
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 REPLY BRIEF

Submitted by:

Timothy M. Miller (WVSB #2564)
Jennifer J. Hicks (WVSB #11423)
Austin D. Rogers (WVSB #13919)
BABST, CALLAND, CLEMENTS & ZOMNIR, P.C.
300 Summers Street, Suite 1000
Charleston WV 25301
681-205-8888
681-205-8814 (fax)
tmiller@babstcalland.com
jhicks@babstcalland.com
arogers@babstcalland.com

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I. Argument.

A. Standard of Review.

The parties agree that “[a]ppellate 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); Resp’t Resp. Brief at 6.

Despite Respondents’ attempt to paint MVP’s petition as asserting facts for the first time on appeal, this is simply untrue. As explained in its opening brief, and reiterated below, the Circuit Court erred as a matter of law by its failure to construe the Complaint(s) in the light most favorable to 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. 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 v. Pep Boys-Manny, Moe and 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 v. Nowsko Well Service, Ltd.*, 177 W. Va. 50 at 51, 350 S.E.2d at 562 at 563 (1986).

The Circuit Court could not have reached its conclusions had it taken the facts in the Complaint as true. Respondents’ only response was to quote a section of the Order written by their counsel and entered without modification by the Court granting their Motion to Dismiss. There are two faults with Respondents’ position. First, the section quoted, and the entire Order, ignores the actual allegations as stated in the Complaint as if they did not exist. In the block quote used by Respondents, the Court makes bald assertions like “MVP pleads no facts to suggest or permit a

reasonable inference to be drawn . . .” and “[t]aking all the allegations in the complaint as true . . .” but these assertions are directly contrary to the Complaint. The Court blatantly ignores specific allegations that Respondents interfered with and obstructed MVP’s construction activities (JA 0023; JA 0194); the congressional mandate of 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) via the Right of Way agreement from the Weisman Living Trust (JA 0093-97) and the License agreement from CSX (JA 0098-111); 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, which included a blog post authored by one of the trespassers and several Facebook posts including quotes from the trespassers. *See generally*, JA 0002–20; JA 0184–189 (Order repeatedly referring to Respondents’ trespass as “brief.”). Second, the sections Respondents find so compelling to their side are in reference to a single count of the Complaint. The entire two paragraph block quote in Respondents’ brief is in reference to MVP’s tortious interference claims. Respondents provide no showing that the Court viewed the facts in the light most favorable to MVP in deciding to dismiss the remaining claims in the Complaint.

Similarly, Respondents have no response to the Complaints’ reference to and Exhibit A to the Complaint which include Respondents’ public admission and guilty plea to criminal charges arising from their trespass. MVP’s Complaint 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.

C. 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.

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.

At the outset, it is important to note that Respondents' Counsel filed a motion to dismiss another trespasser case in the Northern District of West Virginia, relying on the same law, and Judge Kleeh rejected the same. *Mountain Valley Pipeline, LLC v. Wagner*, No. 2:24-cv-12, 2025 WL 685225 (N.D.W. Va. March 3, 2025). Specifically, Judge Kleeh held MVP's "Complaint sufficiently alleges damage in the form of interference with its possession to the Subject Property." *Id.* at *2. For his analysis, Judge Kleeh quotes *Rhodes v. E.I. du Pont de Nemours & Co.*, finding that trespass is an "unauthorized entry onto the land of another and damage to or *interfering with his use of his real property.*" *Id.* (quoting *Rhodes*, 636 F.3d 88, 94 (4th Cir. 2011) (emphasis added) (citing *Hark v. Mountain Fork Lumber Co.*, 127 W. Va. 586, 34 S.E.2d 348 (W. Va. 1945)). Additionally, Judge Kleeh cites *Ghafourifar v. Cmty. Tr. Bank, Inc.*, in its dismissal of the trespass claim because the Complaint did "not allege that the entry onto his land caused any harm to him, his land, or *his use of his land*["].” *Id.* (quoting *Ghafourifar*, No. 3:14-cv-01501, 2014 WL 4809794, at *8 (S.D.W. Va. Sept. 26, 2014) (emphasis added)). Finally, Judge Kleeh relies on *Moore v. Equitrans, L.P.*, in finding "[i]n both residential and non residential cases, a plaintiff may seek damages for loss of use, which in the case of nonresidential property may include lost profits or lost rental value." *Wagner* at *2 (quoting *Moore*, 27 F.4th 211, 220 (4th Cir. 2022)). Ultimately, Judge Kleeh found "[a]ssuming at this stage of the case that [MVP's] rights-of-ways and easements

are valid, [MVP's] claim properly alleges that Defendant's actions constituted an interference with MVP's possession and use of the Subject Property for the purpose of the Project. *Id.* at *3.

