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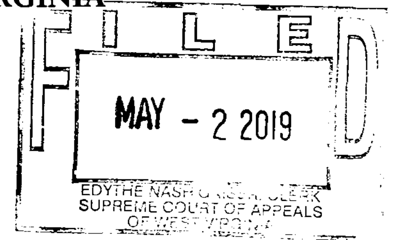
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



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. STATEMENT OF THE CASE

This is an appeal by Northeast Natural Energy LLC and NNE Water Systems LLC ("NNE" or "Defendants") from an order granting in part a motion by Pachira Energy LLC ("Pachira" or "Plaintiff") for a preliminary injunction related to the use of waterline and handling facilities to transport water for use during the hydraulic fracturing process of gas wells.

The Circuit Court erred in issuing a partial injunction because, first and foremost, it did not, and could not, find that Pachira would suffer irreparable harm without one. The Circuit Court appeared to split the proverbial baby by enjoining the use of the Water Lines to transport water outside the AMI while permitting their use to transport water inside the AMI. This ruling was a clear abuse of discretion because, as the Circuit Court acknowledged at the preliminary injunction hearing, even if Pachira were to succeed on the merits of its claims, it could be wholly compensated with money damages. There was no basis to distinguish between the damages stemming from transporting water within and outside the AMI, making the issuance of a partial injunction incongruous. Pachira's alternative theories of irreparable harm fare no better—it does not identify any basis in law or fact that would support a finding of irreparable harm here. Accordingly, for these reasons alone, the injunction should not have issued.

The Circuit Court also erred when it granted an injunction based on a flawed reading of the Partnership Act. Pachira's only evidence in support of its contention that parties' conduct had created a partnership under West Virginia law was a self-serving affidavit from Pachira's CEO. While the Circuit Court states that it also relied on arguments of counsel and facts "proffered" by counsel, those statements cannot provide the evidentiary basis for granting an injunction. Moreover, nothing in the evidence Pachira presented in support of its motion for a preliminary

injunction shows that Pachira and NNE had associated "to carry on as coowners a business for profit" concerning the Water Line.[1]

Instead, the undisputed facts show the opposite: the parties tried to reach an agreement over the use of the Water Line but could not. The only association of Pachira and NNE is set out in the AMI Agreement and the JOA, **and those documents explicitly disclaim the formation of a joint venture or partnership**. Both in the Circuit Court and this Court, Pachira argues that despite its "good faith attempts to memorialize the oral agreement concerning the Water Facilities in writing, NNE and Pachira have been unable to agree upon the terms of such written agreement," citing nothing in the record except Petitioners' brief.[2] But as Pachira admits, there never was an agreement or association - oral or otherwise - regarding the Water Facilities. [3]

Nor could the Circuit Court have based its injunction on the existence of an oral agreement prohibiting the use of the Water Lines to transport water outside the AMI. Pachira does not dispute that the only evidence it presented in support of its preliminary injunction briefing[4] was a single affidavit that asserted: "Pachira and NNE agreed that the Water Line and Handling Facilities would be used solely to carry water from the sources located within the Blacksville AMI for use at wells located within the Blacksville AMI."[5] At the same time, however, Pachira concedes such an agreement never existed.

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[1] W. Va. Code § 47B-2-2.

[2] [Respondent's Brief at 2]

[3] [Id.]

[4] [App. at 147-150]

[5] [App. at 148]

In opposition, NNE offered a sworn declaration by Mike John, its president, stating that "[a]t no time did NNE and Pachira agree that the use of the Water Facilities would be limited to transporting 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."[6] Based solely on this evidence, the Circuit Court erred in issuing the drastic remedy of a preliminary injunction. Without evidence of a meeting of the minds forming an agreement to limit the use of the Water Line to within the AMI, the Court abused its discretion by finding that Pachira had a reasonable likelihood of success on the merits of its claims.

For these reasons and others detailed below, this Court should reverse the portion of the Circuit Court's decision enjoining the use of the Water Line facilities outside of the AMI and remand with directions that the preliminary injunction be dissolved and NNE awarded damages suffered as a result of the issuance of the preliminary injunction.

