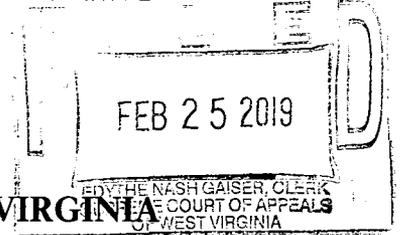


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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 18-1034

**NORTHEAST NATURAL ENERGY LLC, AND
NNE WATER SYSTEMS LLC, *Petitioners***

v.

PACHIRA ENERGY LLC, *Respondent*

Honorable Russell M. Clawges, Jr., Judge
Circuit Court of Monongalia County
Civil Action No. 18-C-369

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I. ASSIGNMENT OF ERROR

The Circuit Court abused its discretion under the four-factor test in *Jefferson County Board of Education v. Jefferson County Education Association*, 183 W. Va. 15, 393 S.E.2d 653 (1990), by enjoining the Defendants' use of water facilities to transport water to locations outside of the Blacksville AMI or selling water to third parties where (a) it found that "Plaintiff has established that it is likely to suffer immediate and irreparable harm" despite other portions of its Order finding that use of the Water Facilities would not constitute irreparable harm because any harm "can be calculated and reduced to monetary damages;" (b) it awarded a preliminary injunction based on a cursory affidavit; (c) it found that "Plaintiff has established that there is a likelihood of success on the merits of its claims" where the record reflects that the parties did not form a partnership or joint venture, but instead own the water facilities as tenants in common and where in every written agreement setting forth the parties' relationship they expressly disclaimed the formation of any partnership or joint venture; (d) it found, without identifying any source, that "enjoining Defendants from (i) transporting water to locations outside of the Blacksville AMI or (ii) selling water to third parties for use outside of the Blacksville AMI is in the public interest;" and (e) it failed to balance the comparative hardship to the respective parties.

II. STATEMENT OF THE CASE

This is an appeal from an order granting in part and denying in part Plaintiff's motion for a preliminary injunction related to the use of waterline and handling facilities to transport water for use during the hydraulic fracturing process of natural gas wells.

On January 20, 2011, Northeast Natural Energy LLC ("NNE" or "Defendants") and Pachira Energy LLC ("Pachira" or "Plaintiff") entered into an Area of Mutual Interest and

Exploration Agreement (“AMI Agreement”) establishing the Blacksville Area of Mutual Interest (“Blacksville AMI”).¹ Under the AMI Agreement, NNE and Pachira would jointly develop the Marcellus Shale within the Blacksville AMI.²

The parties also entered a Joint Operating Agreement (“JOA”) describing the rights and obligations of the parties in the operation of the wells and establishing, with respect to the drilling and operation of wells within the AMI, that NNE would be the operator with a 75% working interest and Plaintiff would be a non-operator with a 25% working interest.³

As the operations within the Blacksville AMI expanded, NNE arranged for the construction of water line and handling facilities (“Water Facilities”) inside the Blacksville AMI to transport water used in the fracking process.⁴ NNE arranged for the construction of the Water Facilities in segments as new well pads were being constructed,⁵ and Pachira shared in the direct costs associated with these Water Facilities.⁶

Although the parties attempted to memorialize an agreement regarding the Water Facilities in writing, the parties were unable to agree to the terms.⁷

Initially, water from Dunkard Creek was used for fracking operations within the AMI.⁸ At certain times of the year, however, Dunkard Creek’s flow does not provide enough water to

¹ [App. at 46]

² [App. at 47]

³ [App. at 65]

⁴ [App. at 222]

⁵ [App. at 286-87]

⁶ [App. at 286]

⁷ [App. at 286] Critically, at no time did the parties agree that the use of the Water Facilities would be limited to the transportation of water from a source inside the Blacksville AMI, or to transport water only to wells located within the Blacksville AMI or wells in which the parties jointly own.

frack wells efficiently, and often, the water level is so low that withdrawal of water is prohibited.⁹ Thus, NNE arranged for the construction of an additional waterline located outside of the Blacksville AMI to bring water from the Monongahela River to the Blacksville AMI (“Monongahela Trunk Line”).¹⁰ Plaintiff did not participate in the costs associated with the Monongahela Trunk Line.

Additionally, NNE arranged for the construction and Pachira participated in the direct costs of constructing a waterline that connects to the Monongahela Trunk Line at the edge of the AMI to bring water sourced from the Monongahela River into the Blacksville AMI (“Mon River Extension”).¹¹

The Mon River Extension connects to the existing Water Facilities and enables Defendants to provide water to all of its well pads, both those where Plaintiff has an interest and those where it does not, in addition to wells that are owned by third parties. As part of the Water Facilities, the cost and ownership of the Mon River Extension (which is located completely inside the AMI) is also 75%/25%.

On September 4, 2018, NNE began testing the Monongahela Trunk Line and the Mon River Extension to start using them to transport water for fracking wells located inside the Blacksville AMI and jointly owned by NNE, and Plaintiff known as the Mepco Wells.¹²

On September 7, 2018, the Plaintiff filed a motion for a temporary restraining order and preliminary injunction in the Northern District of West Virginia seeking to prohibit NNE’s use

⁸ [App. at 222]

⁹ [App. at 222]

¹⁰ [App. at 222]

¹¹ [App. at 223]

¹² [App. at 204]

of the Water Facilities to transport water from a source located outside the Blacksville AMI.¹³ After this motion was filed, NNE halted operations and did not begin fracking the wells using Monongahela River water.

Before dismissing the case in federal court, on September 11, 2018, the Plaintiff filed suit in the Circuit Court of Monongalia County.¹⁴ On September 12, 2018, NNE commenced fracking the Mepco Wells, wells jointly owned by NNE and the Plaintiff, using the Monongahela Trunk Line and Mon River Extension.¹⁵ On September 13, 2018, the Plaintiff filed a motion seeking injunctive relief in the Circuit Court of Monongalia County.¹⁶

Attached to the Plaintiff's "Emergency Motion for Temporary Restraining Order, Preliminary Injunction, and Request for Expedited Hearing"¹⁷ was a single affidavit.¹⁸ The affiant, Benjamin M. Statler, the Plaintiff's president, asserted that "Pachira and NNE agreed that the Water Line and Handling Facilities would be used solely to carry from the sources located within the Blacksville AMI for use at wells located within the Blacksville AMI,"¹⁹ but NNE offered a sworn declaration by Mike John, NNE's president, that stated, "[a]t no time did NNE and Pachira agree that the use of the Water Facilities would be limited to transporting

¹³ [App. at 204]

¹⁴ [App. at 5]

¹⁵ [App. at 223]

¹⁶ [App. at 123]

¹⁷ [App. at 147-150]

¹⁸ [App. at 147]

¹⁹ [App. at 148]

water from a source inside the Blacksville AMI, transporting water only to wells located within the Blacksville AMI, or in which NNE and Pachira have a joint interest.”²⁰

As explained in NNE’s counter-affidavit by its president: (1) “The Monongahela River is outside of the Blacksville AMI;” (2) “NNE has paid 100% of all costs associated with the Monongahela Trunk Line, which is owned 100% by NNE;” (3) “Pachira did not finance and has no ownership share on the Monongahela Trunk Line as such infrastructure is entirely outside the Blacksville AMI;” (4) “On or about July 24, 2018, I had a discussion with Mr. Statler and specifically advised him that in September of 2018, we would begin to use Monongahela River water for fracking of the Mepco Wells in the Blacksville AMI;” (5) “NNE and Pachira jointly own the Mepco Wells;” (6) “NNE commenced fracking the Mepco Wells on September 12, 2018;” (7) “For the fracking of the Mepco Wells, NNE is using the Monongahela Trunk Line and the Mon River Extension;” and (8) “If NNE is forced to stop using the Water Facilities to transport water from the Monongahela River to frack the Mepco Wells, it will be forced to haul water in trucks to the well pads for the fracking process and the water would come from outside the Blacksville AMI.”²¹

Additionally, in its response to the Plaintiff’s preliminary injunction motion, NNE argued:

1. The Plaintiff was unlikely to prevail on the merits because there was no contract or agreement between the parties imposing the restrictions it sought in the form of injunctive relief.
2. Nothing in the AMI Agreement or the JOA restricts the use of the Water Facilities to water from within the Blacksville AMI.

