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.

RESPONDENTS' BRIEF

On Appeal from the Circuit Court of
Summers County, West Virginia
Hon. Robert Irons

William V. DePaulo, Esq. #995
P. O. Box 1711
Lewisburg, WV 24901
Tel: 304-342-5588
Fax: 866-850-1501
william.depaulo@gmail.com

Counsel for Respondents

February 28, 2025

TABLE OF CONTENTS

TABLE OF AUTHORITIES (1/2)

FEDERAL CASES

U.S. SUPREME COURT

COURT OF APPEALS

DISTRICT COURT

STATE CASES

WEST VIRGINIA SUPREME COURT OF APPEALS

TABLE OF AUTHORITIES (2/2)

WEST VIRGINIA SUPREME COURT OF APPEALS (CONTINUED)

WEST VIRGINIA INTERMEDIATE COURT OF APPEALS

OTHER STATE AUTHORITIES

OTHER AUTHORITIES

RESPONDENTS' BRIEF

I. SUMMARY OF ARGUMENT

All of the matters complained of by Petitioner in this appeal are a result of Petitioner's failure below to allege critical facts and/or legal elements of causes of action: (a) possessory interest and/or damages for the trespass cause of action; (b) loss of a contractual or other business relationship to support a claim of tortious interference, as opposed to mere hindrance of performance, and/or (c) damage to real or personal property, as required by the explicit language of W. Va. Code § 61-10-34, to support a claim of civil liability under the Critical Infrastructure Act.

It is irrelevant that Respondents engaged in activities Petitioner found inconvenient and, assertedly, actionable based upon additional facts or theories never pled by Petitioner. The requirement of Rule 12(b)(6) is to state a sustainable cause of action under the well-pled facts of one's Complaint; Petitioner failed to do so under any fair-minded analysis.

Petitioner's invocation of a broad public policy favoring energy development is not a substitute for a well-pled complaint. The Circuit Court's rulings against Petitioner were fully supported by existing precedent and the facts alleged by Petitioner, even after granting Petitioner all of the presumptions and inferences required by Rule 12(b)(6).[1]

II. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner takes the unsustainable position that the facts alleged in its Complaint fully satisfy the requirements of existing decisions of this jurisdiction, but that it is nonetheless

[1] While Respondents understand that all well-pled allegations are accepted as true for the purposes of Rule 12(b)(6), Respondents note that Petitioner's Statement of the Case contains numerous references to allegations and insinuations not contained within the Complaint. *See* Petitioner's Brief (hereinafter "Pet'r's Brief"), pp. 2-3.

necessary to conduct oral argument to discern or apply those precedents to a relatively straight forward statement of facts. The facts alleged, even when granted all indulgences required incident to Rule 12(b)(6) motions to dismiss, are simply insufficient to support the causes of action alleged in Petitioner's Complaint. There is no need to engage this Court's oral argument facility to resolve any issue presented in this appeal.

III. ARGUMENT

A. Standard of Review

Respondents agree that Rule 12(b)(6) motions involve questions of law which this Court must consider ***de novo***. Respondents note, however, that the ***de novo*** review must be based on controlling precedent as applied to the well pled facts of Petitioner's Complaint, and not purported facts asserted, for the first time, on appeal.

B. For purposes of Respondents' Rule 12(b(6) motion to dismiss, the Circuit Court accepted as true all of Petitioner's material allegations of fact.

[Response to Assignment of Error No. 1]

The Circuit Court did not disregard the facts alleged by Petitioner. Petitioner claims, at Pet'r's Brief, p. 5, that the Circuit Court disregarded the following:

1. "the allegations that Respondents interfered with and obstructed MVP's construction activities" (JA 0023; JA 0194);
2. "the importance of the project's speedy completion" (JA 0024; JA 0195);
3. "that MVP has the legal right to enter upon and construct a pipeline" [sic] (JA 0026);
4. "MVP's contractual and business expectancy for the Project's completion" (JA 0026; JA 0197);"
5. "that Respondents interfered with MVP's property rights and easements" (JA 0046;

JA 0199);

6. and the gravity of Respondents' conduct by "repeatedly" referring to Respondents' trespass as "brief," JA 0002–20; JA 0184–189.