II. ARGUMENT

A. 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.

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

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[6] [App. at 222] As explained in NNE's counter-affidavit: (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." [App at 222-23]

> 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."[7]

Because the Circuit Court failed to apply this test properly, this Court should set aside the preliminary injunction and remand for its dissolution and the award of damages.[8]

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."

As articulated in NNE's opening brief, there was no evidence in the record that Pachira would suffer "immediate and irreparable harm" in the absence of injunctive relief. Indeed, the Circuit Court specifically noted that it did not understand how Pachira would suffer irreparable harm.[9]

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[7] *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 Board of Education v. Jefferson County Education Association*, 183 W. Va. 15, 24, 393 S.E.2d 653, 662 (1990)(quoting *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bradley*, 756 F.2d 1048, 1054 (4th Cir. 1985)).

[8] Although Pachira's brief states, "Petitioners have the burden of establishing that the Circuit Court abused its discretion in granting a preliminary injunction" [Respondent's Brief at 8], that is not the standard because 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 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.'" Syl. pt. 1, *Camden-Clark Mem'l Hosp. Corp. v. Turner*, 212 W. Va. 752, 575 S.E.2d 362 (2002)(citations omitted). Similarly, Pachira's statement that, "Petitioners do not claim that the Circuit Court committed an error in any underlying findings of fact or conclusions of law," id. at 9, is incorrect as NNE's opening brief stated, "[T]he Circuit Court . . . made clearly erroneous findings of fact and conclusions of law." [Petitioners' Brief at 15]

[9] [Petitioners' Brief at 17-18]

The Circuit Court, in an attempt to find a middle ground between the parties, however, took the nonsensical position that the use of the Water Lines to transport water outside the AMI would somehow cause irreparable harm, even though that alleged harm could easily be reduced to money damages. Irreparable harm is the most crucial consideration in deciding whether to issue an injunction and, for this reason alone, the Circuit Court erred when it granted a partial injunction without a finding of irreparable harm.[10]

Pachira, knowing full well that it could not suffer irreparable harm where its alleged harm could be compensated with money damages, instead relies on inapplicable theories to concoct non-monetary harm. As Pachira itself notes in its response brief,[11] the Circuit Court was understandably confused by Pachira's arguments that irreparable harm could be found where Pachira clearly could be compensated with money damages. Seeing the inherent contradiction between the Circuit Court's statement and its final order, Pachira resorts to adopting theories of irreparable harm that are either inapplicable or have no basis in law.

Pachira rehashes its argument that "Pachira's harm could not be reduced to monetary damages" because NNE's conduct allegedly breached fiduciary duties owed to partners.[12] There is no legal basis, however, for this contention. In addition to the uncontroverted fact that the written agreements between the parties expressly disclaimed the existence of any partnership, the violation of fiduciary duties does not in and of itself constitute irreparable harm, nor does Pachira explain how it could. The only support Pachira cites for this absurd proposition is a provision of

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[10] See *West Virginians For Life, Inc. v. Smith*, 919 F. Supp. 954, 957 (S.D. W. Va. 1996).

[11] [Respondent's Brief at 19]

[12] [Respondent's Brief at 21] As discussed below, there was no partnership formed here. Accordingly, NNE wed no fiduciary duty to Pachira.

the Partnership Act that has no relation to the irreparable harm, and a Fourth Circuit case standing for the (uncontroverted) proposition that fiduciary claims are by their nature equitable.[13] None of Pachira's authority, however, supports the concept that a breach of fiduciary duty owed to a partner alone constitutes irreparable harm, and NNE's counsel has found none.[14]

Pachira next cites case law stating that the "unauthorized interference with a real property interest constitutes irreparable harm as a matter of law."[15] The case relied on, however, is inapposite because Pachira conflates real property with **personal property**.

In *7-Eleven*, real property owners were being prevented from access to or use of their real property interests and, as such, the courts found irreparable harm.[16] Pachira admits that "the Water Facilities are simply fixtures to the land," and therefore do not constitute real property.[17] Moreover, the scope of the injunction extends only to the Water Line facilities **outside** the AMI, in which Pachira does not claim to have any real property interest. Accordingly, the Circuit Court

[13] Id. (citing W.Va. Code § 47B-4-1(g); *In re Hutchinson*, 5 F.3d 750, 757 (4th Cir. 1993)).

