

**IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT**

PENNSYLVANIA
ENVIRONMENTAL DEFENSE
FOUNDATION,

Appellant,

v.

COMMONWEALTH OF
PENNSYLVANIA, AND TOM
WOLF, IN HIS OFFICIAL
CAPACITY AS GOVERNOR OF
PENNSYLVANIA,

Appellees.

Docket No. 65 MAP 2020

**GOVERNOR WOLF’S
SUR-REPLY BRIEF IN OPPOSITION TO THE PENNSYLVANIA
ENVIRONMENTAL DEFENSE FOUNDATION’S APPEAL**

On November 3, 2020, the Pennsylvania Environmental Defense Foundation (the “Foundation”) filed a notice of appeal of the Commonwealth Court’s October 22, 2020 final order in *Pennsylvania Environmental Defense Foundation v. Commonwealth of Pa.*, No. 358 M.D. 2018, 2020 Pa. Commw. Unpub. LEXIS 507, 25, 46, 241 A.3d 119, 2020 WL 6193643 (Pa. Cmwlth. October 22, 2020) (“*PEDF IV*”). On March 24, 2021, the Commonwealth of Pennsylvania and Governor Wolf jointly filed their brief in opposition to the appeal. The Foundation filed a reply brief on April 10, 2021, in which it argued, for the first time, that the Department of Conservation and Natural Resources (“DCNR”) is a party to the litigation. Pursuant

to Pa.R.A.P. 2113, Appellee Governor Wolf sought leave to file a sur-reply brief to address that portion of the Foundation’s brief. Appellee now files his sur reply brief with leave of Court granted May 3, 2021.

ADDING THE DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES AS A PARTY IS IMPROPER

In its reply brief, the Foundation argued that “[b]y its active participation in this action, DCNR” has supported and adopted the actions of the Appellees and therefore has violated Article I, Section 27 and its duties as a trustee. (*See* Reply Brief at pg. 2). Appellant states that when it refers to “Respondents” in the reply brief, it refers to Appellees *and DCNR*. (Reply Brief at pg. 3, emphasis added). Although it appears that the Foundation has retracted its attempt to add DCNR as a party by stating that “PEDF is not attempting to add DCNR as a party in its reply brief,” it goes on to argue posit that as an agency of the Commonwealth, DCNR is, in fact, a party. (PEDF Answer to App. For Leave to File at pg. 1). The Foundation supports this by arguing that by putting the mission of the DCNR as the focus of their primary brief, Appellees have asked this Honorable Court to speak to the DCNR’s role and responsibilities as trustee. However, this confuses the issue.

It is PEDF, itself, that has put DCNR’s mission in the forefront of this discussion by arguing, contrary to this Court’s holding in *Pennsylvania Environmental Defense Foundation v. Commonwealth of Pa.*, 161 A.3d 911 (Pa. 2017) (“PEDF II”), that all Oil and Gas Lease Fund money must remain in the corpus

of the trust and cannot be used for appropriations to DCNR for general government operations. (Petition for Review at pg. 8). This Court made clear in *PEDF II* that the funding of an “initiative or agency dedicated to effectuating Section 27” with Oil and Gas Lease Fund money would not run afoul of the Constitution. *PEDF II*, 161 A.3d at 939. It is therefore necessary for Governor Wolf and the Commonwealth to explain how the appropriations to DCNR – as challenged by the Foundation – are funding an “initiative or agency dedicated to effectuating Section 27.” *Id.* This analysis is necessary regarding any agency or initiative to whom Lease Fund money is appropriated. However, it does not permit the Foundation to join or substitute the DCNR as a party during its appeal.

The Foundation has had three years since it filed its original Petition for Review to join the DCNR as a party, yet it did not. Rather, only now, on appeal, did the Foundation claim that the DCNR has actively participated in the litigation and attempts to bootstrap the DCNR as a party because “the Commonwealth is named ... [and the] DCNR is an agency of the Commonwealth.” (PEDF Answer to App. For Leave at pg. 1). Still, neither argument will suffice to effectuate the addition of a party on appeal.

