
IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

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**Mountain Valley Pipeline, LLC,
Plaintiff Below, Petitioner,**

v.) No. 24-ICA-447

**Martha Ann Zinn
Defendant Below, Respondent.**

and

**Mountain Valley Pipeline, LLC
Plaintiff Below, Petitioner,**

v.) No. 24-ICA-458

**Mary Beth Naim, Judy Kay Smucker, and Jessica Grim,
Defendants Below, Respondents.**

**ON APPEAL FROM THE CIRCUIT COURT OF
SUMMERS COUNTY, WEST VIRGINIA**

PETITIONER'S OPENING BRIEF

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I. Assignments of Error.¹

Assignment of Error No. 1: The Court erred in failing to accept as true the material allegations of the complaint as required when ruling on a W. Va. R. Civ. P. 12(b)(6) motion.

Assignment of Error No. 2: The Court erred as a matter of law by holding that the owners of a perpetual right-of-way and easement for a natural gas pipeline and a license agreement for use of a private road acquired no legally protectable interest and that the Respondents and those who illegally and without permission entered the property and shutdown a construction project are immune from any civil liability.

Assignment of Error No. 3: The Court erred as a matter of law by dismissing the tortious interference, civil conspiracy, and the civil remedy cause of action authorized by the West Virginia Critical Infrastructure Protection Act, W. Va. Code § 61-10-34(d)(1).

Assignment of Error No. 4: The Court erred as a matter of law granting the W. Va. R. Civ. P. 12(b)(6) motions and entry of the October 10, 2024, and October 29, 2024 dismissal orders.

II. Statement of the Case.

Petitioner Mountain Valley Pipeline, LLC (“MVP”) seeks reversal of two orders entered by the Summers County Circuit Court granting Martha Zinn’s (“Zinn”), Mary Beth Naim’s (“Naim”), Judy Kay Smucker’s (“Smucker”), and Jessica Grim’s (“Grim”) (together, “Respondents”) Motion to Dismiss (“Motion”). JA 0002–20; JA 0183–89.

Both underlying civil actions arose from Respondents’ trespass on MVP’s property in Summers County, West Virginia. MVP is a natural gas company that, at the time of the filing of the Complaint, was in the process of constructing a natural gas transmission pipeline from Wetzel County, West Virginia to Pittsylvania County, Virginia (the “Project”). JA 0022; JA 0193. MVP’s

¹ Petitioner has re-ordered and re-worded the assignments of error set forth in the Notice of Appeal.

work on the Project was specifically authorized by Congress and the Federal Energy Regulatory Commission. JA 0023; JA 0194. To accomplish its work, MVP acquired temporary and permanent easements for property underlying the pipeline, in proximity to the pipeline, or for purposes of ingress and egress to the Project. A portion of the pipeline runs through Summers County, West Virginia (the “Subject Property”). JA 0023; JA 0194.

Respondents oppose the Project and have worked both individually and in concert with others to protest and interfere with the Project through unlawful means. JA 0023; JA 0194. On or around September 7, 2023, Respondents entered the Subject Property without MVP’s permission or that of the grantors of the easement and license. JA 0056. Naim, Smucker, and Grim physically blocked the only access road to the Subject Property and Zinn attached herself by mechanical device to a piece of equipment being used for the Project. JA 0056. When confronted, each Respondent refused to leave the Subject Property. JA 0056. Over the ensuing hours, members of the West Virginia State Police were dispatched to the scene to remove Respondents from the Subject Property. JA 0056. Respondents were arrested for trespass, destruction of property, obstructing an officer, and violation of the Critical Infrastructure Protection Act. JA 0068–74.

The report of the arresting officer, with respect to Zinn, recites that that:

two females, later identified as Rose Abramoff and Martha Zinn were secured to a large piece of drilling equipment . . . and Ms. Zinn secured to the . . . equipment by way of a ‘Sleeping Dragon’ device. This device conceals the suspects hands and wrists by steel metal tubing preventing law enforcement from removing them by normal means . . . Ms. Abramoff and Ms. Zinn were . . . given lawful commands to remove their hands from the device and remove themselves from the equipment however both refused to comply.

JA 0069.