²⁰ [App. at 222]

²¹ [App. at 222-23]

3. Neither the AMI Agreement nor the JOA restricts the use of those Water Facilities for the exclusive benefit of wells in which the Plaintiff and NNE have a joint interest.
4. The course of conduct between the parties created a tenancy in common permitting NNE to use the Water Facilities for its benefit.
5. Any damages suffered by the Plaintiff as a result of the disputed use of the water would be subject to calculation and awardable at law.
6. The balance of equities favored NNE as it had invested considerable funds in the installation of water lines and related facilities and was in the process of fracking wells owed by both the Plaintiff and NNE.
7. The public interest weighed against the award of injunctive relief because it would interfere with continued natural gas operations and production.²²

The Court conducted a hearing on the Plaintiff's request for a preliminary injunction on September 19, 2018.²³ At the hearing, the Plaintiff offered no evidence in support of its motion, but only provided the argument of counsel.

The following exchange between the Circuit Court and the Plaintiff's counsel demonstrates why it erred in granting injunctive relief:

THE COURT: I understand that. And I guess what I'm getting at and -- you know, you're asking for an injunction, and, obviously, to get an injunction you have to substantiate that there's irreparable harm on your side of the table. I mean, I understand your partnership arguments, joint venture arguments, and I'm sympathetic to those arguments, they make sense, but I'm still trying to figure out, okay, why all of a sudden is this an emergency that requires a preliminary injunction?

MR. HAWK: Because there wasn't a trespass until last week. And, quite frankly -

THE COURT: Okay. So how are you harmed because water from the Monongahela River, as opposed to water from Dunkard Creek, has gone through those pipelines?

²² [App. at 200-19] Attached to the response were a counter-affidavit, emails, and federal court pleadings. [App. at 221-43]

²³ [App. at 244]

MR. HAWK: Well, as my partner has already said, it's this proportionate reduction in the price. As long as it's within the . . .

THE COURT: That's \$.50 a barrel and it's - I can measure that. You can come in here six months from now and tell me that it's cost us X number of dollars more because we've had to pay \$.50 a barrel more.

MR. HAWK: But if it's trespass, that is where injunctive relief is appropriate. And we cite a case in our brief 7-Eleven v. Khan that states the unauthorized interference with real property interest constitutes irreparable harm as a matter of law.

THE COURT: How is it an interference? I'm sorry, I'm -- you know, maybe I'm getting a little thick up here, but, I mean, water is water. What difference does it make where it comes from if the difference is what it costs?

MR. HAWK: Well, the difference is it's actually -- Your Honor, they have a partnership. They have a duty of loyalty to each other as partners, and they are trampling on that duty of loyalty and they're looking out for their self-interest by building this extension outside of it, knowing they are going to charge for that, not get - being objected to all along the way. And, again, it's a trespass, and that's where the fact that the partnership is a separate entity. This isn't them trespassing against Pachira. This is them trespassing against this partnership that has been established. And, furthermore, it's not water that was contemplated by the original agreement.²⁴

In other words, when pressed by the Court to explain why it would suffer irreparable harm, Plaintiff's counsel could not answer the question and instead attempted to tie its need for an injunction to the merits of its claims. But as the Circuit Court rightly observed, no injunction can issue where money damages can properly compensate a party.

Contrary to its ultimate decision to issue a preliminary injunction, the Circuit Court repeatedly noted that the Plaintiff had not made a showing that it was likely to succeed on the merits of its claim. For example, when the Circuit Court stated at the hearing, "I don't even think they agree that there's a partnership," the Plaintiff's counsel conceded, "I understand

²⁴ [App. at 280-81]

that's a fact issue and that's why we have litigation."²⁵ Then, redirecting the Circuit Court's attention away from what should have been the issues contrary to this Court's rule that maintaining the status quo is an insufficient reason to grant a preliminary injunction,"²⁶ the Plaintiff's counsel argued, "But the point is, is that the status quo by using this water from the Mon River to cross into the AMI has changed from what the relationship of the parties was before."²⁷

Regarding the issue of whether NNE's conduct was in furtherance of the parties' relationship, as explained in Mr. John's declarations, the use sought to be enjoined by the Plaintiff was necessitated by the unavailability of water inside the Blacksville AMI: (1) "At certain times of the year, the flow of Dunkard Creek does not provide enough water to efficiently frack wells that are scheduled to be brought online;" (2) "From July 15, 2018 to September 7, 2018, there were at least 17 days when withdrawing water from Dunkard Creek was prohibited;" and, in the absence of using the Water Facilities to transport water from the Monongahela River to frack wells within the Blacksville AMI, (3) "[I]t will be forced to haul water in trucks to the well pads for the fracking process," "[T]hat water would come from outside the Blacksville AMI," "Approximately 60 water trucks a day for 100 days with each truck making multiple trips to and from the well pad would be needed to haul water for fracking," and "Hauling water in

²⁵ [App. at 264]

²⁶ See, e.g., *Markwest Liberty Midstream & Resources v. Nutt*, 2018 WL 52720 at *3 (W. Va.) (memorandum) ("The perfunctory order granting the preliminary injunction was grounded in the erroneous notion that it is appropriate to issue a preliminary injunction based solely on a simple conclusion that the status quo should be preserved without consideration of the well-established factors for analyzing the necessity of a preliminary injunction. The order correctly cites *Powhatan Coal* in terms of the function of a preliminary injunction being to preserve the status quo. However, correctly recognizing the function of a preliminary injunction does not end the inquiry. Analysis of the need for injunctive relief is still required.").

²⁷ [App. at 264-65]

trucks is more expensive than using the Water Facilities and will delay the fracking process which results in additional increases in costs.”²⁸

By way of comparison, the sole affidavit offered by the Plaintiff states only that, “Historically, water from Dunkard Creek has been used to satisfy the requirement of wells within the Blacksville AMI,”²⁹ and in response to the argument of the Plaintiff’s counsel, unsupported by any evidence, that “The point is, is that they’ve come in in their papers and said we’ve got to have this because the water is not sufficient out of Dunkard Creek, and the point is, is that is inaccurate,”³⁰ the Circuit Court observed, “Well, and the point is, that’s ultimately going to be a factual issue that’s going to have to be determined by an arbiter of facts and that’s not something that I’m in a position to do today.”³¹

At this point in the hearing, conceding that both the scope of the parties’ agreement and adequacy of water from Dunkard Creek were contested factual issues, the Plaintiff’s counsel reiterated the legally baseless argument that an injunction was appropriate in order to maintain the “status quo”:

But part of the point about an injunction is to maintain the status quo, and the other part of the point is, is their complaint that you’re going to injure me by doing this and you’re going to injure yourself, and the point is that’s just – we don’t believe that to be true and we don’t believe that to be factual.³²

²⁸ [App. at 222-24]

²⁹ [App. at 149]

³⁰ [App. at 267-68]

³¹ [App. at 268]

³² [App. at 268]

Again, this is contrary to the rule that maintaining the status quo is an insufficient reason to grant a preliminary injunction.”³³

Despite expressly acknowledging factual disputes over matters central to whether the Plaintiff will ultimately prevail on the merits, the Circuit Court made the following findings of fact which undermine rather than support its ultimate decision:

5. There is no written agreement governing the construction, operation, or maintenance of the Water Line and Handling Facilities.

8. Defendants constructed another water line to connect the Monongahela River to the Water Line and Handling Facilities (the “Monongahela River Trunk Line”). . . .

10. Plaintiff has no interest in and did not share in the cost of the construction, operation, or maintenance of the Monongahela River Trunk Line.

11. Defendant NNE WS intends to charge working interest owners such as Plaintiff their proportionate share of \$0.50 per barrel for water transported through the Monongahela River Trunk Line to the boundary of the Blacksville AMI. . . .

12. Plaintiff had knowledge of the construction of the Mon River Extension and knowledge of its intended purpose to facilitate using water from the Monongahela River inside the Blacksville AMI. . . .