[14] Pachira appears to have dropped another theory it raised in the Circuit Court, which is that NNE's actions constituted a trespass, which was irreparable harm *per se*. Under West Virginia law, a trespass does not constitute irreparable harm *per se*. Trespass cases resulting in injunctive relief involve a permanent or irremediable damage to the land or a severance or carrying away of part of the property. See, e.g., *Allegheny Dev. Corp., Inc. v. Barati*, 166 W. Va. 218, 221, 273 S.E.2d 384, 387 (1980) (finding injunctive relief was appropriate in a trespass action wherein a trespasser had removed top soil, rock, and road building materials from the property); *Webber v. Offhaus*, 135 W. Va. 138, 146, 62 S.E.2d 690, 695-96 (1950) (granting injunctive relief to prevent trespassers from cutting and removing timber). In this case, the use of the Water Facilities will not cause irremediable damage to the Water Facilities and does not involve the severance or carrying away of part of the property resulting in irreparable harm.

[15] [Respondent's Brief at 20] (citing *7-Eleven v. Kahn*, 977 F. Supp. 2d 214, 234 (E.D.N.Y. 2013)).

[16] See *7-Eleven* supra at 234 (finding that the continued occupancy of a retail store in interference with the property owner's rights constituted irreparable harm where the owner was unable to make better use of the property); see also *SWN Prod. Co., LLC v. Edge*, 2015 WL 5786739, at *5 (N.D. W.Va.) (finding that the plaintiff made a clear showing of irreparable harm where the defendants prevented access to their real property for the plaintiff to commence oil and gas operations).

[17][Respondent's Brief at 20]

could not have adopted Pachira's theory of irreparable harm stemming from a non-existent interest in real property.

Pachira attempts, in vain, to correct this problem by arguing that the Water Facilities "were constructed on property acquired pursuant to Surface Use Agreements," thereby creating for Pachira a real property interest in the Water Line Facilities.[18] As acknowledged by all parties, however, the dispute at hand is not over the use of the land on which the Water Line Facilities lie, but over the Water Line Facilities themselves. Pachira, therefore, cannot create a real property interest where there is none.

Because the Circuit Court could not have found that there was irreparable harm stemming from NNE's conduct, this Court should set aside the preliminary injunction and remand for its dissolution and the award of damages.

2. The Evidence Presented by Pachira was Insufficient to Support a Preliminary Injunction.

Pachira's attempts to counter NNE's argument that the evidence below was insufficient is also telling.

First, Pachira makes the argument that "Petitioners did not object to the sufficiency of the Statler Affidavit, or any other evidence, during the Preliminary Injunction Hearing. . . As a result, Petitioners waived any arguments regarding sufficiency of the evidence."[19] Initially, it should be noted that Pachira confuses preserved objections over the **admissibility** of evidence with objections over the sufficiency of evidence. The case Pachira cites has nothing to do with the sufficiency of evidence—it concerns only whether a party had correctly preserved an objection to

[18] [Respondent's Brief at 21-22]

[19] [Respondent's Brief at 10]

a witness's testimony where it only objected to the court's ruling on a motion in limine permitting such testimony.[20] Parties are not required to object to the sufficiency of evidence to preserve this argument on appeal.[21] Such a rule would make no sense, as it would require parties to object after the court's final order. But, of course, that is precisely the purpose of an appeal.

Moreover, NNE in its response to Pachira's request for a preliminary injunction specifically argued:

> There is no agreement governing the rights and obligations of the parties with respect to use of the Water Facilities. . . . Plaintiff cannot invent contractual terms out of whole cloth, expecially where it acknowledges there has been no meeting of the minds. *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**). For this reason alone, Plaintiff cannot succeed on its breach of contract claims.[22]

To the extent preservation of sufficiency of the evidence was required, during the hearing itself, NNE repeatedly argued that the record evidence was insufficient to satisfy this Court's standards for the award of a preliminary injunction:

> 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**. . . .
>
> I would like to just respond to a couple of those comments. He keeps saying that's a fact. **Those facts that he keeps saying are facts are not anywhere in this record** . . . .[23]

Accordingly, the record shows that NNE did not waive any argument that the evidence was insufficient.