The arrest report also notes that “...the work sight (*sic*) had a legal demarcation in the form of an eight (8) foot fence with barbed wire on top. The barbed wire in which they gained entry

into the worksite had been cut and removed.” JA 0069. On March 6, 2024, Respondents entered into plea agreements in which they pleaded guilty to trespass. JA 0076–77. Photographs of the Respondents blocking the road and attached to a large piece of construction equipment are included in the record at JA 0032–34; JA 0043–44; JA 202–05; JA 0213–14.

MVP filed the summons and complaint in this action on September 15, 2023, and MVP served both documents upon Respondents by and through the West Virginia Secretary of State in accordance with W. Va. Code § 56-3-33. JA 0021–30; JA 0190–200. On May 14, 2024, Respondent Zinn filed her Motion to Dismiss. JA 0045–53. The Court held a hearing on the Motion on September 27, 2024, and granted Respondent Zinn’s Motion from the bench. JA 0156–57. An Order granting Zinn’s Motion followed on October 10, 2024.² JA 0001–20. On October 28, 2024, Naim, Smucker, and Grim filed their Motion to Dismiss. JA 0243–49. Without hearing, or affording MVP the opportunity to respond, the Judge granted Respondents’ Motion the next day. JA 0183–89.

III. Summary of Argument.

The Circuit Court erred by dismissing the Complaint and holding that MVP as the owner of a perpetual right-of-way and easement for the property where a natural gas pipeline was being constructed and a license agreement from a railroad granting MVP the right to “occupy, possess and use” a private road to access the property, acquired no legally protectable interest. The Court erred by dismissing the trespass, tortious interference, civil conspiracy, and the civil remedy cause of action authorized by the West Virginia Critical Infrastructure Protection Act, W. Va. Code § 61-

² Notably, the proposed Order granting the motion to dismiss the Zinn case was tendered to the court pursuant to Trial Court Rule 24.01(c) by counsel for Respondents on October 9, 2024 and entered by the court less than 24 hours later, without allowing Petitioner five days to respond or the opportunity to provide objections or a counter-proposal in violation of Trial Court Rule 24.01(c). See JA 182, Docket Entries 28, 29.

10-34(d)(1) (“Critical Infrastructure Act”). In doing so, the Circuit Court ignored long-standing West Virginia law and invaded the province of the jury.

IV. Statement Regarding Oral Argument.

MVP requests oral argument under Rule 19. The Circuit Court failed to view the evidence in the light most favorable to the non-moving parties and erred in holding that no civil cause of action exists for any person or entity who is deprived of their right to own, occupy, and possess property pursuant to valid rights of way, easements, and licenses. The holding constitutes a dangerous precedent which would deprive numerous types of property owners in West Virginia of any legal protection or civil remedy against trespassers and those who have no right to use, occupy, or possess the property. The case merits oral argument and is not appropriate for a memorandum decision.

V. Argument.

A. Standard of Review.

“Appellate review of a circuit court’s order granting a motion to dismiss a complaint is *de novo*.” *State ex rel. McGraw v. Scott Runyal Pontiac-Buick, Inc.*, 194 W. Va. 770, 461 S.E.2d 516 (1995); *see also Elmore v. Triad Hospitals, Inc.*, 220 W. Va. 154, 640 S.E.2d 217 (2006). A complaint “must set forth enough information to outline the elements of a claim or inferences to be drawn that these elements exist.” *Fass v. Nowisko Well Service, Ltd.*, 177 W. Va. 50, 52, 350 S.E.2d 562, 563 (1986). When considering a motion to dismiss for failure to state a claim upon which relief may be granted, the court must accept each allegation in the Complaint as true. *See Mey v. Pep Boys-Manny, Moe & Jack*, 228 W. Va. 48, 52–53, 717 S.E.2d 235, 239–40 (2011). A complaint is construed in the light most favorable to the plaintiff when analyzing a motion to dismiss. *Fass*, 177 W. Va. at 51, 350 S.E.2d at 563. Therefore, when a circuit court is “appraising

the sufficiency of a complaint on a Rule 12(b)(6) motion, [it] should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” Syl. Pt. 2, *Stricklen v. Kittle*, 168 W. Va. 147, 287 S.E.2d 148 (1981) (quoting *Flowers v. City of Morgantown*, 166 W. Va. 92, 272 S.E.2d 663 (1980)). Generally, the West Virginia Rules of Civil Procedure should be liberally construed to promote the interests of justice. W. Va. R. Civ. P. 8(f). To achieve these ends, “a circuit court may look beyond the technical nomenclature of the complaint when ruling on a motion to dismiss pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure to reach the substance of the parties’ positions.” Syl. Pt. 1, in part, *Harrison v. Davis*, 197 W. Va. 651, 478 S.E.2d 104 (1996).