16. There were ongoing negotiations between the parties regarding the Water Line and Handling Facilities. . . .

22. Any damage that Plaintiff may suffer stemming from use of the Water and Handling Facilities to transport Monongahela River water for use inside the Blacksville AMI can be calculated and reduced to economic damages.

³³ See, e.g., *Markwest*, supra at *3 (“The perfunctory order granting the preliminary injunction was grounded in the erroneous notion that it is appropriate to issue a preliminary injunction based solely on a simple conclusion that the status quo should be preserved without consideration of the well-established factors for analyzing the necessity of a preliminary injunction. The order correctly cites Powhatan Coal in terms of the function of a preliminary injunction being to preserve the status quo. However, correctly recognizing the function of a preliminary injunction does not end the inquiry. Analysis of the need for injunctive relief is still required.”).

23. Plaintiff seeks to enjoin Defendants from using the Water Line and Handling Facilities to (i) transport water from sources located outside of the Blacksville AMI; (ii) transport water to locations outside of the Blacksville AMI, or (iii) sell water to third parties for use outside of the Blacksville AMI.³⁴

Although the Circuit Court denied the Plaintiff's request to enjoin NNE from transporting water to the Blacksville AMI using the facilities it constructed at its expense and with the knowledge of the Plaintiff, it nevertheless enjoined NNE from transporting water outside of the Blacksville AMI or selling water to third parties for use outside of the Blacksville AMI without providing any meaningful distinction between those two activities. Indeed, the Circuit Court's entire analysis is set forth in but a single paragraph that fails to explain or elaborate on its conclusions:

6. The balance of hardship favors granting the Motion to enjoin Defendants from using the Water Line and Handling Facilities to (i) transport water to locations outside of the Blacksville AMI or (ii) sell water to third parties for use outside of the Blacksville AMI.

(a) The Court finds that Plaintiff has established that it is likely to suffer immediate and irreparable harm before the Court makes its final ruling on Plaintiff's request for permanent injunctive relief if Defendants are not enjoined from (i) transporting water to locations outside of the Blacksville AMI or (ii) selling water to third parties for use outside of the Blacksville AMI.

(b) The Court finds that Plaintiff has established that there is a likelihood of success on the merits of its claim to enjoin Defendants from using the Water Line and Handling Facilities to (i) transport water to locations outside of the Blacksville AMI or (ii) sell water to third parties for use outside of the Blacksville AMI.

(c) The Court finds that enjoining Defendants from (i) transporting water to locations outside of the Blacksville AMI or (ii) selling water to third parties for use outside of the Blacksville AMI is in the public interest.³⁵

³⁴ [App. at 376-78]

³⁵ [App. at 380]

This Court will review the Circuit Court's order in vain for the following:

1. Any explanation or evidentiary support for the conclusion that any harm suffered by the Plaintiff as a result of transporting water to locations outside of the Blacksville AMI would be irreparable. This is because to the extent that it is ultimately determined that Defendants have no legal right to transport water through the line, an award of monetary damages can adequately compensate the Plaintiff.
2. Any explanation or evidentiary support for the conclusion that any harm suffered by the Plaintiff as a result of Defendants selling water to third parties for use at locations outside of the Blacksville AMI would be irreparable. This is because an award of monetary damages can adequately compensate the Plaintiff if it is ultimately determined that Defendants have no legal right to sell water to third parties for use outside the Blacksville AMI.
3. Any discussion of the substantive law of oral contract, partnership, or joint venture to support the conclusion that there is a likelihood that the Plaintiff will prevail on the merits of its claims against Defendants which obviously necessitate some legal prohibition against NNE transporting water to locations outside of the Blacksville AMI or selling to third parties for use outside the Blacksville AMI. This is because based upon the single affidavit presented, refuted by a counter-declaration of equal evidentiary value, there is no enforceable oral, partnership, or joint venture agreement precluding NNE from transporting water to locations outside of the Blacksville AMI or selling water to third parties for use outside of the Blacksville AMI.
4. Any identification of a "public interest" to be served by the award of a preliminary injunction. This is because there is no "public interest" in a court favoring one side or another in a contractual dispute.

The Circuit Court erred in awarding a preliminary injunction, predicated on a single affidavit, in a ruling that pays nothing but lip service to this Court's standards for the award of a preliminary injunction. Accordingly, its preliminary injunction should be set aside, and the case remanded with directions that it be vacated and that NEE be awarded its damages suffered and legal expenses incurred as a consequence of its entry.

III. SUMMARY OF ARGUMENT

The Circuit Court's order is contrary to this Court's decision in *Jefferson County Board of Education*.

First, the Circuit Court erred by finding that "Plaintiff has established that it is likely to suffer immediate and irreparable harm before the Court makes its final ruling on Plaintiff's request for permanent injunctive relief," where the Court recognized that any potential harm suffered by Plaintiff would be compensable by money damages.

Second, the Circuit Court erred by enjoining the Defendants' use of the Water Facilities to transport water to locations outside of the Blacksville AMI or to sell water to third parties where the Plaintiff's only evidence was a cursory affidavit.

Third, the Circuit Court erred by finding "Plaintiff has established that there is a likelihood of success on the merits of its claims" where the record reflects that the parties did not form a partnership or joint venture, but instead own the water facilities as tenants in common and particularly where, in every written agreement setting forth the parties' relationship in other respects, the parties expressly disclaimed the formation of any partnership or joint venture; the law provides that the Plaintiff and NNE owned the Water Facilities as tenants in common; the Uniform Partnership Act states that "joint property, common property or part ownership does not by itself establish a partnership;" the Circuit Court recognized that the issues of an alleged oral joint venture and the adequacy of water flow from Dunkard Creek presented issues for resolution by the trier of fact.

Fourth, the Circuit Court erred by finding, without the identification of any public interest, that "enjoining Defendants from (i) transporting water to locations outside of the

Blacksville AMI or (ii) selling water to third parties for use outside of the Blacksville AMI is in the public interest.”

Finally, the Circuit Court erred by failing to address the harm to NNE in balancing the relative hardship to the respective parties.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

R. App. P. 19(a)(1) and (2) oral argument is appropriate in this case as it involves an “assignment[] of error in the application of settled law” and “an unsustainable exercise of discretion where the law governing that discretion is settled.”

V. ARGUMENT

A. STANDARD OF REVIEW

In Syllabus Point 2 of *State ex rel. McGraw v. Telecheck Services, Inc.*, 213 W. Va. 438, 582 S.E.2d 885 (2003), this Court held, “West Virginia Constitution, article VIII, section 3, which grants this Court appellate jurisdiction of civil cases in equity, includes a grant of jurisdiction to hear appeals from interlocutory orders by circuit courts relating to preliminary and temporary injunctive relief.”³⁶

This Court’s review of the award of a preliminary injunction has three parts:

“In reviewing the exceptions to the findings of fact and conclusions of law supporting the granting of a temporary or preliminary injunction, we will apply a three-pronged deferential standard of review. We review the final order granting the temporary injunction and the ultimate disposition under an abuse of

³⁶ See also *Hart v. NCAA*, 209 W. Va. 543, 550 S.E.2d 79 (2001)(appeal of order awarding preliminary injunction, order vacated); *Sams v. Goff*, 208 W. Va. 315, 540 S.E.2d 532 (1999)(appeal from granting of preliminary injunction; injunction held to be appropriate); *State By & Through McGraw v. Imperial Marketing*, 196 W. Va. 346, 349, 472 S.E.2d 792, 795 (1996)(“The defendant . . . appeals an order of the Circuit Court of Kanawha County granting a preliminary injunction....”); *Park Com'n v. Hotel and Restaurant Employees*, 198 W. Va. 215, 479 S.E.2d 876 (1996)(appeal of preliminary injunction restricting picketing); *Jefferson County Bd. of Educ.*, supra (circuit court granted preliminary injunction against work stoppage; association appealed, injunction upheld).

discretion standard, *West v. National Mines Corp.*, 168 W. Va. 578, 590, 285 S.E.2d 670, 678 (1981), we review the circuit court's underlying factual findings under a clearly erroneous standard, and we review questions of law *de novo*.”³⁷

This Court has articulated the criteria for preliminary injunction relief as follows:

The customary standard applied in West Virginia for issuing a preliminary injunction is that a party seeking the temporary relief must demonstrate by a clear showing of a reasonable likelihood of the presence of irreparable harm; the absence of any other appropriate remedy at law; and the necessity of a balancing of hardship test including: “(1) the likelihood of irreparable harm to the plaintiff without the injunction; (2) the likelihood of harm to the defendant with an injunction; (3) the plaintiff's likelihood of success on the merits; and (4) the public interest.”³⁸

Here, as in other similar cases,³⁹ a decision is warranted setting aside the preliminary injunction and remanding for its dissolution and the award of damages where the Circuit Court abused its discretion and made clearly erroneous findings of fact and conclusions of law.