In contrast, 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 of the easement or license, but it has no application as applied to third parties who have no ownership interest in the property and are mere trespassers.

Again, 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. This theory, however, ignores 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). Despite Plaintiff's reliance on other portions of the Restatement, the Circuit Court failed to consider this portion of the Restatement. 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, contrary to well-established West Virginia law and the Restatement.

As explained in its Opening Brief, MVP, at the time of Respondents' trespass, needed access to the site to be able to construct the Project. 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. Additionally, the Circuit Court's analysis 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 v. Appalachian Power Co.*, 187 W. Va. 1, 415 S.E.2d 145 (1991). JA 0069.

Respondent's reliance on *U.S. Forest Service v. Cowpasture River Preservation Association* is misleading. Although the Supreme Court briefly discusses easements, it is in an entirely different context. 590 U.S. 604, 613, 140 S.Ct. 1837, 1844 (2020). The question in *Cowpasture* is whether, an owner may grant a second easement over land already incumbered. *See generally* 590 U.S. 604, 140 S.Ct. 1837. MVP is not and has not alleged an ownership interest that supersedes or is adverse to its Grantor and Licensor, the Weisman Living Trust or CSX (the underlying landowners) but rather that MVP, as an easement holder, retains the right to use and enjoyment of that easement especially in the face of adversity from a third party who has no legal rights or possessory interest in the property.

Respondents miss the forest for the trees in refuting MVP's showing of actual possession. The case judge Kleeh relied upon, *Moore v. Equitrans, L.P.*, in addition to *Belcher v. Greer*, 181 W. Va. 196, 198 n.1, 382 S.E.2d 33 (1989), *Brown v. Crozer Coal & Land Co.*, 144 W. Va. 296, 107 S.E.2d 777 (1959), and *CDS Family Trust*, along with Black's Law Dictionary, all show the true definition of actual and constructive possession. *Belcher*, 181 W. Va. at 198 n.1 (citing 87 C.J.S. at 972) ("To sustain an action for trespass, the plaintiff must have either actual physical possession or constructive possession" of the property trespassed upon."); Syl. Pt. 6, *Brown*, 144 W. Va. 296 ("[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."); *Actual Possession*, *Black's Law Dictionary* (10th ed. 2014) ("Actual possession" means "[p]hysical occupancy or control over property."); *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. Based on the plain language of this State's common law, MVP satisfies the actual or constructive possession element of a trespass claim—the exact element Respondents are attempting to refute.

Respondents have admitted to trespassing on MVP's property and are now asking the Courts to shield them from liability. Such a ruling would mean citizens are free to go beyond legal methods of protest and opposition to a project and are free to block driveways, access roads, construction sites, and roadways with impunity and be immune.

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

Respondents take a hard line position to the pleading standards that is inconsistent with the law. “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. Ketrick*, 918 F.Supp. 977 (N.D.W.Va. 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).

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)

In the course of the litigation, it became clear that the barbed wire on MVP’s fence was cut which is why Respondents’ Counsel could not represent anything different to the Circuit Court at the hearing. Counsel quotes the exchange in footnote 9 of their Response, but it supports MVP’s

position—that it is common knowledge that the barbed wire was cut and the fence scaled to gain access to the construction site. Counsel simply sidestepped this fact, pivoting to a technicality, that there was no reference to the barbed wire in the Complaint. Such a ridged review is contrary to West Virginia law. Here, it is clear MVP could prove a set of facts entitling it to relief.

