Herder has not cited one opinion written by this Court wherein the divestiture of a severed nonproducing oil and gas estate based on an unseated surface estate tax sale for an assessment that was made after the severance's recording has been condoned. Instead, Herder has relied upon cases that are factually and legally distinguishable, all in an attempt to conflate the narrow issues presented by this appeal with other scenarios and thereby create a false impression of uncertainty and undoing settled law. Accordingly, this Court should reject Herder's arguments and strictly construe the Act of 1806 and related tax laws, thereby reinstating the trial court's judgment in favor of the Keller heirs.

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[7] Contrary to the argument made by Amicus Seneca Resources, the Keller heirs are not suggesting that legal conclusions in the trial court's decision in *Hutchinson* are dicta. Rather, what constitutes dictum are those aspects of the trial court's opinion, both legal and factual, that were not raised on appeal to this Court. ***Horton*, 81 A.3d at 887 n.8.**

II. STARE DECISIS DOES NOT PRECLUDE THIS COURT FROM ENGAGING IN A PROPER STATUTORY CONSTRUCTION OF THE ACT OF 1806 AND RELATED UNSEATED LAND TAX STATUTES.

Herder litters its briefs with speculative assertions that a ruling in the Kellers' favor would upset long established law. Their pleas in favor of *stare decisis* are misplaced. For example, contrast their position with the fact that they are unable to direct the Court to **any** decision from this Court that contains an analysis concluding that the Act of 1806 and the related unseated land tax statutes authorizes title washes of the kind presented here. In fact, the attempted use of the Act of 1806 to wash unseated land title at tax sales, in order to unify previously severed estates, is a construct of recent lineage and finds no support in the legal annals of the 19th and early 20th centuries. Nor has it ever been adopted by the Pennsylvania General Assembly.[8] This Court should not entertain the temptation to follow blindly what Herder classifies as "*stare decisis*" in the face of the clear requirements of the Act of 1806 and the related unseated land tax statutes.

Moreover, Herder has not cited a single decision, secondary authority or treatise contemporary with the Act of 1806 or the 1935 Tax Sale that demonstrates that title washing, as envisioned by them, was a common and accepted practice by

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[8] Pennsylvania's Dormant Oil and Gas Act does not authorize a confiscation of duly severed nonproducing oil and gas interests. ***See* 58 P.S. § 701.2** ("It is not the purpose of this act to vest the surface owner with title to oil and gas interests that have been severed from the surface estate.").

property law practitioners in the 19th and early 20th centuries. The only secondary authority Herder cites in its failed attempt to document this purportedly "longstanding" practice is a Pennsylvania Bar Association Quarterly newsletter published in 2013, an advocacy piece written by a lawyer who represents surface owners in cases seeking to uphold the divestiture of severed oil and gas interests. This article of recent vintage cannot possibly stand for the proposition that property law practitioners have relied upon title washing to determine the true owners of severed and duly recorded subsurface estates for the last 200 years. Herder's utter failure to demonstrate that reuniting duly severed oil and gas estates with unseated surface estates at tax sales under the auspices of the Act of 1806 was an accepted and longstanding practice eviscerates its argument that this Court should adhere to principles of *stare decisis* in this respect. It also exposes the frailty of the argument made by Herder that a ruling in the Keller heirs' favor will cause chaos and confusion among landowners and oil and gas producers who have supposedly relied upon title washing principles for more than a century.

The very record in this case shows that practitioners at the time, contrary to Herder's assertions, **did not** consider unseated land tax sales to wash the title of nonproducing oil and gas reservations that were duly recorded years before the assessments that led to the unseated land tax sales. At the time Herder purchased the surface estate from the tax sale purchaser's estate, its counsel located the

Kellers' oil and gas reservation in the chain of title and specifically included a provision in Herder's deed stating that the conveyance was subject to "all reservations and exceptions as are contained in the chain of title." (R. 116a.) If it was obvious to practitioners of the day that a severance of an oil and gas estate followed by a tax sale based on assessments made in the name of only the unseated surface estate owner reunited the non-producing oil and gas estate with the unseated surface estate, Herder's attorney never would have included language recognizing the reservation.[9]

Additionally, there are no facts of record that indicate how the titles of landowners in this Commonwealth will be affected by a decision in favor of the Keller heirs. Thus, the "facts" that Herder's Amici now insert into the record before this Court are improper and should not be considered. *See* ***Temple Univ. Hosp., Inc. v. Healthcare Mgmt. Alternatives, Inc.*****, 764 A.2d 587, 595 (Pa. Super. 2000)** (refusing to consider amici's citations to evidence outside the record certified to the Superior Court and not presented to the trial court).