In fact, the Circuit Court accepted all facts alleged in the Complaint as true, and nonetheless concluded that MVP failed to state a cause of action. For example, in section II of the Circuit Court's October 10, 2024 Order, the Court stated the following:

> A single protest that delays a construction project for hours on a single day, but does not precipitate a breach or non-performance of any contract, does not amount to tortious interference with a business relationship under West Virginia law. 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. *See Fass,* 177 W. Va. at 52. This Court finds that MVP did not, and could not plausibly, allege that the hours-long delay at issue in this case adversely impacted the federal regulation or permitting of the pipeline project (which has now been completed), or placed MVP's easement grants in any jeopardy.
>
> Taking all the allegations in the complaint as true, and considering MVP's explanation of its theory of liability at the hearing in this matter, it is clear that MVP's claim is premised on the proposition that it can recover damages under a theory of tortious interference because, by obstructing pipeline work, Ms. Zinn made MVP's performance of its contractual obligations more expensive. MVP cites no authority to support its expansive theory of liability, under which interfering with a construction project creates a cause of action for tortious interference for any damages incurred during a brief period of delay, even absent any allegation that any contract or relationship with any third party was actually affected by the delay. As a matter of law, this theory of liability cannot sustain a cause of action for tortious interference. *See Webb v. Paine,* 515 F. Supp. 3d 466,485 (S.D. W. Va. 2021).

JA 0006-0007.

Petitioner's real objection is that the Circuit Court found that those facts, even when granted all deference required for Rule 12(b)(6) motions, simply don't state a cause of action against these Respondents. Petitioner's legal arguments are addressed in detail below, but it cannot plausibly be argued that the Circuit Court ignored the well pled facts of Petitioner's case.

The Circuit Court's consideration of those facts is evident in the plain language of the Court's opinion cited above.

C. The Circuit Court correctly applied controlling precedent regarding the elements of the trespass cause of action asserted in Petitioner's Complaint.

[Response to Assignment of Error No. 2]

i. West Virginia law has long recognized that an easement is not a possessory interest, and cannot support a cause of action for trespass.

a. *Smoot v. Am. Elec. Power* is dispositive of MVP's trespass-to-land theory of liability.

MVP's alleged easement rights cannot form the basis for a trespass claim. In *Smoot ex rel. Smoot v. Am. Elec. Power*, 222 W. Va. 735, 671, S.E.2d 740 (2008), the Supreme Court of Appeals of West Virginia held that an easement or right of way agreement does ***not*** amount to a possessory interest giving rise to an assertion of trespass against third parties. In the face of the defendant power company's attempt to raise a trespass defense in a personal injury action, *Smoot* reaffirmed the longstanding principle prohibiting companies from "rely[ing] on the defense of trespass on real property in which they only had a right of way." 222 W. Va. at 742, 671 S.E.2d at 747 (citing *Sutton v. Monongahela Power Co.*, 151 W. Va. 961, 158 S.E.2d 98 (1967)). In *Smoot*, the utility company "did not own the land upon which Mr. Smoot allegedly trespassed" and therefore could not assert a defense of trespass to land. So too here: MVP does not own the land upon which Ms. Zinn purportedly trespassed and therefore cannot assert a claim of trespass to land.[2]

Consistent with *Smoot*, numerous other state and federal courts hold that easements are

[2] *Smoot* clarified that *Huffman v. Appalachia Power Co.*, 187 W. Va. 1, 415 S.E.2d 145 (1991), upon which MVP relies, "recognizes a trespass in climbing [the power company's] transmission tower, ***not in being on the land where the tower stood***." *Smoot*, 222 W. Va. at 742 n.14, 671 S.E.2d at 747 n.14 (emphasis added). Thus, *Huffman* provides no support for MVP's trespass-to-land theory of liability. Respondents address MVP's trespass-to-equipment theory of liability in Section III(D)(i)(d), *infra*.