Additionally, the fence was part of MVP’s equipment on site the morning of the trespass and, because it was damaged, clearly provides a nexus for MVP’s claim to trespass to equipment. Respondents climbed over and, in the process, damaged MVP’s fence and Respondent Zinn climbed on and attached herself by a mechanical device to MVP’s equipment within the bore pit so that she could only be removed by the State police cutting the mechanical device. Respondents now allege, suddenly ambivalent to the requirement to remain within the four corners of the Complaint, that the equipment on site may not be MVP’s. This is irrelevant because the allegation is that Respondents trespassed and caused damage—both physical and financial. These allegations are well documented and there is certainly reason to believe MVP can sustain an action for trespass.

D. 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, 314 S.E.2d 166 (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 ruling on a hinderance damage claim—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.

MVP has specifically pleaded interference with 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.

Even in the Response, Respondents are still questioning—just as the Court did—the underlying factual allegations. Respondents’ entire position regarding the tortious interference claim is premised on the false notion that MVP could not have alleged that halting work on the day of the trespass “adversely impacted the federal regulation or permitting of the pipeline project[.]” Resp’t Resp. at 18. This is precisely what MVP alleged—that the delay impacted the federal regulation and permitting of the project, as each of these provide deadlines and timeframes by which to complete part or all of the project and MVP’s business expectancy to construct the project without outside interference. Any delay in the project impacted MVP’s construction process and caused increased cost, for shutdown and delay of the project.

Respondents also allege MVP has not properly asserted its claim for tortious interference. This analysis is misplaced because, again, 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). Respondents admit MVP

alleges a contract was breached. Resp't Resp. at 21. But go on to analyze why that should be ignored. This analysis is improper at the motion to dismiss stage.

This entire analysis is irrelevant, however, because it is based on an argument that does not take MVP's allegations as true. It calls into question MVP's factual allegation that it was adversely impacted by the delay resulting from the trespass.

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.

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. Respondents allege that it is mere speculation that the fence was cut, and that the fence was owned by MVP, but once again misses the point. The Complaint clearly states a claim for violation of the Critical Infrastructure Act, but respondents hang their hat on an undisputed fact—that the barbed wire was cut and the fence scaled to gain access to a completely enclosed construction site. This position flies in the face of basic principles surrounding Rule 8 of the West Virginia Rules of Civil Procedure.

iii. Civil Conspiracy

Respondents admit MVP’s civil conspiracy claim should proceed if the underlying actions of the Complaint had not been dismissed. Resp’t Resp. at 23. As is made clear above, MVP’s position is that each of its allegations in the Complaint are well supported and were incorrectly dismissed based on the Circuit Court’s failure to take the factual allegations in the Complaint as true. As such, the Circuit Court’s dismissal of the civil conspiracy count is faulty, based on the legitimacy of MVP’s claims outlined above.

II. Conclusion.

For all the reasons stated in MVP's Opening Brief and above, MVP asks this Court to reverse and vacate both the October 10, 2024, and October 29, 2024, Orders and remand this matter for further proceedings before the Circuit Court.

**MOUNTAIN VALLEY PIPELINE, LLC,
By counsel,**

/s/ Timothy M. Miller

Timothy M. Miller (WVSB No. 2564)

Jennifer J. Hicks (WVSB No. 11423)

Austin D. Rogers (WVSB No. 13919)

BABST CALLAND, P.C.

300 Summers Street, Suite 1000

Charleston, WV 25301

Telephone: (681) 205-8888

Facsimile: (681) 208-8814

tmiller@babstcalland.com

jhicks@babstcalland.com

arogers@babstcalland.com

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

CERTIFICATE OF SERVICE

I hereby certify that on March 21, 2025, I electronically filed the foregoing PETITIONER’S REPLY BRIEF via File & Serve*Xpress* which will provide electronic notification to the following counsel of record:

William V. DePaulo, Esquire
PO Box 1711
Lewisburg, WV 24901
Counsel for Respondents

/s/ Timothy M. Miller

Timothy M. Miller (WVSB No. 2564)

Jennifer J. Hicks (WVSB No. 11423)

Austin D. Rogers (WVSB No. 13919)

BABST CALLAND, P.C.

300 Summers Street, Suite 1000

Charleston, WV 25301

Telephone: (681) 205-8888

Facsimile: (681) 208-8814

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jhicks@babstcalland.com

arogers@babstcalland.com