While it cannot be denied that the DCNR has interest in the outcome of the litigation, active engagement in the litigation does not make it a party, nor does the DCNR Chief Counsel’s involvement. First, Ms. Miner has entered her appearance

for Appellee Wolf, not the DCNR. Although the Commonwealth Attorneys Act establishes the appointment of chief counsel to assist each executive agency, it does not prohibit those attorneys from representing other executive officers or agencies as assigned. *See* Commonwealth Attorneys Act, Act of Oct. 15, 29080, P.L. 950, No. 164 §301. Therefore, Ms. Miner’s representation of the Governor, separate from the DCNR is wholly appropriate. Second, whether the DCNR has remained abreast of the issues or even supplied input does not make it a party. The issue remains that the DCNR has not been named through appropriate means.¹

Further, the Foundation’s position that “the Commonwealth” has been named and it may then bootstrap the DCNR as a party is also incorrect. “It is well-settled that the Commonwealth government and its various agencies are separate parties, and merely naming the Commonwealth is insufficient to state a claim against a Commonwealth agency.” *Ballroom, LLC v. Commonwealth*, 984 A.2d 582, 587 (Pa. Cmwlth. 2009) *citing* *Tork-Hiis v. Commonwealth*, 735 A.2d 1256 (1999). In fact, the amendment of a complaint to substitute an agency for the Commonwealth “amounts to the addition of a new party and not merely the correction of a captioned

¹ The DCNR is not an indispensable party either. “A party is indispensable when his or her rights are so connected with the claims of the litigants that no decree can be made without impairing those rights.” *Orman v. Mortg. I.T.*, 118 A.3d 403, 406 (Pa. Sup. Ct. 2015) quoting *City of Phila. v. Commonwealth*, 838 A.2d 566, 581 (Pa. 2003). Here, the use of the Oil and Gas Lease Fund money is at the center of the Foundation’s case. The Foundation’s challenge to the appropriations was to the manner in which the Lease Fund money is appropriated to the DCNR. This is outside of the DCNR’s control.

party name.” *Brouillette v. Wolf*, 213 A.3d 341, 356 (Pa. Cmwlth. 2019). Naming the Commonwealth did not give the Foundation the ability to add or substitute the DCNR pro forma.

Finally, an appellant “may file a brief in reply to matters raised by appellee’s brief ... and not addressed in appellant’s brief.” Pa.R.A.P. 2113(a). An appellant is prohibited from raising new issues in a reply brief. “When an appellant uses a reply brief to raise new issues or to remedy deficient discussions in an initial brief, the appellate court may suppress the non-complying portions.” *Commonwealth v. Fahy*, 737 A.2d 214, 215 (S. Ct. 1999) citing Pa.R.A.P. 2101. The Foundation used its reply brief to attempt to add the DCNR as a party on the appeal of a final order from the Commonwealth Court before whom DCNR was not a party. Appellee Wolf respectfully requests that this Honorable Court suppress any reference by the Foundation to DCNR as a party or an Appellee within its reply brief.

WHEREFORE, Appellee Governor Wolf respectfully requests that this Honorable Court suppress all reference to DCNR as an Appellee and affirm the holding of the Commonwealth Court.

Respectfully submitted,

Date: May 17, 2021

By: /s/ M. Abbegael Giunta
M. ABBEGAEL GIUNTA
Deputy General Counsel
Attorney I.D. 94059
Governor's Office of General Counsel
333 Market Street, 17th Floor
Harrisburg, PA 17101
Tel: (717) 787-9350
Fax: (717) 787-1788
Email: magiunta@pa.gov

Counsel for Appellee, Governor Wolf

CERTIFICATE OF COMPLIANCE – PUBLIC ACCESS

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

/s/ M. Abbegael Giunta _____

M. ABBEGAEL GIUNTA

Deputy General Counsel

Attorney I.D. 94059