As explained below, the Circuit Court erred as a matter of law by its failure to construe the Complaint(s) in the light most favorable to the MVP and holding that the owners of a perpetual right-of-way and easement for a natural gas pipeline and a license agreement from a railroad granting the right to “occupy, possess and use” a private road to access the pipeline right-of-way acquired no legally protectable interest.

B. Assignment of Error No. 1: The Court erred in failing to accept as true the material allegations of the complaint as required when ruling on a W. Va. R. Civ. P. 12(b)(6) motion.

When considering a motion to dismiss for failure to state a claim upon which relief may be granted, the court must accept each allegation in the Complaint as true. *See Mey*, 228 W. Va. at 52–53, 717 S.E.2d at 239–40. A complaint is construed in the light most favorable to the plaintiff when analyzing a motion to dismiss. *Fass*, 177 W. Va. at 51, 350 S.E.2d at 563.

The Circuit Court could not have reached its conclusions had it taken the facts in the Complaint as true. Generally, MVP relied on Exhibit A to the Complaint to establish the factual background of the incident. JA 0031–44; JA 0201–214. MVP references the exhibit throughout the Complaint and thereby incorporates it by reference. With this in mind, MVP used the

Complaint to outline the legal causes of action. In particular, it seems clear the Circuit Court ignored several assertions in the Complaint.

In particular, the Circuit Court seems to ignore the allegations that Respondents interfered with and obstructed MVP's construction activities (JA 0023; JA 0194); the importance of the project's speedy completion (JA 0024; JA 0195); that MVP has the legal right to enter upon and construct a pipeline (JA 0026); MVP's contractual and business expectancy for the Project's completion (JA 0026; JA 0197); and that Respondents interfered with MVP's property rights and easements (JA 0046; JA 0199). Additionally, and perhaps more importantly, the Circuit Court minimizes or ignores the facts and admissions outlined in Exhibit A of the Complaint. *See generally*, JA 0002–20; JA 0184–189 (Order repeatedly referring to Respondents' trespass as "brief.").

Respondents have publicly admitted and pled guilty to a criminal charge arising from their trespass, which facts MVP incorporated into its Complaint. Further, MVP specifically outlined its causes of action in the Complaint and the resulting delay damages and costs incurred by the shutdown of a large construction project. Together, these constitute a well pleaded complaint and, therefore, MVP should be allowed to pursue all of its claims against Respondents.

C. Assignment of Error No. 2: The Court erred as a matter of law by holding that the owners of a perpetual right-of-way and easement for a natural gas pipeline and a license agreement for use of a private road acquired no legally protectable interest and that the Respondents and those who illegally and without permission entered the property and shutdown a construction project are immune from any civil liability.

The Circuit Court found that MVP's claim for trespass should be dismissed because MVP has no possessory interest in the subject property, and that MVP failed to allege any damage to property. JA 0005–6; JA 0187. Neither assertion is correct.

i. West Virginia law recognizes a cause of action for trespass and interference with a perpetual easement and a license to occupy, possess and use a private road.

As stated in the Complaint, and as confirmed in the arresting officer's report, the area where Zinn entered and attached herself was in a construction area for the pipeline and that "...the work sight (*sic*) had a legal demarcation in the form of an eight (8) foot fence with barbed wire on top" and "[t]he barbed wire in which they gained entry into the worksite had been cut and removed." JA 0023; JA 0069. MVP had possession of the worksite and the equipment in the worksite and Respondents gained entry to the site by illegal means. JA 0069. The area where the entry was made is on property where MVP was granted a perpetual easement to occupy land and construct and operate a pipeline, and a separate license agreement from CSX Transportation expressly granting MVP the right to "occupy, use and possess" a private road to obtain ingress and egress to the site. JA 0093–97; JA 0098–112.