nonpossessory in nature. *See*, *e.g.*, *United States Forest Service v. Cowpasture River Preservation Association*, 590 U.S. 604, 613 (2020) (collecting authorities and quoting *Kelly v. Rainelle Coal Co.*, 135 W. Va. 594, 604, 64 S.E.2d 606, 613 (1951), *overruled in part on other grounds by Kimball v. Walden*, 171 W. Va. 579, 301 S.E.2d 210 (W. Va. 1983)) ("easements grant only nonpossessory rights of use limited to the purposes specified in the easement agreement" or, in other words, a "limited privilege to 'use the lands of another[ ]'"); *Quintain Dev., LLC v. Columbia Nat. Res., Inc.*, 210 W. Va. 128, 135 556 S.E.2d 95, 102 (W. Va. 2001) (quoting RESTATEMENT (THIRD) PROPERTY § 1.2(1) (2000)) (the right created by an easement is "nonpossessory"). As "easements are not land" but "merely burden land that continues to be owned by another[,]" *Cowpasture*, 590 U.S. at 613, it is logical and entirely unsurprising that West Virginia's highest court does not permit mere right-of-way holders to assert claims of trespass to land. West Virginia law on this question is consistent with numerous other jurisdictions.[3]

Further, the easement and land license agreements referenced at Paragraph 6 of MVP's Complaint, *see* JA 0093-0112, establish conclusively that MVP's interest in the land at issue is nonpossessory.[4] Neither instrument contains any provision granting MVP exclusive possession

[3] *See*, *e.g.*, *Brookshire Katy Drainage Dist. v. Lily Gardens, LLC*, 333 S.W.3d 301, 312-13 (Tex. App. 2010) (holding that summary judgment was appropriate on trespass claim because, as an easement holder, plaintiff lacked the "ownership or right of possession" necessary to sustain a trespass action); *State ex rel. Green v. Gibson Circuit Court*, 246 Ind. 446, 449, 206 N.E.2d 135, 137 (1965) ("Traditionally, it has been held that an action for trespass [to real estate] cannot be maintained for an invasion of a right of way or easement. . . . [T]respass actions are possessory actions and [ ] the right interfered with is the plaintiff's right to the exclusive possession[.]"); *MCI Commc'ns Servs., Inc. v. Sec. Paving Co., Inc.*, No. 115CV01940LJOJLT, 2016 WL 1436521, at *3 (E.D. Cal. Apr. 12, 2016) (noting that "California courts have consistently held that an easement is not a possessory interest in land" and that plaintiff, who was granted right of way, therefore "failed to allege a possessory interest in the land" as "necessary to sustain an action for trespass").

[4] As Ms. Zinn argued below, without opposition from MVP, the Circuit Court was entitled to consider these property instruments in adjudicating her Motion. *See Mountaineer Fire & Rescue Equipment, LLC v. City National Bank of W. Va., et al.* 244 W. Va. 508, 528, 854 S.E.2d 870, 890 (2020):

> [W]hen a movant makes a motion to dismiss pleading pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure, and attaches to the motion a document that is

of, or the right to exclude third parties from, the land of the servient estate. *See* JA 0093 (November 30, 2017 Pipeline Right of Way and Easement Agreement between MVP and the Wiseman Living Trust granting MVP a right of way and easement "over, upon and across the lands of the Grantor"); JA 0098 (April 11, 2017 Land License Agreement between MVP and CXS providing MVP with "non-exclusive access over or across property owned or controlled" by CSX)[5]; *Cowpasture*, 590 U.S. at 613 ("easements grant only nonpossessory rights of use limited to the purposes specified in the easement agreement").[6]

b. <u>The inapposite authorities relied upon by MVP do not establish MVP's "actual possession" over the nonpossessory easements at issue.</u>

Unable to square its assertion that "easements and rights of way are possessory interests on which another may trespass" with *Smoot*, *see* Pet'r's Opening Brief, p. 9, MVP relies on a combination of inapposite authorities and policy arguments to support it position. *See* Pet'r's Opening Brief, pp. 8-9. But neither the cases cited by MVP nor the Restatement provide a compelling reason to ignore the clear teaching of *Smoot*, *et al.*: an easement holder has no

---

> outside of the pleading, a court may consider the document only if (1) the pleading implicitly or explicitly refers to the documents; (2) the document is integral to the pleading's allegations; and (3) no party questions the authenticity of the document.