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[20] *Wimer v. Hinkle*, 180 W. Va. 660, 663, 379 S.E.2d 383, 386 (1989).

[21] See W. Va. R. Evidence 103 (applying only to rulings on the admissibility of evidence).

[22] [App. at 207] (Emphasis supplied)

[23] [App. at 293, 302] (Emphasis supplied)

Second, Pachira states, "Petitioners' representation that the Statler Affidavit was the only evidence that the Circuit Court considered in granting Pachira's Motion is demonstrably false. To the contrary, the Order states that the Circuit Court 'considered proffered facts by counsel, statements in Plaintiff's verified complaint, the affidavits of Benjamin Statler and Mike John, and the arguments of counsel,'"[24] but the "arguments of counsel," as a matter of law, are not evidence.[25] Likewise, a "proffer" of "facts by counsel" does not satisfy the evidentiary requirement for a preliminary injunction.[26]

Finally, Pachira asserts that this Court should disregard NNE's argument that a "cursory affidavit" is insufficient to sustain a movant's burden of establishing a sufficient evidentiary predicate for preliminary injunctive relief because it "failed to provide any case law to explain what constitutes a 'cursory' affidavit."[27] To the contrary, in its brief, NNE referenced this Court's leading case on preliminary injunctions, *Jefferson County Board of Education*, supra at 24, 393 S.E.2d at 653, in which it specifically held:

> 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

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[24] [Respondent's Brief at 11]

[25] *Hampden Coal, LLC v. Varney*, 240 W. Va. 284, 296, 810 S.E.2d 286, 298 (2018)("It is axiomatic that his counsel's arguments are not evidence."); see also *Crum v. Ward*, 146 W. Va. 421, 457, 122 S.E.2d 18, 38 (1961) (Haymond, J., dissenting) (stating that "[e]very trial judge knows, as every trial lawyer knows, and every appellate court judge should know, that the statements of counsel in an argument are not evidence ....").

[26] Palmer & Davis, LITIGATION HANDBOOK ON WEST VIRGINIA RULES OF CIVIL PROCEDURE 5TH at § 65(a)[4] (2017)(footnote omitted); see also *Vantone Group Ltd. Liability Co. v. Yangpu NGT Indus. Co., Ltd.*, 2015 WL 1055933 at *3 (S.D. N.Y.)("The Moving Parties' proffer with respect to the element of irreparable harm is wholly conclusory, and is unsupported by even a single specific allegation of fact.")(footnote omitted).

[27] [Respondent's Brief at 12]

> 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).[28]

Also, as noted in NNE's opening brief:

> [N]owhere 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**.[29]

The record evidence before this Court, properly disregarding the arguments by Pachira's counsel without any evidentiary support, was insufficient to support the conclusory findings of fact and conclusions of law in the Circuit Court's preliminary injunction order. Accordingly, this Court should set it aside and remand with directions that it be dissolved.

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

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 omission warrants setting aside the preliminary injunction.

Concerning this obvious infirmity, Pachira argues that "it has made clear from the outset of this action that the Water Facilities are jointly-owned joint venture property, governed by the

[28] [Petitioners' Brief at 20-21]

[29] [Petitioners' Brief at 22] (emphasis supplied).

Partnership Act."[30] The undisputed facts in this case show, however, that there is no oral joint venture or partnership between NNE and Pachira governing the ownership or use of the Water Facitilies.

Pachira's attempt to fabricate the terms of an oral joint venture by referring back to the AMI Agreement, while simultaneously acknowledging that the parties have been unable to agree on the terms of that joint venture, clearly fails to meet the standard that it will likely succeed on the merits of its claims. Also, Pachira 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, yet objects to NNE's references to those same agreements as support for NNE's position.[31]

The AMI agreement, however, explicitly 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**."[32]

Similarly, the JOA contains almost 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 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.[33]

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[30] [Respondent's Brief at 13]

[31] [Respondent's Brief at 16]

[32] [App. at 55] (emphasis supplied)

[33] [App. at 78] (emphasis supplied)

Thus, in the only written agreements governing the parties' relationship, the same "fiduciary," "fair dealing," and "loyalty" duties arising under a "partnership"[34] or "joint venture" **were expressly disclaimed by both Pachira and NNE**.