The Circuit Court's analysis hinges on the premise that the owner of a perpetual easement to occupy, possess and use property and a license agreement expressly granting a right to "occupy use and possess" a road is a "non-possessory" interest. JA 0004. This may be a generic description that merely recognizes that the grantee of an easement and a license cannot claim exclusively ownership adverse to that of the grantor, but it has no application as applied to third parties who have no ownership interest in the property and are mere trespassers.

The Court's "non-possessory interest" theory derives from arguments and authorities cited by the Respondents below that purportedly are contained in the Restatement (Third) of Property (2000). JA 0049. Respondents cite to case law purporting to preclude a cause of action for trespass on an easement because it is defined as a "non-possessory" interest. For this proposition Respondents rely on and cites to § 1.2(1) of the Restatement (Third) of Property (2000), but that

section is entitled “Easement and Profit Defined” and merely provides a definition of an easement. RESTATEMENT (THIRD) OF PROPERTY § 1.2(1) (2000). That section does not address whether the holder of an easement as a servitude on the land can assert a cause of action for a trespass on the servitude. Instead, this issue is answered by Restatement § 8.1, which states “[a] person who holds the benefit of a servitude under any provision of this Restatement has a legal right to enforce the servitude.” RESTATEMENT (THIRD) OF PROPERTY § 8.1 (2000). The Restatement further provides that “a servitude may be enforced by any appropriate remedy or combination of remedies, which may include declaratory judgment, *compensatory damages*, *punitive damages*, nominal damages, *injunctions*,” *Id.* at § 8.3 (emphasis added). The Circuit Court failed to consider this portion of the Restatement, as relied upon by case law cited by the court, which makes it clear that one who holds rights to property by way of servitudes, like an easement, has a legal interest that they are entitled to protect as against third-party trespassers and those who hold no title to the land. West Virginia has long defined an easement or right-of-way over land of another as a “servitude” upon the servient estate. *See Cottrell v. Nurnberger*, 131 W. Va. 391, 396, 47 S.E.2d 454, 457 (1948). And an easement as a servitude is “an incorporeal hereditament and as such a species of land.” *Id.* The Circuit court’s reasoning essentially negates that the holder of any servitude has any legally protectable interest as against third-party trespassers.

“To sustain an action for trespass, the plaintiff must have either actual physical possession or constructive possession” of the property trespassed upon.” *Belcher v. Greer*, 181 W. Va. 196, 198 n.1 (1989) (citing 87 C.J.S. at 972). Indeed, “[a]ctual possession is *prima facie* evidence sufficient to maintain an action of trespass on the case for damages to real estate without further proof of title.” Syl. Pt. 6, *Brown v. Crozer Coal & Land Co.*, 144 W. Va. 296 (1959). “Actual possession” means “[p]hysical occupancy or control over property.” *Actual Possession*, *Black’s*

Law Dictionary (10th ed. 2014); *see also CDS Family Trust, LLC v. ICG, Inc.*, No. 13-0376, 2014 W. Va. LEXIS 2, *11, *13–*16 (W. Va. January 15, 2014). As alleged in the Complaint, MVP had control and possession of the worksite by way of: (1) a private agreement with the landowner; (2) permits and authorizations for the work by Act of Congress; and (3) permits from the applicable regulatory authorities. JA 0022–23; JA 0193–94. The allegations of the Complaint must be taken as true and the report of the arresting officer confirms the basic facts alleged in the Complaint, and the Respondents pled guilty to trespass. JA 0068–74; JA 0076–77.