The property instruments tendered to the Court by Ms. Zinn meet all three requirements of the *Mountaineer Fire* test. First, the Complaint explicitly refers to the easement documents at Paragraph 6 (JA0023). Second, the documents are integral to the pleading's allegations, as they set forth MVP's property interest in the Subject Property purportedly giving rise to its trespass claim. Third, MVP has not questioned the authenticity of these documents, which were provided by MVP in discovery.

[5] MVP repeatedly states that its license agreement with CSX grants MVP the right to "occupy, possess and use" the CSX roadway. *See* Pet'r's Brief at pp. 3, 5, 7, 11.

MVP has badly misread its agreement with CSX on this issue. The Land License Agreement between CSX and MVP grants MVP "a non-exclusive right to use" the CSX roadway, subject to the right of "Licensor"—i.e., CSX—"to occupy, possess, and use its property[.]" JA 0098.

[6] Contrary to MVP's suggestion, the Complaint contains no factual allegations that the Act of Congress or regulatory permits referenced within bestow MVP a possessory interest in the land in question. *See* Pet'r's Opening Brief, p. 9; JA 0022-23.

possessory interest in the land subject to the easement and cannot cry "trespass" based on a third parties' presence on the *land*.

Tellingly, MVP does not cite a single case recognizing a cause of action for trespass by an easement holder against a third party. MVP's authorities on the issue of "actual possession" are easily distinguishable from *Smoot* and the unbroken line of authorities holding that easements are nonpossessory.

Specifically, *Belcher v. Greer*, 181 W. Va. 196, 382 S.E.2d 33 (1989), does not assist Petitioner. The *holding* of *Belcher* was that plaintiff had no standing to bring an action for wrongful conversion of mineral interests while the estate had been forfeited to the State, and that plaintiff regained standing to sue upon redemption of title. *Id.* at 197-98, 34-35. The brief, three-sentence footnote discussing "actual possession" in *Belcher* is *dicta*. *Id.* at 198 n.1, 35 n.1. Moreover, unlike *Smoot*, *Belcher* contains no discussion whatsoever of easements or rights-of-way and does not consider whether easement and right-of-way holders actually *possess* the land upon which their easement/right-of-way lies.

Brown v. Crozer Coal & Land Co., 144 W. Va. 296, 107 S.E.2d 777 (1956), in turn, addresses a dispute regarding title to land in an action where the plaintiff had alleged *damage to property* by the defendant coal company. *Id.* at 297-98, 780. The coal company in that case raised a defense of defective title to part of the land in question, and the Court found that regardless of whether title had previously been defective, the plaintiffs had nevertheless obtained title by adverse possession. *Id.* at 298, 307-08, 782, 785. In other words, the *Brown* Court treated actual possession as *prima facie* evidence of proper title, without requiring further proof of title—it did ***not*** suggest that it was redefining "actual possession" to encompass easement or right-of-way interests that are explicitly recognized as nonpossessory. In fact, like *Belcher* and unlike *Smoot*, *Brown* contains

no discussion whatsoever of easements or rights-of-way.

Nor do *Cottrell v. Nurnberger*, 131 W. Va. 391, 396, 47 S.E.2d 454, 457 (1948), or *CDS Family Trust, LLC v. ICG, Inc.,* No. 13-0376, 2014 W. Va. LEXIS 2 (W. Va. Jan. 15, 2014), speak at all to the question of whether an easement holder may bring a trespass claim against a third party.

The provisions of the Restatement cited by MVP do not help them on this point. These provisions simply speak to the breadth of remedies available to enforce a servitude, but do not clarify *against whom* easement holders may employ such remedies. Nothing in the provisions of the Restatement cited by MVP indicates that the terms of an easement—i.e., a land contract between the easement holder and servient estate—give rise to a cause of action by the easement holder against non-parties to the contract. *Smoot* and *Huffman*, in turn, clarify that while easement holders may assert trespass claims against third parties who trespass upon the *personal property of the easement holder*, they may not assert trespass claims against third parties who merely trespass upon the *land of the servient estate*. And even if there were provisions of the Restatement stating that an easement gives rise to a cause of action by the easement holder against third parties, they would conflict with *Smoot* and would not override the express holdings of the Supreme Court of Appeals of West Virginia.

c. MVP's policy arguments are not a basis for reversal.