³⁷ Syl. pt. 1, *Camden-Clark Mem'l Hosp. Corp. v. Turner*, 212 W. Va. 752, 575 S.E.2d 362 (2002)(citations omitted).

³⁸ *State ex rel. McGraw v. Imperial Mktg.*, 196 W. Va. 346, 352 n.8, 472 S.E.2d 792, 798 n.8 (1996) (quoting *Jefferson County Bd. of Educ.*, supra at 24, 393 S.E.2d at 662 (quoting *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bradley*, 756 F.2d 1048, 1054 (4th Cir. 1985)).

³⁹ See, e.g., *Belcher v. Dynamic Energy, Inc.*, 240 W. Va. 391, 813 S.E.2d 44 (2018)(once the Department of Environmental Protection issued a letter relieving coal mining companies of their obligation to provide property owners with a replacement water supply based on contaminated water wells, the circuit court was required to dissolve a preliminary injunction requiring the provision of a replacement water supply); *Markwest*, supra at *1 (“Upon our review of the parties' arguments, the appendix record, and the pertinent authorities, we find that the circuit court erred in granting the motion for a preliminary injunction. Accordingly, we reverse and remand this case.”); *Morrissey v. West Virginia AFL-CIO*, 239 W. Va. 633, 642, 804 S.E.2d 883, 892 (2017)(“The unions failed to establish a likelihood of success on the merits of their three constitutional claims. The circuit court therefore abused its discretion in granting a preliminary injunction. The circuit court's February 24, 2017, order is therefore reversed, the preliminary injunction dissolved, and the case remanded for the circuit court to conduct a final hearing on the merits of the parties' various contentions.”); *State ex rel. West Virginia Secondary School Activity Com'n v. Webster*, 228 W. Va. 75, 84, 717 S.E.2d 859, 868 (2011)(“Having determined that the trial court exceeded its authority in issuing both the temporary restraining order and the preliminary injunction, a writ of prohibition was previously entered by order of this Court on December 7, 2010, and the mandate was contemporaneously issued with that prior ruling.”); *State ex rel. Smith v. Thornsberry*, 214 W. Va. 228, 222-23, 588 S.E.2d 217, 233-34 (2003)(“Inasmuch as the lower court lacked jurisdiction, the March 26,

B. THE CIRCUIT COURT ABUSED ITS DISCRETION UNDER THE FOUR-FACTOR TEST IN *JEFFERSON COUNTY BOARD OF EDUCATION* BY ENJOINING NNE'S USE OF WATER FACILITIES TO TRANSPORT WATER TO LOCATIONS OUTSIDE OF THE BLACKSVILLE AMI OR TO SELL WATER TO THIRD PARTIES WHERE IT (I) FOUND THAT "PLAINTIFF HAS ESTABLISHED THAT IT IS LIKELY TO SUFFER IMMEDIATE AND IRREPARABLE HARM," BUT THE ONLY EVIDENCE WAS TO THE CONTRARY; (II) AWARDED A PRELIMINARY INJUNCTION BASED ON A CURSORY AFFIDAVIT; (III) FOUND THAT "PLAINTIFF HAS ESTABLISHED THAT THERE IS A LIKELIHOOD OF SUCCESS ON THE MERITS OF ITS CLAIMS" WHERE THE RECORD REFLECTS THAT THE PARTIES DID NOT FORM A PARTNERHSHIP OR JOINT VENTURE, BUT INSTEAD OWN THE WATER FACILITIES AS TENANTS IN COMMON; (IV) FOUND, WITHOUT ANY IDENTIFICATION OF SOURCE, THAT "ENJOINING DEFENDANTS FROM (A) TRANSPORTING WATER TO LOCATIONS OUTSIDE OF THE BLACKSVILLE AMI OR (B) SELLING WATER TO THIRD PARTIES FOR USE OUTSIDE OF THE BLACKSVILLE AMI IS IN THE PUBLIC INTEREST;" AND (V) IT FAILED BALANCE THE COMPARATIVE HARDSHIP TO THE RESPECTIVE PARTIES.

- 1. The Circuit Court Erred in Finding that "Plaintiff Has Established that it is Likely to Suffer Immediate and Irreparable Harm before the Court Makes its Final Ruling on Plaintiff's Request for Permanent Injunctive Relief," But the Only Evidence Was to the Contrary.**

At the preliminary injunction hearing, the following discussion of alleged "irreparable harm" occurred:

MR. KING: Yeah, but I -- and let me explain why I think that that -- why I think this is evidence of irreparable harm. The reason it's evidence of irreparable

2003, order is void, and its provisions, including the temporary restraining order, are unenforceable."); *Camden-Clark Memorial Hosp. Corp. v. Turner*, 212 W. Va. 752, 754, 575 S.E.2d 362, 364 (2002)("Because we find that the lower court erred in placing a burden on Ms. Turner to disprove the allegations made against her, we reverse the lower court's grant of a permanent injunction and remand the case with directions."); Hart, *supra* at 546, 550 S.E.2d at 82 ("pon a review of the appellate record, the parties' arguments, and the pertinent authorities, we conclude that Hart was not entitled to injunctive relief. Because we find that the Circuit Court of Raleigh County abused its discretion, we vacate its order awarding a preliminary injunction."); see also *Quintain Development, LLC v. Columbia Natural Resources, Inc.*, 210 W. Va. 128, 137-38, 556 S.E.2d 95, 104-05 (2001)("Because we have reversed the circuit court's ruling as to the dissolution of the injunction with respect to the McCormick tract, CNR is entitled to recover its damages incurred in connection with the McCormick portion of the injunction. . . . Furthermore, CNR may be entitled to recover attorney fees related to the McCormick portion of the injunction if it can establish the required elements of proof. . . .").

harm is, according to them, and we agree, there is no contract, there's no written contract, there's only a partnership that we say exists and by -

THE COURT: I was going to say, I don't even think they agree that there's a partnership, but okay.

MR. KING: I understand that's a fact issue and that's why we have litigation, but I think we've put forth evidence that one does exist, and Mr. Hawk will present the cases to Your Honor that demonstrates that the evidence is certainly -- show the likelihood of success on the merits. But the point is, is that the status quo by using this water from the Mon River to cross into the AMI has changed from what the relationship of the parties was before and from what they're trying to do.⁴⁰

Obviously, other than arguing the Plaintiff had a right to maintain the status quo, which this Court has rejected as a reason for awarding a preliminary injunction,⁴¹ no "irreparable harm" was identified here. When later pressed by the Circuit Court regarding how the Plaintiff was harmed at all by the transmission of generic water through a portion of the system jointly developed by the parties, the Plaintiff's counsel identified only alleged economic harm and maintaining the status quo as justification for the issuance of an injunction:

THE COURT: I understand that. And I guess what I'm getting at and -- you know, you're asking for an injunction, and, obviously, to get an injunction you have to substantiate that there's irreparable harm on your side of the table. I mean, I understand your partnership arguments, joint venture arguments, and I'm sympathetic to those arguments, they make sense, but I'm still trying to figure out, okay, why all of a sudden is this an emergency that requires a preliminary injunction?

MR. HAWK: Because there wasn't a trespass until last week. And, quite frankly --

THE COURT: Okay. So how are you harmed because water from the Monongahela River, as opposed to water from Dunkard Creek, has gone through those pipelines?