Under West Virginia law, Pachira cannot have its cake and eat it too. If it relies on the AMI and JOA agreements to explain the terms of the parties' agreement over the Water Line, it cannot ignore those terms explicitly disclaiming any joint venture or partnership.

Pachira argues that "Petitioners incongruously criticize the Circuit Court for 'completely ignoring' express disclaimers in the AMI Agreement and JOA regarding duties that arise under a partnership or joint venture agreement.... But in the same breath, they also argue that there is no written agreement that governs the Water Facilities."[35]

To the contrary, there is nothing incongruous about noting that (1) the parties negotiated but were never able to reach a meeting of the minds on the Water Facilities and (2) with respect to the two written agreements upon which the parties were able to reach a meeting of the minds, **those two written agreements expressly disclaimed any partnership or joint venture between them**. It is Pachira, not NNE, making the incongruous argument that two written agreements that expressly disclaimed any partnership or joint venture between the parties can somehow form the

[34] 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, 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).

[35] [Respondent's Brief at 16] (Footnote omitted)

basis for contractual or quasi-contractual obligations between them **regarding subject matter over which the parties negotiated but were unable to reach an agreement**.

Two parties who orally agree to negotiate a contract but who are never able to have a meeting of the minds over its terms do not have a contract. Nevertheless, Pachira was able to convince the Circuit Court to issue a preliminary injunction enforcing a non-existent contract by arguing, as it does to this Court, that there was some "oral agreement" that does not exist.

"[W]hen it is shown that the parties intend to reduce a contract to writing," this Court has held, "this circumstance creates a presumption that no final contract has been entered into, which requires strong evidence to overcome."[36] Moreover, a plaintiff cannot invent contractual terms out of whole cloth, especially where it acknowledges there has been no meeting of the minds.[37] This issue, not even mentioned by the Circuit Court in its order, precluded the conclusion Pachira was more likely than not to prevail on its "oral joint venture" claim.

In the absence of a formal agreement governing the terms and scope of the use of the Water Line Facilities, the parties' relationship is governed by the law of tenancy in common: "**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 property," and to use that property in its own business.[38] Pachira admits the parties reached no agreement and, accordingly, each co-owner of the property is entitled

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

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

[38] *Id.*

to use the Water Lines for their own business.[39] That is black-letter law and dismissing it as such is hardly a compelling argument in opposition to its application in this case.

Here, NNE is not excluding Pachira from the use of the commonly owned waterline. Pachira merely complains that NNE is using the Water Facilities in a manner to which the Pachira has not consented. As tenants in common, however, NNE does not need Pachira's consent to use the water line as long as NNE is not depriving Pachira of the opportunity to use the line. If anything, by securing an injunction, Pachira has deprived NNE of its permitted use of the Water Facilities. Accordingly, the Circuit Court erred in finding that Pachira was likely to succeed on the merits of its claims regarding the Water Facilities.

Pachira also now attempts to advance a new argument, not raised in the court below, that Pachira and NNE's relationship is something it for the first time calls a "joint venture partnership"[40] stating: "a joint venture partnership, unlike a tenancy in common, is specifically for a **<u>business purpose for profit</u>**."[41]

First, because Pachira did not make this argument below, it has waived it.[42]

Second, Pachira admits that as to the Water Facilities the parties were unable to negotiate an agreement and the only legal authorities it cites in support of this new argument are the statutory definition of partnership and the common law definition of joint venture. Pachira never connects

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[39] *Id.*

[40] The Court should weigh Pachira's argument for the existence of something called a "joint venture partnership" in the context of the reality that in this Court's history it has never once used the phrase "joint venture partnership."