MVP advances policy arguments better directed to the legislature regarding its grievances with the state of common law trespass jurisprudence in West Virginia. Pet'r's Opening Brief, pp. 4, 9. Of course, the role of this Court is to faithfully apply controlling precedents of the Supreme Court of Appeals – not to engage in policymaking or freestanding interest balancing. Regardless, MVP's policy concerns are overblown.

Contrary to MVP's suggestion, Defendants do not take the position that "a person cannot trespass on an easement[.]" *See* Pet'r's Brief, p.9. Rather, Defendants take the position, consistent with *Smoot*, *et al.*, that easement holders cannot bring a civil action for trespass to land that they do not own. This does *not* mean that individuals are "free to block driveways, access roads, construction sites, and roadways with impunity and [immunity] from arrest and civil liability." *See id.* First, assuming the damage element is met, individuals can be subject to civil liability for trespass by the *owner* of the land in question, as well as the owner or possessor of any personal property upon which there is a trespass. *See Huffman*, 187 W. Va. 1, 415 S.E.2d 145. Second, individuals are subject to arrest and criminal sanctions for trespassing on land subject to an easement regardless of whether the easement holder (as opposed to the owner) can maintain a civil cause of action for trespass. In fact, as MVP notes, Defendants in this case were arrested for, and convicted of, trespass. Third, easements can presumably be written so that the landowner's trespass claims are assigned to the easement holder. The problem for MVP is that the easements in this case were not so written.

If the legislature found the current state of West Virginia law insufficient to protect the interests of easement holders such as MVP, it could have created a statutory remedy to augment those criminal and civil remedies presently available to property owners and easement holders. But in the face of clear court precedent rejecting the notion that easement holders can cry "trespass" based upon a third party's presence on the land of the servient estate, the legislature has not done so. The sky is not falling under the present state of law, and regardless, it is not the role of this Court to disregard binding authorities such as *Smoot* to accommodate MVP's policy concerns.

d. MVP's trespass to equipment theory cannot rescue its Complaint.

Finally, MVP argues that its Complaint can survive a motion to dismiss based on a theory

of trespass to equipment. But MVP does not assert anywhere—either within or outside the four corners of the Complaint—that the drilling equipment at issue was even minimally damaged in any respect, or that it was property of MVP.[7] Thus, MVP's trespass-to-equipment theory cannot sustain the Complaint for the reasons set forth in Section III(C)(ii). While MVP suggests that the Circuit Court erred in relying on *Smoot* given the allegation of trespass to equipment, *see* Pet'r's Opening Brief, pp. 9-11, in fact, the Circuit Court rejected this theory of liability because MVP did not allege any damage to equipment. *See* JA 0005-6.

ii. Petitioner failed to allege damage to its real or personal property, a necessary element of all trespass causes of action, as opposed to mere monetary damages for construction costs of delay and/or loss of use.

Under long-established West Virginia law, "a 'trespass' is 'an entry on another man's ground without lawful authority, and doing some damage, however inconsiderable, to his real property." *Bailes v. Tallamy*, No. 21-1008, 2023 WL 2785792, at *3 (W. Va. Apr. 5, 2023) (memorandum decision) (quoting *EQT Prod. Co. v. Crowder*, 241 W. Va. 738, 828 S.E.2d 800 (2019)). *See also*, *e.g.*, *Meeks v. McClung*, No. 2:20-cv-00583, 2021 WL 36305326, at *1, *3-4, *7 (S.D. W. Va. May 3, 2021) (recommending dismissal of common-law trespass claims brought under West Virginia law because plaintiff failed to allege that defendants "damaged his real property in any manner"), *adopted by* WL 3013361 (S.D. W. Va. July 16, 2021). MVP presents no authority establishing that the trial court erred in applying this principle to the instant case.

As in the trial court below, *see* JA 00061, in its opening brief, MVP relies *solely* on the authority of *Moore v. Equitrans*, *L.P.*, 27 F.4th 211, 220-21 (4th Cir. 2022) for the proposition that a "plaintiff's recovery in a West Virginia trespass action [includes] . . . damages for loss of use."

[7] While MVP refers to the drill as "MVP's equipmenet"—*see* Pet'r's Brief, p. 10, it is careful not to directly represent ownership of the drill. And rightfully so as, on information and belief, MVP does not own the drill at issue in this case.