Additionally, Respondents’ assertion that a person cannot trespass on an easement is nonsensical. If that were the case, individuals would be free to block driveways, access roads, construction sites, and roadways with impunity and be immune from arrest and civil liability. Long-standing West Virginia law is clear that easements and rights of way are possessory interests on which another may trespass. For example, in *Huffman v. Appalachian Power Co.*, Plaintiff sued after he climbed a power tower and was electrocuted. *See* 187 W. Va. 1, 415 S.E.2d 145 (1991). After a verdict was entered against the Company, it appealed, claiming the verdict should be set aside, in part, because Plaintiff was a trespasser. *Id.* at 4, 148. The tower, although located within a public park, was constructed on the Company’s right-of-way. *Id.* at 3–4, 147–48. The Supreme Court found that, unlike several other cases where the Plaintiffs unknowingly or inadvertently entered the power company’s property, this Plaintiff’s action constituted a trespass on the Company’s right-of-way and property. *Id.* at 6, 150. The Circuit Court relies on *Smoot v. Am. Elec. Power*, 222 W. Va. 735, 671 S.E.2d 740 (2008) in holding “‘that utility companies [can] not rely upon the defense of trespass on real property in which they only had a right-of-way.’” JA 0004–05. The Circuit Court analogized that, as in *Smoot*, here, MVP does not “own” the underlying land and, therefore cannot assert a defense of trespass. JA 0005. This analysis fails for two reasons: (1)

MVP's operations in constructing the Project is fundamentally different from the passive act of maintaining a right-of-way, and (2) even assuming the above analysis were true—Zinn was, in fact, on MVP's equipment, just as in *Huffman*.

First, MVP, at the time of Respondents' trespass, was actively constructing the Project. MVP needed access to the site to be able to perform this work. MVP was prevented from performing the necessary work on September 7, 2023, because of Respondents' actions. Respondents were unlawfully on property MVP maintained actual possession over and, therefore, had a right to prevent Respondents from interfering with their right to possess and use the property. Second, even taking the Circuit Court's analysis as true, it is incomplete. If the Circuit Court maintains that trespass cannot be pursued for *land* that a utility does not own but can be pursued for *equipment* on land that a utility does not own, this case can still withstand a Motion to Dismiss. Zinn, as alleged in the Complaint and confirmed in the arresting officer's report, was physically attached to a piece of the drilling equipment, a set of facts exactly tracking those in *Huffman*. JA 0069. The Circuit Court improperly relies on *Smoot*, as it is not relevant here.

Smoot involves a child who struck a guy wire on the electric company's pole. *Smoot*, 222 W. Va. at 737–38. The pole, and the guy wire, were situated on a third party's property. *Id.* The Court held that, because the electric company only maintained a right-of-way, and did not own the property on which the guy wire sat, it was forbade from relying on the defense of trespass. *Id.* at 742. This is fundamentally different from the situation in this case—where Zinn was physically attached to MVP's equipment. The Court in *Smoot* says as much, drawing the distinction between trespass on land where the respondent has a right-of-way and trespass on respondent's equipment. *Id.* at n. 14. *Smoot* specifically draws this distinction, stating that a trespass to equipment is more

akin to the facts in *Huffman. Id.* As such, *Smoot* actually supports MVP’s claim against Zinn and, therefore, the Circuit Court’s Order should be reversed.

MVP has pleaded facts sufficient to establish that it had actual possession of the subject property by means of both physical occupancy and control over the property. In particular, MVP asserted in the Complaint it: (1) holds a FERC certificate to construct the Project and operate the gas pipeline, (2) is engaged in the construction and operation of natural gas pipelines through Summers County, West Virginia, (3) received all necessary authorizations and permits to proceed with construction of the project, and (4) received voluntary agreements for temporary and permanent easements to construct and operate the pipeline on the Subject Property, and rights to occupy, use and possess access roads to the Subject Property. JA 0022–23; JA 0193–94.

The Complaint further alleges MVP was in possession and use of the Subject Property for purposes of construction of the pipeline and that Respondents trespassed on property in possession of MVP in three manners. First, they entered on property controlled by MVP pursuant to a valid right-of-way agreement; second, by attaching to a piece of equipment possessed and controlled by MVP; and third, by physically blocking the access road which MVP controlled pursuant to the license agreement. *See generally* JA 0022–44; JA 0193–214.

ii. MVP has alleged monetary damages for construction delay costs and loss of use.