⁴⁰ [App. at 264-65]

⁴¹ See, e.g., *Markwest*, supra at *3.

MR. HAWK: Well, as my partner has already said, it's this proportionate reduction in the price. As long as it's within the -

THE COURT: And that's \$.50 --

MR. HAWK: -- AMI, it is a complete wash.

THE COURT: That's \$.50 a barrel and it's - I can measure that. You can come in here six months from now and tell me that it's cost us X number of dollars more because we've had to pay \$.50 a barrel more.

MR. HAWK: But if it's trespass, that is where injunctive relief is appropriate. And we cite a case in our brief 7-Eleven v. Khan that states the unauthorized interference with real property interest constitutes irreparable harm as a matter of law.

THE COURT: How is it an interference? I'm sorry, I'm -- you know, maybe I'm getting a little thick up here, but, I mean, water is water. What difference does it make where it comes from if the difference is what it costs?

MR. HAWK: Well, the difference is it's actually -- Your Honor, they have a partnership. They have a duty of loyalty to each other as partners, and they are trampling on that duty of loyalty and they're looking out for their self-interest by building this extension outside of it, knowing they are going to charge for that, not get - being objected to all along the way. And, again, it's a trespass, and that's where the fact that the partnership is a separate entity. This isn't them trespassing against Pachira. This is them trespassing against this partnership that has been established. And, furthermore, it's not water that was contemplated by the original agreement. It's not water within the AMI. And, again, when it's within the AMI, it's a wash as far as price goes. It's not a trespass when it's brought within the AMI, it's sourced from within the intention of the parties. And, quite frankly, it's what the parties have done for the past five years. That's the point of an injunction is to return the parties to the status quo.⁴²

Again, other than another talismanic invocation of its "status quo" argument, absolutely no "irreparable harm," if that requirement is to have any meaning, is identified in this exchange. Moreover, Plaintiff's counsel essentially conceded that any harm suffered by the Plaintiff as a

⁴² [App. at 280-82]

result of using the system to transport water outside the Blacksville AMI would be subject to a calculation by the award of damages:

As my partner notes, one of the other reasons that you do obtain an injunction is to stop the damages, and we have damages here. There's going to be a difference in price for any water that is sourced outside of this AMI to the detriment of Pachira. And so that is one of the reasons why we didn't have this - it wasn't immediate until last week when they started flowing this water. We got in there as soon as we could. We filed this, I believe, the day after - we filed this lawsuit and the next day they are pumping water from the Monongahela River.⁴³

If "stopping damages" were the law, all parties to any contract, partnership, or joint venture with a dispute could obtain a preliminary injunction—hardly an "extraordinary" remedy.

As to the Plaintiff's "trespass" argument, NNE's counsel noted at the hearing:

MR. JOHNS: The cases they cited regarding trespass, the one 7-Eleven case, that talked about -- that was a franchisee that refused to vacate the 711 and the fact that it's a unique property and therefore it is irreparable harm when you have that type of situation. Here, we're talking about water passing through a pipe. If there's any type of trespass, it's not irreparable harm at all in this case.⁴⁴

This explains why the Circuit Court's order does not refer to the word "trespass" nor any reference to the *7-Eleven* case.⁴⁵

⁴³ [App. at 282]

⁴⁴ [App. at 303]

⁴⁵ Indeed, the word "trespass" appears nowhere in the Plaintiff's complaint. [App. at 5-45] The first time it was referenced in the case was in the brief in support of the Plaintiff's motion for injunctive relief when the novel concept of "a trespass on joint venture property" was referenced. [App. at 141] The only case cited in support of the proposition that a court can enjoin "a trespass on joint venture property" is not a West Virginia case, but *7-Eleven, Inc. v. Khan*, 977 F. Supp. 2d 214 (E.D. N.Y. 2013), where a federal district court applying a New York statute governing franchise agreements, having absolutely nothing to do with joint ventures or West Virginia law, held that the franchisor had established the likelihood of prevailing on its suit to terminate the subject franchise agreements; that the franchisees' continued use of the franchisor's trademarks was unauthorized and would create confusion under the Lanham Act; and that the franchisees' continued occupancy of the real property owned by the franchisor after termination of the franchise agreements would cause the type of harm that could not be rectified by

“Injunctive relief, like other equitable or extraordinary relief,” this Court has held, “is inappropriate when there is an adequate remedy at law.”⁴⁶ Indeed, a “preliminary injunction is extraordinary and drastic remedy not to be granted unless movant clearly establishes burden of persuasion as to all elements.”⁴⁷

Here, there is absolutely no record evidence to support the Circuit Court’s conclusion that the Plaintiff would suffer irreparable harm if water from outside the Blacksville AMI passed through what the Plaintiff itself alleges is “joint venture property.”⁴⁸ Instead, as discussed above, to the extent that the Plaintiff prevails on one of its claims that Defendants’ use of the Water Facilities violates some right of the Plaintiff, any damages suffered as a result may be remedied by money damages. Accordingly, this Court should set aside the Circuit Court’s order granting a preliminary injunction.

2. There Was an Insufficient Evidentiary Predicate for the Award of a Preliminary Injunction.

The Circuit Court erred when it issued a partial injunction based on an insufficient, bare-bones evidentiary submission. Under W. Va. Code § 53-5-8, a preliminary injunction may issue if “the court or judge be satisfied by affidavit or otherwise of the plaintiff’s equity.”⁴⁹ As this Court cautioned, however, in *Jefferson County Board of Education*:

monetary damages. The only thing about the *7-Eleven* case that is similar to the present case is that a preliminary injunction was involved, which explains, in part, why the Circuit Court’s preliminary injunction order makes no reference to it.

⁴⁶ *Hechler v. Casey*, 175 W. Va. 434, 440, 333 S.E.2d 799, 805 (1985).

⁴⁷ *West Virginia AFL-CIO*, supra at 648 n.16, 804 S.E.2d at 989 n.16 (Workman, J., concurring in part, and dissenting, in part)(citing *Horton v. City of St. Augustine*, 272 F.3d 1318, 1326 (11th Cir. 2001));

⁴⁸ [App. at 141] Obviously, the idea that one could trespass on one’s jointly-held property is preposterous.

⁴⁹ The relevant text of W. Va. Code § 53-5-8 provides: “No injunction shall be awarded in vacation nor in court, in a case not ready for hearing, unless the court or judge be satisfied by affidavit or

This does not mean that a cursory affidavit is sufficient to support the issuance of an injunction. As we explained in *State ex rel. Bronaugh v. City of Parkersburg*, 148 W. Va. 568, 574, 136 S.E.2d 783, 787 (1964): “Any injunctive relief in these circumstances would be mandatory in nature, a harsh remedial process, used only in cases of great necessity and not looked upon with favor by the courts.” (Citation omitted). *See also State ex rel. Donley v. Baker*, 112 W.Va. 263, 164 S.E. 154 (1932).⁵⁰

Hand-in-hand with this requirement that there be more than a cursory affidavit offered in support of a preliminary injunction is the corresponding requirement that a circuit court makes specific findings of fact and detailed conclusions of law:

Rule 52(a) of the West Virginia Rules of Civil Procedure states that “in granting or refusing preliminary injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action.” More specifically, we now state that an order granting a preliminary injunction shall set forth the reasons for its issuance; shall be specific in its terms; and shall describe in reasonable detail, and not by reference to a complaint or other document, the act or acts sought to be restrained.⁵¹

As noted above, the only evidence submitted in support of the Plaintiff’s motion for a preliminary injunction was a four-page affidavit of its president.⁵² That affidavit admits that the Plaintiff has “no ownership interest in the Monongahela Extension” and that “The Monongahela River is

otherwise of the plaintiff’s equity; and any court or judge may require that reasonable notice shall be given to the adverse party, or his attorney-at-law, or in fact, of the time and place of moving for it, before the injunction is awarded, if in the opinion of the court or judge it be proper that such notice should be given.” See also Syl. pt. 10, *Chesapeake & Potomac Tel. Co. v. City of Morgantown*, 143 W. Va. 800, 105 S.E.2d 260 (1958).