[41] [Respondent's Brief at 17] (Emphasis in original)

[42] See *Shaffer v. Acme Limestone Co.*, 206 W. Va. 333, 349 n.20, 524 S.E.2d 688, 704 n.20 (1999) ("Our general rule is that nonjurisdictional questions not raised at the circuit court level, but raised for the first time on appeal, will not be considered." (citation omitted)).

these legal definitions to any record evidence satisfying them because there is none. Pachira has not pointed to *any* evidence showing that there was an "association of two or more persons to carry on as coowners a business for profit."[43] Indeed, all of the evidence points to the contrary—there was no association over the Water Line because the parties were unable to come to mutually acceptable terms.

Finally, Pachira assumes incorrectly that the parties do not have a tenancy in common because, to the extent there is an agreement between Pachira and NNE concerning the Water Lines, it is one "for profit." But as noted in the same provision of the Partnership Act on which Pachira relies, a "tenancy in common . . . does not by itself establish a partnership, **even if the coowners share profits made by the use of the property**."[44] The Partnership Act clearly contemplates that tenants in common could also be engaged in a profit-sharing enterprise. The key difference between a partnership and a tenancy in common is the "association of two or more person to carry on as a business," which the record here does not establish. Accordingly, Pachira's argument that there could not have been a tenancy in common must fail.

The Circuit Court thus plainly erred by finding that Pachira had a reasonable likelihood of success on the merits, and this Court should set aside the preliminary injunction, and remand with directions that it be dissolved and damages awarded to NNE.

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[43] See *Trans Energy, Inc. v. EQT Production Co.*, 2016 WL 3190248, at *6 (N.D. W. Va.)(rejecting plaintiffs' argument that pooling resources and expertise into developing leases constitutes a partnership under W. Va. Code § 47B-2-2 because it "does not provide for the co-ownership of a business in which the parties share management authority and profits and losses").

[44] W. Va. Code. § 47B-2-2(c)(1)(Emphasis supplied)

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.[45] Again, other than including that language in its preliminary injunction order, the Circuit Court did not discuss this issue and, likewise, Pachira offers no meaningful, substantive argument in support of the preliminary injunction serving the public interest in its brief.

Pachira concedes that there is a public interest in encouraging development of mineral resources, but argues that "[e]ven if true, it does not necessarily follow that it is in the public interest to develop oil and gas resources in violation of the duties owed to a joint venture partnership or the Surface Use Agreements."[46]

But Pachira's reliance on this Court's statement in *Wellington Power Corp. v. CNA Sur. Corp.*, 217 W. Va. 33, 38, 614 S.E.2d 680, 685 (2005) that "the freedom to contract is a substantial public policy that should not be lightly dismissed" misses the point. That case involved an actual contract and the Court's statement related to enforcing the plain terms of that contract over a conflicting policy argument.[47] Moreover, the"freedom not to contract should be protected with the same zeal as the freedom to contract."[48]

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

[46] [Respondent's Brief at 24]

[47] Id.

[48] *Shelley v. Trafalgar H. Pub. Ltd. Co.*, 973 F. Supp. 84, 89 (D. P.R. 1997); see also *Joseph Martin, Jr., Delicatessen, Inc. v. Schumacher*, 417 N.E.2d 541, 543 (N.Y. 1981) (noting that the freedom to contract "is no right at all if it is not accompanied by freedom not to contract") (internal quotation marks and citations omitted); *Integrated Consulting Serv., Inc. v. LDDS*, 176 F.3d 475, 1999 WL 218740, at *9 (4th Cir.) ("freedom **not** to contract should be as protected as freedom to contract")(Emphasis in original); *Blue Cross & Blue Shield Mut. v. Blue Cross & Blue Shield Ass'n*, 110 F.3d 318, 333 (6th Cir. 1997)("[F]reedom of

Where, as here, the parties attempted to negotiate the terms of an agreement without resolving their differences, it was wrong for the Circuit Court to impose its conception of how those negotiations should have concluded by accepting the position of one of those parties - Pachira - and imposing that position on the other party - NNE - through the issuance of a preliminary injunction.