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[9] Herder argues that it cannot be bound by its attorney's conduct or knowledge. (Appellee Br, pp. 33-34). However, an attorney's knowledge is imputed to a client. ***V-Tech Servs. v. Street*****, 72 A.3d 270, 279 (Pa. Super. 2013).** Moreover, Herder argues that the divestiture of previously recorded nonproducing oil and gas estates and their reunification with an unseated surface estate represent long standing precedent. Herder cannot have it both ways. Moreover, it must be remembered that it was Herder, not the Keller heirs, that file the underlying quiet title action and that Herder choose not to file its lawsuit until approximately 50 years after it obtained its deed from the estate of the 1935 tax sale purchaser. Why would Herder wait so long to seek a declaration of its rights if, as it says, the law was so clear and well established at the time it acquired the surface estate?

What the record **does** show is that (1) the Kellers purchased the whole fee of unseated land at a tax sale in 1894 and held it for five years without ever being subject to another tax sale,[10] (2) in 1899, the Kellers conveyed the surface of the unseated land by way of a duly recorded deed that excepted and reserved a non-producing oil and gas estate, and (3) earlier claims for adverse possession have failed because there has not been prior oil and gas production. As a result, an outcome that favors the Kellers will impact only other similarly-situated non-producing oil and gas estates where severance occurred before any assessment of surface rights triggering a tax sale took place. In contrast, title acquired by a tax deed for actively producing oil and gas estates or assessed mineral interests are not affected by the issues in this case and have been secured by the doctrine of adverse possession or other means disassociated with "title washing" tax sales. *See* **Jonathan W. Still, Note, *The Constitutionality of Notice by Publication in Tax Sale Proceedings*, 84 Yale L.J. 1505, 1517 (1975).** As such, the "prejudice" argument raised by Herder's Amici is of no concern. Since a result in favor of the

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[10] Contrary to Herder's statements, the Keller heirs have not admitted that they have no evidence that their ancestors ever complied with the Act 1806's reporting requirement. (Appellee Br., p. 10). On the contrary, the assessment and payment of taxes between 1894 and 1899 constitutes evidence that the Kellers complied with the Act of 1806. Moreover, once the Kellers sold the surface in 1899, it became the duty of the new surface estate owner, who at that time "bec[ame] a holder of unseated lands," to accurately report its partial interest in the surface of the whole fee that the Kellers acquired in 1894 and there is no evidence that the subsequent surface owners either failed to report such partial interest or falsely reported more than what they actually owned.

Kellers will affect only non-producing estates, oil and gas producers cannot claim they are prejudiced by investing millions of dollars into production efforts.[11]

There also is no indication by Herder's Amici regarding what type of relationship they entered into in order to operate, drill for and produce these oil and gas estates in Pennsylvania. Presumably, most of those relationships, as is typical in the industry, would consist of lease agreements between the producer and the surface owner. Any disputes, therefore, regarding title to the subsurface estate would have little impact on the relationship between the lessor and the lessee. At most, if a decision was rendered in the Keller heirs' favor and, as a result, the underlying owner of a particular oil and gas estate was determined to be someone other than the surface owner, Amici would be able to simply top lease[12] the impacted property and change the royalty payee(s). Such an outcome – simply changing the name on a royalty check – is hardly the kind of doomsday scenario envisioned by Herder's Amici.

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[11] Amicus Range Resources admits that operators will not engage in "significant capital expenditures if there is uncertainty about the ownership rights." This statement defeats its own argument because this case only affects non-producing estates. Furthermore, Range's position is based on the erroneous theory that because properties have gone through "tax sales" in general, this case actually affects those sales and, in particular, any associated wells. It does not. This case addresses a narrow class of tax sales – only tax sales that purportedly reunited a previously severed, duly recorded nonproducing oil and gas interest with an unseated surface estate when the oil and gas interests did not have any value and therefore were not assessed and were untaxable.

[12] The term "top lease" is used in the oil and gas industry to refer to the circumstance in which a lease is executed covering land upon which a current lease already exists. *See* ***Bloom v. Devonian Gas & Oil Company*, 155 A.2d 195, 196 (Pa. 1959).**

In sum, there are no controlling precedents that command the result that Herder seeks here. Nor would a ruling for the Keller heirs result in turmoil. Rather, the Keller heirs are only asking the Court to give antiquated decisions their proper precedential weight, and to ignore after-the-fact attempts to give those decisions a weight that they never were intended to bear. This Court instead should adhere to principles of statutory construction in construing the Act of 1806 and should therefore render a decision in the Keller heirs' favor.