However, as set forth in the Circuit Court's dismissal order:

> *Moore* does not help MVP's trespass claim, because the availability of damages for lost profits in a proper trespass action does not alter the elements of trespass.
>
> MVP does not provide any authority contradicting the well-established proposition that *damage to property* is required to sustain an action for trespass under West Virginia law. . . . And a careful reading of *Moore* shows there is nothing inconsistent about the propositions that 1) damage to property is a necessary element of a trespass claim and 2) lost profits are recoverable in a proper trespass action.
>
> Tellingly, in the paragraph immediately preceding the portions of *Moore* cited by MVP, the Fourth Circuit noted that "***when residential real property is damaged***, the owner may recover the reasonable cost of repairing it" as well as additional costs associated with the ***damage***. *Moore*, 27 F. 4th at 220 (*quoting Brooks v. City of Huntington*, 234 W. Va. 607, 728 S.E.2d 97, 105-06 (2014)) (emphasis added). Neither *Moore*, nor any of the trespass cases cited in the Fourth Circuit's discussion of this issue in *Moore*, suggest that a plaintiff states a cognizable claim for trespass by alleging economic loss associated with a temporary and isolated intrusion onto its property that results in no damage to the property itself.
>
> In short, MVP's Complaint pleads no facts to suggest or permit a reasonable inference to be drawn that MVP's equipment suffered any damage as a result of the protest in this case. *See Fass,* 177 W. Va. at 52. Consequently, its trespass to equipment theory fails to state a claim for trespass as a matter of law.

JA0005-6 (bold and italics in original).

MVP confuses the elements of a trespass claim with the recovery available for a valid trespass claim. A careful review of the West Virginia cases cited by the Fourth Circuit on this issue in *Moore* confirms that that Circuit Court was correct in finding that neither *Moore*, nor the trespass cases cited by *Moore* in support of its damages analysis, recognizes a cause of action for trespass in the absence of any damage to property. *See Brooks*, 234 W. Va. at 610, 768 S.E.2d at 100 (plaintiffs' property was damaged by flooding); *Kincaid v. Morgan*, 188 W. Va. 452, 458, 425 S.E.2d 128, 134 (1992) (considering appropriate measure of damages in permanent encroachment

case); *Malamphy v. Potomac Edison Co.*, 140 W. Va. 269, 277-80, 83 S.E.2d 755, 760-62 (1954) (involving damage to property from fly ash and soot); *EQT Prod. Co.*, 241 W. Va. 738 (affirming jury award when EQT drilled wells on plaintiffs' property in excess of its implied surface rights); *Bethlehem Steel Corp. v. Shonk Land Co.*, 169 W. Va. 310, 288 S.E.2d 139 (1982) (addressing holdover damages that may accrue when a lessee remains on private property following termination of a tenancy).[8]

MVP entirely failed to plead the essential element of damage to property in its Complaint. *See generally* JA 0022-44; JA 0027 (alleging that "Defendant has caused damage to MVP in salaries, wages, and other expenses incurred through the delay of the project" with no reference to any property damage incurred). Thus, the Circuit Court was "*required* to dismiss the complaint pursuant to Rule 12(b)(6)." *Newton v. Morgantown Mach. & Hydraulics of W. Virginia, Inc.*, 242 W. Va. 650, 653, 838 S.E.2d 734, 737 (2019), quoting Louis J. Palmer, Jr. and Robin Jean Davis, *Litigation Handbook on West Virginia Rules of Civil Procedure*, 406-07 (5th ed. 2017) (emphasis added, quotations and citation omitted).

MVP's untimely insinuation that barbed wire was damaged in the course of the protest at issue does not rescue the Complaint from this fatal deficiency.[9] MVP ignores the principle, subject

[8] With respect to the *Bethlehem* plaintiff's claim that the defendant had trespassed on a tract of land outside the lease at issue, the defendant was held liable for the value of the coal mined by the defendant, less the reasonable cost of removal. 169 W. Va. at 323-24, 288 S.E.2d at 146-47. This award is consistent with the notion that damage to property—e.g., removal of coal—is the proper measure of damages in a trespass claim. With respect to the award of holdover damages, as Judge Kleeh of the Northern District of West Virginia Federal Court recently recognized, an action to recover damages in the case of a holdover tenancy properly sounds in a claim for breach of contract, not trespass. *See Big Brother & Holding Co., LLC v. Certified Pressure Testing, LLC*, No. 2:20-CV-41, 2022 WL 16857330, at *2-3 (N.D. W. Va. Nov. 10, 2022).