⁵⁰ *Jefferson Co. Bd. of Educ.*, supra at 24, 662 S.E.2d at 662.

⁵¹ Syl. pt. 4, *Ashland Oil, Inc. v. Kaufman*, 181 W. Va. 728, 384 S.E.2d 173 (1989); *see also* Palmer & Davis, LITIGATION HANDBOOK ON WEST VIRGINIA RULES OF CIVIL PROCEDURE 5TH at § 52(a)[4] (2017)(“Rule 52(a) states that in granting or refusing a preliminary injunction, the court must set forth findings of fact and conclusions of law which constitute the grounds for its action. In *Ashland Oil, Inc. v. Kaufman*, the Supreme Court held that an order granting a preliminary injunction must (1) set forth the reasons for its issuance, (2) in terms that are specific, and (3) describe in reasonable detail, and not by reference to a complaint or other document, the act or acts sought to be restrained.”)(footnote omitted)

⁵² [App. at 147-150]

located outside the Blacksville AMI.”⁵³ The affidavit identifies no written contract, email, or other document evidencing any agreement that the Water Facilities could not be used by Defendants to transport water from outside the Blacksville AMI, to locations outside the Blacksville AMI, or for transporting water for sale by Defendants to third parties for use outside the Blacksville AMI. Instead, after sitting back and watching NNE construct, at its sole expense, the Monongahela Trunk Line, and connecting it to the Water Facilities, the affidavit took the unilateral position that because the use of the Water Facilities in the past did not include such use, it was prohibited at the whim of the Plaintiff.

Also, nowhere in the affidavit does Mr. Statler (1) identify any harm to the Plaintiff, let alone irreparable harm, that would be suffered by using the Water Facilities to transport water for sale or use outside the Blacksville AMI; (2) identify the legal source of any enforceable agreement precluding Defendants from the usage sought be enjoined; and (3) discuss any “public interest” served by enforcing one party’s interpretation of its scope of some oral, partnership, or joint venture agreement over another party. Of course, this explains why the Circuit Court’s preliminary injunction order makes no findings regarding these matters.

Here, because the Circuit Court relied on a conclusory affidavit that failed to address the required elements for injunctive relief and it failed to make the detailed findings of fact and conclusions of law, this Court should reverse the Circuit Court’s order.

⁵³ [App. at 148]

3. **The Circuit Court Erred by Finding that “Plaintiff Has Established that There is a Likelihood of Success on the Merits of Its Claims” Where the Evidence is Undisputed that the Parties Did not Form a Partnership, Joint Venture, or Have Any Other Agreement Related to the Water Facilities, But Instead Own the Water Facilities as Tenants in Common and the Uniform Partnership Act States that “Joint Property, Common Property or Part Ownership Does Not by Itself Establish a Partnership.”**

Although the language, “Plaintiff has established that there is a likelihood of success on the merits of its claims” appears in the Circuit Court’s order, not only is there no discussion of any substantive law applicable to those claims—indeed, there is no substantive law cited in the order. This alone warrants setting aside the preliminary injunction. Also, to the extent the Plaintiff’s claims were relevant to its demands for injunctive relief and played a part in the Circuit Court’s order, the Plaintiff failed to demonstrate any likelihood of succeeding on those claims.

Also, as previously noted, there is no “trespass” claim contained in the Plaintiff’s complaint even though it was essentially the only substantive argument made at the hearing. Indeed, most of the counts of the complaint have nothing to do with the dispute that ultimately produced the Plaintiff’s motion for injunctive relief. Counts I, IV, and VIII of the complaint alleged that NNE failed to “ratably produce oil and gas from the Blacksville AMI in favor of wells in which it holds all working interest.”⁵⁴ Counts II, VI, IX complains that NNE has failed to provide certain “Seismic Data.”⁵⁵ Count XII seeks an accounting. Only Counts III, VII, and XI of the complaint address the disputes over the Water Line and Handling Facilities.

Count III of the complaint is a suit for “breach of contract” based upon allegations that (1) “NNE and Pachira agreed to construct and jointly own, on the same 75/25% basis, the Water

⁵⁴ [App. at 24, 29, 36]

⁵⁵ [App. at 25, 30, 37]

Line and Handling Facilities;” (2) “Pachira has attempted to memorialize the agreement concerning the same in writing but the parties were unable to agree upon the terms of a written agreement;” and (3) “As a result” of the parties’ failure to work out a written agreement, “the Water Line and Handling Facilities are jointly-owned joint venture property of Pachira and NNE under the Partnership Act which imposes a duty of care on each party to protect the properties and interest of the partnership and a duty of loyalty to the other partners of the partnership.”⁵⁶

Here, there is no dispute that NNE constructed the Monongahela Trunk Line without any financial contribution by the Plaintiff and with the Plaintiff’s knowledge. Only after NNE decided to connect it to the Water Facilities to provide water to wells both within and outside the Blacksville AMI did the Plaintiff claim that, because “At no time was there an agreement, implied or otherwise, that the Water Line and Handling Facilities were to be used to transport water from a source outside the Blacksville AMI, or for use to provide water to wells in which NNE and Pachira did not own the working interest,”⁵⁷ it had the unilateral right to stop NNE from using the Water Facilities that the Plaintiff alleges in its own complaint were “jointly-owned.”

The following illustrates the absurdity of Plaintiff’s position: two families who have separate and joint business enterprises enter into an oral agreement to construct a multi-family residential building that is silent on whether either family can rent to anyone other than members of the two families. Thereafter, a dispute arises over whether one family can rent to a non-family member after difficulties present themselves in keeping the building occupied, but the parties are unable to resolve this dispute by negotiating a written agreement. One family sues the other

⁵⁶ [App. at 26-27]

⁵⁷ [App. at 27]

claiming that, even though there is no written agreement, the one family owes some sort of fiduciary duty to the other under a phantom partnership or joint venture agreement, and can enjoin the other family from renting to a non-family member even though to do so will cause no harm to the building.

Indeed, in Count VII of the complaint, the Plaintiff tacitly conceded that there is no agreement prohibiting NNE from using the Water Facilities to transport water from outside the Blacksville AMI to both within and outside it, seeking a declaration of such prohibition: (1) “NNE and Pachira both acknowledge that the Water Line and Handling Facilities are not governed by the AMI Agreement or the JOA” and (2) “Defendants’ plan to use the joint venture Water Line and Handling Facilities for their own gain at the exclusion of Pachira is a breach of the fiduciary duty, the duty of good faith and fair dealing, and the duty of loyalty that Defendants owe Pachira pursuant to the oral joint venture.”⁵⁸

The Plaintiff’s preliminary injunction briefing relied upon the law of contract.⁵⁹ However, in its complaint, it acknowledged that its negotiations with NNE over contractual terms governing the parties’ ownership of the Water Facilities produced no written contract. Moreover, nowhere does it identify a meeting of the minds.

“[W]hen it is shown that the parties intend to reduce a contract to writing this circumstance creates a presumption that no final contract has been entered into, which requires strong evidence to overcome.”⁶⁰ Moreover, a plaintiff cannot invent contractual terms out of

⁵⁸ [App. at 33-34] Count XI of the complaint, seeking injunctive relief, was predicated upon the same “oral joint venture” theory. [App. at 39-42]

⁵⁹ [App. at 139]

⁶⁰ *Blair v. Dickinson*, 133 W. Va. 38, 70, 54 S.E.2d 828, 844 (1949).

whole cloth, especially where it acknowledges there has been no meeting of the minds.⁶¹ For this reason alone, this issue, not even mentioned by the Circuit Court in its order, precluded the conclusion that Plaintiff was more likely than not to prevail on its “oral joint venture” claim.

Likewise, the Plaintiff cannot point to any language in the AMI Agreement, the JOA, the Surface Use Agreements, or the First Amendment to the AMI to support its argument that any oral agreement connected to the AMI would be governed by the terms of the AMI Agreement and the JOA because such language does not exist. The Plaintiff’s attempt to fabricate the terms of an oral agreement by referring back to the AMI Agreement, while simultaneously acknowledging that the parties have been unable to agree on the terms of that agreement, clearly fails to meet the standard that it will likely succeed on the merits of its claims.