III. THE KELLERS DID NOT WAIVE THEIR DUE PROCESS ISSUE.

Apparently recognizing that the 1935 tax sale as construed by the Superior Court profoundly violates due process, Herder urges this Court to sidestep the issue, contending in error that the Keller heirs' constitutional claims were not properly preserved for this Court's review. These arguments are misplaced.

Initially, the Keller heirs did not waive their arguments regarding due process in the trial and intermediate appellate courts, because they were the prevailing party at the trial court and then the losing party following the Superior Court's decision. **20 Pa. Appellate Practice § 302:60** (Where a party prevails before the original decision maker, he cannot appeal because the prevailing party is not aggrieved. Under those circumstances, the appellee may raise issues without risking waiver).

Moreover, this Court on numerous occasions has decided issues that have been preserved in the record although not explicitly considered in the lower courts in order "to effectuate substantial justice." ***See Commonwealth v. Edwards*, 588 Pa. 151, 903 A.2d 1139, 1157-59 (Pa. 2006)** (on direct appeal, affirming trial court's admission of evidence on alternative grounds not "proffered by the Commonwealth or the trial court"); ***Commonwealth v. Sholcosky*, 553 Pa. 466, 719 A.2d 1039, 1047 (Pa. 1998)** (Saylor, J., dissenting) (dissenting from plurality decision in part because "an appellate court may sustain a correct judgment based upon any valid reason that is supported by the record"); *see also* **Thomas G. Saylor, *Right for Any Reason: An Unsettled Doctrine at the Supreme Court Level and an Anecdotal Experience with Former Chief Justice Cappy*, 47 Duq. L. Rev. 489, 490, 494 (2009)**.

Here, at both the trial and intermediary court levels, the issue of the legal validity of the 1935 Tax Sale was consistently addressed by the parties and the lower courts. Specifically, the Keller heirs raised in their pleadings and contested the validity, effectiveness and procedure of the Tax Sale, Herder addressed and countered the Keller heirs' assertion with its own allegations of validity, and the trial court ruled that the 1935 Tax Sale was invalid and did not pass title of the oil

and gas estate because that estate had not been properly assessed.[13] Also, on appeal before the Superior Court, Herder and the Keller heirs addressed the issue of whether notice of the 1935 tax sale's alleged divesture of the Kellers' reserved oil and gas estate was appropriately provided to the Kellers and their heirs.[14]

In its opinion, the Superior Court framed the issues before it as involving the applicability of the Act of 1806." ***Herder Spring Hunting Club v. Keller*, 93 A.3d 465, 468 (Pa. Super. 2014)**. The court continued to address the propriety of the 1935 Tax Sale by discussing that, at one time, courts required "specific proof that each and every step taken in the foreclosure and sale of the property [at a tax sale] were in 'exact and literal compliance with every direction of the law or laws.'" ***Id.* at 469**. The Superior Court also reiterated the rule propounded by Herder that "acts taken by the commissioners regarding the tax sale were presumed to comport with applicable statutes and regulations." ***Id.* at 471**. Finally, the Superior Court acknowledged that its ruling may offend "modern day" notions of due process but felt compelled to follow what it considered to be the law at the time of the 1935 tax sale. ***Id.***

Following the Superior Court's reversal of the trial court's judgment in their favor, the Keller heirs filed a motion for reargument, raising several reasons why

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[13] *See, e.g.,* First Am. Compl., ¶¶ 10 & 19 (R. 17a); Answer, ¶ 9 (R. 19a)

[14] *See, e.g.,* Sup. Ct. Appellant Br., pp. 14, 17 & 18); Sup. Ct. Appellee Br., p. 15.

reargument was necessary including without limitation their due process arguments. (R. 268a-270a). Then, following the denial of the reargument motion, the Keller heirs petitioned this Court for allocatur, raising as their second issue on appeal their due process arguments. At neither time did Herder argue that the Keller heirs had waived their due process arguments. (R. 327a-333a). Hence, on January 27, 2015, this Court granted allocatur on all four issues raised by the Keller heirs in their petition, including their due process issue. ***Herder Spring,* 108 A.3d 1279**

Accordingly, the Keller heirs' due process arguments have not been waived.

IV. THE STATUTES OF REPOSE AND/OR LIMITATIONS DO NOT PREVENT THE KELLERS FROM ADVANCING THEIR CLAIMS.

In addition to waiver, Herder argues that the Keller's due process claims are time barred and present an alternative ground for affirming the Superior Court's judgment. This argument is wrong. The Keller heirs are permitted to advance their challenges to the 1935 Tax Sale because the Keller heirs are claiming that their duly recorded nonproducing oil and gas interests were not sold by the 1935 tax sale and if they were as the Superior Court has ruled, then the 1935 tax sale violated due process and was thus void to sell their property interests. Accordingly, no statutes of limitation or repose bar the Keller heirs' claims.