“A plaintiff’s recovery in a West Virginia trespass action [includes] . . . damages for loss of use.” *Moore v. Equitrans, L.P.*, 27 F.4th 211, 220–21 (4th Cir. 2022) (“In both residential and nonresidential cases, a plaintiff may seek damages for loss of use, which in the case of nonresidential property may include lost profits . . .”). Here, MVP pleaded facts sufficient to establish that it sustained damages as a result of Respondents’ actions. MVP asserts that Respondents prevented MVP from use and possession of its property and equipment and otherwise

interfered with and temporarily prevented MVP from construction and completion of the Project, resulting in monetary damage and losses. JA 0023; JA 0195. MVP also alleged Respondents “caused damages to MVP in salaries, wages, and other expenses through the delay of the project in the amount of at least \$45,629.50.” JA 0027; JA 0197. The Circuit Court nevertheless held the Complaint did not plead facts establishing any physical damage to real or person property and thus there could not be a trespass cause of action. JA 0005–06; JA 0187.

The Circuit Court claimed there is a distinction between recovery of damages and physical damage to property. Nevertheless, Respondents’ Counsel in this case admitted there was property damage during the September 27, 2024, hearing. JA 0128–129. In referencing MVP’s Response to the Motion to Dismiss, Respondents’ Counsel relies on the fact that reference to the fence is not “contained within the four corners of the Complaint.” JA 0129. Notably, Counsel does not argue that the fence was not cut, but rather that a reference to it was not contained in the Complaint. JA 0129 “Allegations, however unartfully pleaded, will not be dismissed unless it is beyond doubt that the plaintiff could prove no set of facts entitling him to relief.” *Cruz v. Beto*, 405 U.S. 319, 92 S.Ct. 1079 (1972); *Norris v. Ketricks*, 918 F.Supp. 977 (1996). Additionally, a plaintiff does not need to use the specific words required in the legal definition of a claim in order to overcome a motion to dismiss. *See Durbin v. Ball Corp.*, No. CIV.A. 5:07CV115, 2008 WL 2704587, at *2 (N. D. W. Va. July 3, 2008). Instead, the standard is “a short and plain statement of the claim showing that the pleader is entitled to relief.” W. Va. R. Civ. P. 8(a). Indeed, “a complaint meets Rule 8’s requirements if, in the light of the nature of the action, the complaint sufficiently alleges each element of the cause of action so as to inform the opposing party of the claim and its general basis.” *Chao v. Rivendell Woods, Inc.*, 415 F.3d 342, 346 (4th Cir. 2005).

Here, the complaint is clear: it alleges a claim for trespass based on Respondents' activities on September 7, 2023. Included in the Complaint is a blog post by one of Respondents' co-conspirators admitting to committing the crimes, going to so far as to affirm that they were charged with trespass. JA 0032–36; JA 0202–06. In addition, MVP included public Facebook posts by a third-party celebrating the Respondents' crimes and further identifying them and the facts surrounding their trespass. JA 0037–44; JA 0207–14. There is no question the Respondents were on the property and MVP alleges they had no right to be on the property. For this reason alone, MVP's allegation that the Respondents trespassed on the property is sufficient to overcome a motion under W. Va. R. Civ. P. 12(b)(6).

D. Assignment of Error No. 3: The Court erred as a matter of law by dismissing the tortious interference, civil conspiracy, and the civil remedy cause of action authorized by the West Virginia Critical Infrastructure Protection Act, W. Va. Code § 61-10-34(d)(1).

i. Tortious Interference

To establish tortious interference, a plaintiff must show: “(1) existence of a contractual or business relationship or expectancy; (2) an intentional act of interference by a party outside that relationship or expectancy; (3) proof that the interference caused the harm sustained; and (4) damages.” *Kelley v. Kelley*, No. 15-0188, 2015 WL 7628821, at *16 (W. Va. Nov. 23, 2015) (quoting *Torbett v. Wheeling Dollar Sav. & Trust Co.*, 173 W. Va. 210, 211 (1983)). However, “a party is not required to establish a *prima facie* case at the pleading stage.” *Mountaineer Fire & Rescue Equipment, LLC v. City National Bank of W. Va., et al.*, 244 W. Va. 508, 522, 854 S.E.2d 870, 884 (2020).

The Court held that MVP's claim for tortious interference should be dismissed because “MVP pleads no facts to suggest or permit a reasonable inference to be drawn that any contractual

or other business relationship was breached or lost as a result of the brief protest at issue in this case.” JA 0006; JA 0185. The Court goes on, citing *Webb v. Paine*, 515 F. Supp. 3d 466, 485 (S.D. W. Va. 2021) for the proposition that there is no cause of action in West Virginia for tortious interference where the “performance of the contract [is] more burdensome or expensive.” JA 0007; JA 0186.