To the extent the Plaintiff relies on the fact that the 75%/25% cost split for the Water Facilities is the same arrangement put in place in the AMI and the JOA, the AMI agreement specifically states that **“it is not the intention of the Parties hereto to create, nor shall this instrument be construed as creating a mining or other partnership or association, which might render the Parties liable as partners.”**⁶²

The JOA contains almost exactly the same language, but goes even further to specify that the parties are not entering a joint venture and have no fiduciary duty to one another:

It is not the intention of the parties to create, nor shall this agreement be construed as creating, a mining or other partnership, joint venture, agency relationship or association, or to render the parties liable as partners, co-venturers, or principals. In their relations with each other under this agreement, **the parties shall not be considered fiduciaries** or to have

⁶¹ *O’Connor v. GCC Beverages, Inc.*, 182 W. Va. 689, 391 S.E.2d 379 (1990)(where communications between parties evidence that there was no true meeting of the minds, the parties did not form an enforceable agreement).

⁶² [App. at 55] (emphasis supplied)

established a confidential relationship **but rather shall be free to act on an arm's-length basis in accordance with their own respective self-interest**, subject, however, to the obligation of the parties to act in good faith in their dealings with each other with respect to activities hereunder.⁶³

Thus, in the only written agreements governing the parties' relationship, the same "fiduciary," "fair dealing," and "loyalty" duties arising under a "partnership"⁶⁴ or "joint venture" **were expressly disclaimed by both the Plaintiff and NNE.**

As characterized in the entirety of the preliminary injunction proceedings below, the Plaintiff and the Circuit Court completely ignored this express written disclaimer, which warrants setting aside the preliminary injunction.

As noted to the Circuit Court below, in the absence of a formal agreement governing the terms and scope of their respective use of the Water Line Facilities, the parties' relationship is governed by the law of tenancy in common. A tenancy in common is a form of ownership in which each cotenant owns a separate fractional share of undivided property.⁶⁵ A tenancy in common may consist of real or personal property.⁶⁶ **"In the absence of an agreement** among the cotenants as to the use and management of the commonly held property, each tenant in common is equally entitled to the use, occupancy, enjoyment, and possession of the common

⁶³ [App. at 78] (emphasis supplied)

⁶⁴ In addition, the Plaintiff also ignores the clear language of the Uniform Partnership Act which provides that "joint property, common property or part ownership does not by itself establish a partnership." W. Va. Code § 47B-2-2(c). West Virginia law provides that property acquired in the name of a person, where the deed does not indicate that the person is acquiring the property on behalf of a partnership or that a partnership is even in existence, is presumed to be separate property and not partnership property. W. Va. Code § 47B-2-4(d). Likewise, in order to be considered partnership property, the property must be acquired either (1) in the name of the partnership, (2) in the name of a partner with an indication that a partnership exists, or (3) with partnership assets. W. Va. Code § 47B-2-4(b)-(c).

⁶⁵ 20 Am. Jur. 2d *Cotenancy and Joint Ownership* § 31 (2018).

⁶⁶ Id.

property.”⁶⁷ Each co-owner of the property is entitled to use that property in its own business.⁶⁸ Specifically, where parties shared a tenancy in common of a water line, “each cotenant was entitled to the water supplied by this jointly owned pipe line and . . . neither cotenant had a right to exclude the other from use of this common property.”⁶⁹

In *Kellum*, involving circumstances similar to those presented in this litigation, one cotenant with an interest in a water line sought to exclude another cotenant from using the line.⁷⁰ Rejecting the argument advanced by the Plaintiff in this case, the court held that “[n]either could exercise acts of ownership and dominion over the line so as to deprive the other of the joint use thereof and injunction was the proper remedy to protect the interests of the appellee in the subject property.”⁷¹

Here, Defendants are not excluding the Plaintiff from the use of the commonly owned waterline. The Plaintiff merely complains that Defendants are using the Water Facilities in a manner to which the Plaintiff has not consented. However, as tenants in common, Defendants do not need Plaintiff’s consent to use the water line as long as Defendants are not depriving the Plaintiff of the opportunity to use the line. If anything, by securing an injunction, the Plaintiff has deprived Defendants of their rightful use of the Water Facilities. Accordingly, the Plaintiff

⁶⁷ 86 C.J.S. *Tenancy in Common* § 21 (2018); see also *Lucado v. Lester*, 105 W. Va. 491, 143 S.E. 155 (1928)(concluding that an owner in common of personal property of which each owner has equal possession and use is entitled to any use of the jointly owned property not inconsistent with the rights of the other owners).

⁶⁸ *Id.*

⁶⁹ *Kellum v. Williams*, 252 Ala. 71, 72, 39 So.2d 573, 574 (1949)(citations omitted).

⁷⁰ *Id.*

⁷¹ *Id.* at 72, 39 So. 2d at 574.

has hardly made a showing that it has a likelihood of success on the merits of its claims regarding the Water Facilities.

Finally, with respect to the Plaintiff's belated argument that NNE's use of the Water Facilities constitute "a trespass on joint venture property," a joint venture is a business relationship in which the parties combine their property and money, and is not a form of ownership in property⁷² and this Court has held that "[i]t is conceptually impossible for tenants-in-common to trespass against one another."⁷³ Again, the Plaintiff and the Circuit Court ignored this issue, further justifying setting aside the preliminary injunction.

4. The Circuit Erred by Finding, Without Any Support in the Record or Identification of Any Public Interest, that "Enjoining Defendants from (i) Transporting Water to Locations Outside of the Blacksville AMI or (ii) Selling Water to Third Parties for Use Outside of the Blacksville AMI is in the Public Interest."

In determining whether to grant injunctive relief, courts must consider the public interest.⁷⁴ Again, other than simply including that language in its preliminary injunction order, the Circuit Court did not discuss this issue.

First, the public policy of West Virginia is to provide for the development of oil and natural gas.⁷⁵ Here, the public interest is served by the efficient and effective production and transportation of hydrocarbons in the Blacksville AMI, including Defendants' use of the jointly-owned Water Facilities to transport water outside the Blacksville AMI and to third-parties.

⁷² *Armor v. Lantz*, 207 W. Va. 672, 679, 535 S.E.2d 737, 744 (2000).

⁷³ Syl. pt. 2, *Eagle Gas Co. v. Doran & Assocs., Inc.*, 182 W. Va. 194, 387 S.E.2d 99 (1989)(emphasis supplied).

⁷⁴ See *Jefferson Co. Bd. of Educ.*, supra at 24, 393 S.E.2d at 662.

⁷⁵ W. Va. Code § 22-6A-2(a)(8)("Allowing the responsible development of our state's natural gas resources will enhance the economy of our state and the quality of life for our citizens . . .").

Second, in its response on this issue and relying on its counter-affidavit, NNE detailed the public safety concerns attendant to an award of the requested injunctive relief:

Additionally, if Defendants are prohibited from using the Mon River Extension with the Water Facilities, they would be forced to use trucks to haul water to the well pads for the fracking process. *Id.* at ¶ 22. Not only is hauling water inefficient when the Water Facilities are in place, it is also against the public interest as it raises public safety concerns. Water trucking increases traffic and poses safety risks on narrow state and county roads. See *id.* at ¶ 25. Specifically, if required to truck water to the well pads for the fracking process, an estimated 60 trucks will travel 25 miles of roads, 24 hours a day for at least 100 days. See *id.* at ¶ 23. Increased truck traffic also increases road damage and the risk of road closure and traffic delays. See *id.* at ¶ 25. Use of water trucks also decreases fracking efficiency and lengthens the duration of the fracking process, which prolongs the period of increased traffic and safety risks. See *id.* at ¶ 24. For these reasons, an injunction preventing the use of the water infrastructure would work against the public interest, and Plaintiff's motion should be denied.⁷⁶

Finally, there is no "public interest" in resolving a dispute between two parties regarding the existence or non-existence of an "oral joint venture." Indeed, the Plaintiff's "Hail Mary" argument for justifying the award of a preliminary injunction in a private dispute between two parties over an alleged "oral joint venture" is baseless and irrelevant to the inquiry.⁷⁷

Accordingly, because the ultimate result of the Circuit Court's award of a preliminary injunction is permitting one party to a private dispute to use the judiciary to gain leverage over the other party to the private dispute, this Court should set aside the preliminary injunction and remand this case with directions that it be dissolved.