This Court has long held that where a tax sale is void for want of authority to make it, then a property owner is not required to redeem the allegedly sold property within the time provided by any statute, and he is not estopped or otherwise barred from attacking the validity of any such tax sale, even if it took place almost 100 years ago. ***Albert v. Lehigh Coal & Navigation Co.*, 246 A.2d 840, 847 (Pa. 1968)**; ***Simpson v. Meyers*, 47 A. 868, 871 (Pa. 1901)**. In other words, a legal nullity cannot spring to life simply because of the passage of time.

Courts have routinely set aside void tax sales, even decades after they took place, without considering any potential limitations bar, especially when the issues involve the validity of the tax sale or whether proper notice was given to the record property owner. For example, in ***Poffenberger v. Goldstein*, 776 A.2d 1037, 1042 (Pa. Cmwlth. 2001),** a case relied upon by Herder's Amici, the Commonwealth Court rejected the application of any statute of limitations where the challenge was that the tax sale did not convey the subject property interest, was premised on an improper or illegal assessment, and was otherwise void *ab initio*. ***Poffenberger*, 776 A.2d at 1042.** As the Commonwealth Court succinctly stated:

> This court is not aware of any legal authority, nor have the parties cited to any authority, which would provide that a municipal tax sale can divest a property owner, who can establish a valid chain of title through recorded deed[s] and has paid all assessed taxes on such property, of title to the property by improperly listing the property for upset sale. Clearly, in these circumstances, the upset

> sale of a portion of the acreage described in the recorded Stricker deed is void *ab initio*. The fact that a petition to set aside the tax sale was not filed within the applicable statute of limitations does not command a finding in Goldstein's favor.

Id. *See also* ***In re Estate of Marra v. Tax Claim Bureau*, 95 A.3d 951, 956 (Pa. Cmwlth. 2014)** (a 1985 tax sale in which notice was not provided to the property's record deed owner is void and must be set aside even though the petition was not filed until nearly 30 years later).

Accordingly, the Keller heirs' claims are timely and not barred by any statute of limitations or repose.

V. PURSUANT TO THIS COURT'S PRECEDENT, *MULLANE* AND *MENNONITE* CAN BE APPLIED RETROACTIVELY TO INVALIDATE THE SUPERIOR COURT'S RULING THAT THE 1935 TAX SALE APPLIES TO THE KELLERS' RESERVED OIL AND GAS INTERESTS.

Amicus Seneca Resources posits that the Keller heirs cannot rely upon ***Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950)**, and ***Mennonite Bd. of Missions v. Adams*, 462 U.S. 791 (1983)**, to retroactively challenge the 1935 tax sales' failure to provide proper notice in conformance with notions of due process. This is false. Many times, this Court and other Pennsylvania courts have used the legal principles announced in these decisions to reach back in time and invalidate proceedings where the government failed to satisfy the standards of notice. *See, e.g.,* ***Tracy v. Chester County Tax Claim***

***Bureau,* 489 A.2d 1334 (Pa. 1985)** (relied upon *Mullane* and *Mennonite* to invalidate a 1977 tax sale); ***First Pa. Bank, N.A. v. Lancaster County Tax Claim Bureau,* 470 A.2d 938 (Pa. 1983)** (relied upon *Mennonite* to invalidate a 1974 tax sale).

It must be remembered that the Kellers are not advocating for this Court to reach back in time and unwind the 1935 tax sale in its entirety. Instead, the Keller heirs are only advocating that, if the Superior Court's decision that the unseated land tax laws permit the divestiture of reserved nonproducing oil and gas interests, which is expressly denied, then the 1935 tax sale must be invalidated on due process grounds as it applies to the Kellers' reserved oil and gas estate. In its brief, Herder admits that they offered no evidence into the record that the Kellers had actual notice and knowledge of the 1935 tax sale. (Appellee Br., p. 28). Accordingly, without notice and opportunity to be heard, how can the Kellers and their heirs be deprived of their property interests as a matter of federal and state due process?

CONCLUSION

For the reasons stated herein and at oral argument, if permitted, the Keller heirs respectfully request that this Court reverse the Superior Court's judgment and reinstate the trial court's summary judgment in their favor.

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CERTIFICATE OF COMPLIANCE WITH WORD LIMITATION

The undersigned certifies that the foregoing Brief of Appellants complies with the word count limitation set forth in Pennsylvania Rule of Appellate Procedure 2135 and contains 6,956 words.

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PROOF OF SERVICE

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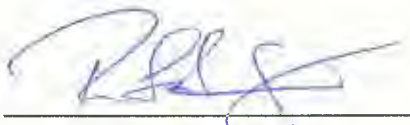

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