5. The Circuit Court Erred by Failing to Address the Harm to NNE in Balancing the Comparative Hardship to the Respective Parties in Awarding a Preliminary Injunction

Just as the Circuit Court's order barely mentions each of the "irreparable harm," "likelihood of success," and "public interest" prongs of the test for a preliminary injunction, it contains no discussion of the "balance of hardship."[49]

In its brief, Pachira does not dispute that the Circuit Court's order contains no discussion of the "balance of hardship."[50] Instead, it attempts to deflect by making two arguments that do not pass the smell test.

First, Pachira completely mischaracterizes a letter written to the Circuit Court following its ruling, claiming that NNE conceded that the Circuit Court had "properly applied the balance of hardship" test, when it knows full well that this statement by NNE was made in the context **<u>of the Circuit Court's ruling in NNE's favor as to the overly broad scope of the preliminary</u>**

contract entails the freedom not to contract, ... except as restricted by antitrust, antidiscrimination, and other statutes."); *Venture Assoc. Corp. v. Zenith Data Sys. Corp.*, 96 F.3d 275, 281 (7th Cir. 1996) (Cudahy, J., concurring) ("Freedom not to contract should be protected as stringently as freedom to contract."); *Yachting Promotions, Inc. v. Broward Yachts,* Inc., 792 So.2d 660, 663 (Fla. Ct. App. 2001) (noting that the "freedom of contract entails the freedom not to contract") (citation omitted).

[49] [App. at 407-414]

[50] [Respondent's Brief at 22-23]

injunction sought by Pachira.[51] Thus, the implication urged by Pachira in its brief that NNE did not originally include this post-ruling letter in the appendix[52] because it was inconsistent with NNE's "balance of hardship" argument is absurd.

Second, Pachira attempts to patch the obvious holes in the Circuit Court's order by speculating about the materials on which the Circuit Court relied. Specifically, although Pachira acknowledges "Petitioners provided the Circuit Court with a substantial damages estimate" in the amount of "$15,869,196 in direct costs if enjoined, in addition to adverse impacts to their financial condition,"[53] it argues that because it "responded with a forty-one-page letter that undercut every one of Petitioner's purported damages,"[54] this Court is supposed to resolve that dispute, on appeal, without the benefit of any analysis by the Circuit Court. As this Court can see from the record, Pachira had ample opportunities, and took advantage of those opportunities, to include in the Circuit Court's order a meaningful analysis of the "balance of harm" issue, and it is too late to do so now.

Finally, as an excuse for the Circuit Court's enforcing a non-existent agreement over subject matter the parties negotiated without success to reach an agreement, Pachira also states, "Petitioners used millions of dollars of Pachira's funds to design, build, and install the Water Facilities,"[55] and neglects to mention the circumstances that caused NNE, on its own, to construct

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[51] [App. at 475](Emphasis supplied)

[52] [Respondent's Brief at 22 n. 11]

[53] [Respondent's Brief at 23](citing App. at 415-432)

[54] [Respondent's Brief at 23](citing App. at 433-473)

[55] [Respondent's Brief at 3] And, the Court will notice, Pachira then adds, "**ostensibly for the joint benefit of Pachira and NEE**." [Id.] (Emphasis supplied) Again, this reinforces the reality that there was never any agreement between the parties that the Water Facilities could be used only as dictated by Pachira.

separate facilities, out of its own resources, not only in furtherance with agreements it had with Pachira, but in pursuance of its legitimate business objectives.

Initially, water from Dunkard Creek was used for fracking operations within the AMI.[56] At certain times of the year, however, Dunkard Creek's flow does not provide enough water to frack wells efficiently, and often, the water level is so low that withdrawal of water is prohibited.[57] 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").[58] **Pachira 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").[59] All of these actions were taken at great expense to NNE in furtherance of its legitimate business of exploration and development of natural gas both inside and outside the AMI.

Accordingly, the Circuit Court's failure to include in its order an analysis of the "balance of harm" is fatal to its award of a preliminary injunction.

III. 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

[56] [App. at 222]

[57] [App. at 222]

[58] [App. at 222]

[59] [App. at 223]

outside of the Blacksville AMI or (ii) sell water to third parties for use outside of the Blacksville 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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