This reliance on *Webb* is misplaced, as explained in the Hearing, but also acknowledged by the Court’s Order. In the Hearing, Counsel explained that the Court in *Webb* was sitting in diversity and, therefore, interpreting West Virginia law. JA 0147. In fact, Judge Copenhaver says as much. *Webb*, 515 F. Supp. 3d at 486–87. As outlined in the Hearing, the Court in *Webb* was ruling on a hinderance damage—some theoretical amount of damage without actual out-of-pocket damages. JA 0147.

This is not the case here. Instead, this case is more akin to *Mountaineer Fire & Rescue Equipment, LLC*, a case the Court was aware of and included in its Order. 244 W. Va. at 524–25, 854 S.E.2d at 886–87; JA 0009; JA 0186–87. In *Mountaineer Fire*, the Court reversed dismissal of the claims because of Respondents’ “acts that harmed Mountaineer Fire’s business prospects.” 244 W. Va. at 525, 854 S.E.2d at 887.

Here, MVP has specifically pleaded MVP’s ongoing operations to construct a pipeline pursuant to a specific federal statute authorizing the Project, administrative orders of the Federal Energy Regulatory Commission (FERC) to construct the Project, environmental permits, and voluntary right-of-way and easement agreements granting exclusively to MVP the rights to use the Subject Property to construct the Project. JA 0022–23; JA 0193–94. MVP specifically alleged it has contractual rights of way and easements to use the Subject Property, and business expectancy for the construction of the Project via the federal statutory authorization and instructions for

completion of the Project and federal administrative agency (FERC) authorizations for the Project. JA 0022–23; JA 0193–94. Finally, MVP describes Respondents’ interference with MVP’s contractual and business expectancies and the damages caused thereby. JA 0026–27; JA 0197. MVP has pleaded facts in support of each element of a claim for tortious interference and, as such, has properly made its claim for tortious interference. JA 0026–27; JA 0197.

ii. West Virginia Critical Infrastructure Protection Act

The Court found MVP’s claim for damages pursuant to W. Va. Code § 61-10-34 should be dismissed because “MVP pleads no facts to suggest or permit a reasonable inference to be drawn that MVP suffered any damage to personal or real property as a result of the brief protest at issue in this case.” JA 0008; JA 0187.

Chapter 61, Article 10 relates to “Crimes Against Public Policy” and W. Va. Code § 61-10-34 is entitled and referred to as the “West Virginia Critical Infrastructure Protection Act” (the “Act”). The Act applies to, among other things, natural gas transmission facilities. W. Va. Code § 61-10-34 (b)(14). The federal enabling legislation for the MVP pipeline also identifies the timely completion and operation as in the national interest. Fiscal Responsibility Act of 2023, Pub. L. No. 118-5, H.R. 3746, § 324(b) (2023). The Act is a criminal trespass statute that explicitly provides for a civil cause of action. “Any person who is arrested for or convicted of an offense under this section may be held civilly liable for any damages to personal or real property while trespassing, in addition to the penalties imposed by this section.” W. Va. Code § 61-10-34(d)(1).

As more fully discussed above, trespass damages include damages for loss of use. *See Moore*, 27 F.4th at 220 (“In both residential and nonresidential cases, a plaintiff may seek damages for loss of use, which in the case of nonresidential property may include lost profits . . .”). Here, MVP has shown Respondents’ conduct “prevented MVP from use of its legal right[.]” JA 0024;

JA 0195. Similarly, MVP alleges “[d]efendant refused to vacate the Subject Property voluntarily and had to be removed by West Virginia State Police causing delays to the Project” which caused delay damages “in the amount of at least \$45,629.50.” JA 0027; JA 0197.