⁷⁶ [App. 218-19] While these arguments were made regarding the fracking of the Mepco wells, these arguments apply equally to any wells outside the Blacksville AMI for which injunctive relief was granted to the Plaintiff.

⁷⁷ See, e.g., *Reg Seneca, LLC v. Harden*, 938 F. Supp. 2d 852, 862 (S.D. Iowa 2013)(finding "the public interest weighs little in favor of either party" where the case was "largely a private dispute, governed by contract law"); *Waldron v. George Weston Bakeries, Inc.*, 575 F. Supp. 2d 271 (D. Maine 2008)("[T]his case is a contract dispute between private parties and as such there is no public interest that is affected by the Court's decision to grant or deny injunctive relief."); *Cartridge Twins, LLC v. Wildwood Franchising, Inc.*, 2009 WL 1690728 at *2 (N.D. Cal.)(“Finally, the public interest does not favor an injunction; this matter is a private dispute.”).

5. The Circuit Court Erred by Failing to Address the Harm to NNE in Balancing the Comparative Hardship to the Respective Parties in Awarding the Injunction Contrary to Syllabus Point 4 of *State ex rel. Donley v. Baker*, 112 W. Va. 263, 164 S.E. 154 (1932).

Just as the Circuit Court's order barely mentions each of the three "irreparable harm," "likelihood of success," and "public interest" prongs of the test for a preliminary injunction, it pays the same lip service to the "balance of hardship" prong. Its order contains absolutely no discussion of the "balance of hardship."⁷⁸

In its opposition to the Plaintiff's preliminary injunction motion, NNE noted:

If injunctive relief is denied, far from suffering harm, Plaintiff, as a joint owner of the Water Facilities, will be paid its share of the cost for all water flowing through the waterlines. On the other hand, if injunctive relief were granted, the harm to Defendants will be substantial. Defendants would be unable to draw enough water from Dunkard Creek to efficiently frack the wells and would be forced to reduce the number of stages each day. Even if Dunkard Creek's water levels were sufficient to allow withdrawal for fracking, the waterline transporting water from Dunkard Creek to the Mepco Wells is 12 inches in diameter and has a flow of 40 bpm at most. See Exh. A, at ¶ 17. The Mon River Extension, however, is 16 inches in diameter with a flow of 60-80 bpm. *Id.* Thus, if forced to use the Dunkard Creek water for fracking, it would take at least 50% longer to complete fracking. Moreover, from July 15, 2018 to September 7, 2018, there were at least 17 days when withdrawing water from Dunkard Creek was prohibited. *Id.* at ¶ 13. The Monongahela River water levels, on the other hand, are more consistent and there are less days when withdrawals are prohibited.

In addition, Defendants have already started fracking on these wells. If an injunction should issue, the frack crews would have to be released to work on other sites. These crews may not be available to Defendants when fracking resumes at a later date. The only other option would be to truck water in to complete the fracking. This would also result in fewer stages being completed in a day, leading to a longer fracking process and resulting in additional costs harming both Plaintiff and Defendants.

On top of the additional fracking costs, if NNE is unable to continue fracking the Mepco Wells, it will cause delays in placing the Jenkins Wells into

⁷⁸ [App. at 407-414]

production. When a well is in production, it produces a significant amount of water. This water is then used at other wells for fracking. If fracking stops on the Mepco Wells, then water produced during production at the Jenkins Wells will have to be stored or disposed of. Because the available storage capacity is unable to keep pace with the water produced, the production of the Jenkins Wells will have to be delayed or the produced water will have to be disposed of at an additional cost.

Finally, if Defendants are enjoined from using the Mon River Extension and are forced to use Dunkard Creek, there are still days during which Defendants will have to haul water in trucks to the well pads for fracking. As noted above, there are often days when withdrawing water from Dunkard Creek is prohibited. On these days, Defendants would have to haul water to the pads for fracking. Not only does this decrease fracking efficiency, it also raises public safety concerns.⁷⁹

Compare this discussion with the argument advanced by the Plaintiff below relative to the balancing of harms, which is nothing more than a recapitulation of its argument that parties to a dispute over the existence or non-existence of an agreement between them are entitled to the intervention of the judiciary by the extraordinary remedy of a preliminary injunction:

Defendants do not have the authority to use the Water Line and Handling Facilities to (i) transport water from sources located outside of the Blacksville AMI, (ii) transport water to wells located outside of the Blacksville AMI, and/or (iii) sell water to third-party operators for use in wells located outside of the Blacksville AMI. **Without a TRO and preliminary injunction enjoining Defendants' actions, Pachira is without a remedy to enforce the joint**

⁷⁹ [App. at 216-17]. In this case, the damage to NNE is particularly acute because it has been enjoined from using a system it constructed with its own resources to sell water to third-parties. As NNE's counsel noted at the hearing:

I thought that Mr. Hawk was going to get up and explain to the Court the irreparable harm that they would suffer, but I've not heard anything about irreparable harm today. The water flowing through the pipe from the Mon River causes just as much wear and tear on the pipe as the water flowing through from Dunkard Creek. So there's no additional expense in terms of the wear and tear on the pipe, and even if there was, it could be compensated for by damages. So they haven't laid out any argument for irreparable harm in any way here today, and, in fact, were we to be enjoined, the cost for all of these wells is going to go up significantly to the tune of about \$3 million to complete the fracking.

[App. at 293]

venture agreement with NNE and protect its interest in the Water Line and Handling Facilities.

On the other hand, the potential harm to Defendants is non-existent. There simply is no reason for Defendants to transport water from sources located outside of the Blacksville AMI for the Mepco wells. Specifically, Defendants could use the Water Line and Handling Facilities to transport water from Dunkard Creek, which is located within the Blacksville AMI, to hydraulically fracture the Mepco wells. See Statler Aff., Ex. A, at if 33. Thus, there are sufficient water sources available within the Blacksville AMI to satisfy the requirements of the Blacksville AMI wells. Further, **Pachira is unaware of any obligations, contractual or otherwise, that require Defendants to breach the joint venture agreement to hydraulically fracture the Mepco wells.** Id. at if 34. Finally, **Pachira is seeking nothing more than enforcement of the joint venture agreement between NNE and Pachira.** Pachira has repeatedly objected to Defendants' use of the Water Line and Handling Facilities for Defendants' proposed purposes. To their own peril, Defendants moved forward with their plans to operate in violation of the joint venture agreement. **To the extent Defendants would suffer any potential harm as a result of a TRO and preliminary injunction, it is harm that they brought on themselves by utilizing the Water Line and Handling Facilities for unlawful purposes.**⁸⁰

Again, the harm caused by one party's alleged breach of an "oral joint venture" is not the kind of harm that, balanced against the practical harm suffered by NNE as a result of the compelled deprivation of its right to use property held as tenants in common, supports the award of a preliminary injunction, which explains why there is no substantive discussion of the issue in the Circuit Court's order.

VI. CONCLUSION

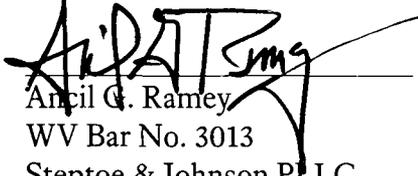
For the reasons set forth above, this Court should reverse the order of the Circuit Court of Monongalia County entered on October 25, 2018, granting the Plaintiff's "Motion to enjoin Defendants from using the Water Line and Handling Facilities to (i) transport water to locations outside of the Blacksville AMI or (ii) sell water to third parties for use outside of the Blacksville

⁸⁰ [App. at 143-44] (emphasis supplied)

AMI,” and remand the case with directions to dissolve the preliminary injunction and to award damages and attorney fees to the Petitioners incurred as a result of the issuance of the preliminary injunction.

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