Additionally, as explained above and outlined in its Response to the Motion to Dismiss, the fence surrounding the worksite was damaged through the protest. JA 0057. Respondents claim that because a specific reference to the damaged fence was not included in the Complaint, that the entire claim should be dismissed. JA 0129. This leap in logic shows the weakness in Respondents’ position. Notably, just as above, Respondents do not deny that the fence was cut, but rather that the fact was not included in the Complaint. JA 0129. Additionally, Respondents’ Counsel, at the hearing, states that even if the Court considered the damage to the fence, there is no allegation that MVP owned the fence. JA 0129. This is nonsensical—at a minimum, one can see the connection that the fence surrounded the worksite and, logically, was put up for use during the project. There is no allegation that the fence was on the property prior to the project beginning. Nevertheless, again, “a party is not required to establish a *prima facie* case at the pleading stage.” *Mountaineer Fire & Rescue Equipment*, 244 W. Va. at 522, 854 S.E.2d at 884. Instead, MVP adequately alleges that Respondents trespassed on MVP’s property and caused damage.

Taking MVP’s allegations as true, the Complaint is more than sufficient to state a claim for damages under W. Va. Code § 61-10-34.

iii. Civil Conspiracy

Despite the Circuit Court’s dismissal of “all claims against the Respondent,” it does not address MVP’s civil conspiracy claim in the Order dismissing claims against Zinn. JA 0002–20. In their Motions, Respondents rely on their baseless assertions that MVP’s tort claims should be dismissed to support their argument that the claim for civil conspiracy should similarly be

dismissed. JA 0051; JA 0219. As outlined above, when the allegations in the Complaint are taken as true, MVP has clearly asserted claims for which relief can be granted. Accordingly, MVP's civil conspiracy claim is similarly well-pleaded.

E. Assignment of Error No. 4: The Court erred as a matter of law granting the W. Va. R. Civ. P. 12(b)(6) motions and entry of the October 10, 2024, and October 29, 2024 dismissal orders.

MVP's Complaints include counts for pleas for preliminary and permanent injunction as well as punitive damages in addition to causes of action for trespass, tortious interference, violation of the Critical Infrastructure Act, and civil conspiracy. JA 0022–30; JA 0193–200. The Complaint, when taken as true, satisfies the requirements under W. Va. R. Civ. P. 8. To survive motions to dismiss, pleadings “must set forth enough information to outline the elements of a claim or permit inferences to be drawn that these elements exist.” *Fass v. Newsco Well Serv., Ltd.*, 177 W. Va. 50, 52 (1986). Pleadings “must be intelligibly sufficient for a circuit court or an opposing party to understand whether a valid claim is alleged and, if so, what it is.” *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W. Va. 770, 776 (1995). (“A plaintiff may not fumble around searching for meritorious claims within the elastic boundaries of a barebones complaint.”).

There is no doubt what MVP's claims are. MVP alleges Respondents conspired to, and actually did, trespass on MVP's worksite and, in so doing, tortiously interfered with MVP's property rights and violated the Critical Infrastructure Act, causing damage in the form of salaries, wages, and other delay expenses. MVP does not mince words in its Complaint and is not attempting to keep its suit alive by “searching for meritorious claims within the elastic boundaries of a barebones complaint.” Instead, MVP was harmed by Respondents' trespass and filed suit saying as much. As further outlined in each of the sections above, MVP adequately pleaded the

above causes of action and it was therefore improper for the Circuit Court to dismiss the Complaint.

VI. Conclusion.

For all the reasons stated above, MVP ask this Court to vacate both the October 10, 2024, and October 29, 2024, Orders and remand this matter for further proceedings before the Circuit Court.

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By counsel,**

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IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

**Mountain Valley Pipeline, LLC,
Plaintiff Below, Petitioner,**

v.) No. 24-ICA-447

**Martha Ann Zinn
Defendant Below, Respondent.**

and

**Mountain Valley Pipeline, LLC
Plaintiff Below, Petitioner,**

v.) No. 24-ICA-458

**Mary Beth Naim, Judy Kay Smucker, and Jessica Grim,
Defendants Below, Respondents.**

**ON APPEAL FROM THE CIRCUIT COURT OF
SUMMERS COUNTY, WEST VIRGINIA**

CERTIFICATE OF SERVICE

I hereby certify that on January 29, 2025, I electronically filed the foregoing PETITIONER'S OPENING BRIEF via File & ServeXpress which will provide electronic notification to the following counsel of record:

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