[9] MVP's assertion that "Respondents' Counsel in this case admitted there was property damage during the September 27, 2024 hearing" (*see* Pet'r's Opening Brief, p. 12) is flagrantly inaccurate. Review of JA 0128-129, which MVP cited in support of this claim, reveals no such admission. Counsel's comments on the fence at the hearing, in their entirety, were as follows:

to limited exceptions inapplicable to the police report at issue, "that circuit courts considering motions to dismiss under Rule 12(b)(6) should confine their review to the four corners of the complaint . . . and may not consider extraneous documents." *Smith v. Elk Rivers Boots and Saddle Club, Inc.*, No. 23-ICA-536, 2025 WL 327382, at *2 (W. Va. Ct. App. Jan. 29, 2025) (quoting *Mountaineer Fire & Rescue Equipment, LLC*, 244 W. Va. at 526, 854 S.E.2d at 888).

MVP has not identified and cannot identify any portion of the *Complaint itself*—or any of the exhibits attached to the Complaint, for that matter (JA 0031-44)—which establishes the element of property damage or permits inferences to be drawn that this element exists. *See Boone v. Activate Healthcare, LLC*, 245 W. Va. 476, 481, 859 S.E.d 419, 424 (2021) (quoting *Fass v. Nowsco Well Serv., Ltd.*, 177 W. Va. 50, 52, 350 S.E.2d 562, 563 (1986)). Thus, the Circuit Court was required to dismiss the Trespass count. *See Newton*, 242 W. Va. at 653, 838 S.E.2d at 737.[10]

D. The Circuit Court properly dismissed Petitioner's claims for tortious interference, violation of the Critical Infrastructure Protection Act, W. Va. Code § 61-10-34(d)(1), and civil conspiracy.

> I briefly want to address the fence issue, Your Honor, because that comes solely from the reply brief – MVP's response brief and that's nowhere within the four corners of the complaint, not even in the exhibits. But even if this Court were to consider this allegation, which we submit that it shouldn't, there's no allegation that MVP had the possessory interest in the fence and based on the report, which is really the basis for MVP's claim and I would suggest, if anything, that was contractor's fence rather than MVP's. But again, we are in the realm of speculation here because we are wholly outside the four corners of the complaint and what we believe is appropriate for consideration.

[10] MVP defends its Complaint wholeheartedly to this Court, and has not argued or suggested to this Court, even in the alternative, that the Complaint should have been dismissed without prejudice. MVP does not argue to this Court that it was entitled to amend its complaint and attempt to cure its utter failure to allege an essential element of trespass.

MVP's unstated grievance with the trial court's order dismissing the trespass claim (and perhaps other claims) may be that it was dismissed with prejudice, but MVP has waived this argument as to all claims by failing to raise it in its opening brief. *See*, *e.g.*, *Hupp v. Monahan*, 245 W. Va. 263, 268 n.6, 858 S.E.2d 888, 893 n.6 (2021) (quoting *Tiernan v. Charleston Area Med. Ctr., Inc.*, 203 W. Va. 135, 140 n.10, 506 S.E.2d 578, 583 n.10 (1998)) ("Issues not raised on appeal or merely mentioned in passing are deemed waived."); *Mountain Valley Pipeline, LLC v. Tuhus*, Nos. 5:23-cv-00625, 5:23-cv-00626, 2024 WL 4122848, *3 (S.D. W. Va. Sep. 9, 2024) (declining to consider argument raised for the first time in reply brief and citing authorities holding that arguments raised for the first time on reply are deemed waived).

[Response to Assignment of Error No. 3]

i. **The Circuit Court properly dismissed Petitioner's claim for tortious interference.**

a. Petitioner never alleged that a contractual or other business relationship was breached or lost as a result of the five-hour protest at issue in this case, and this jurisdiction has never recognized a cause of action for tortious interference based on mere hindrance of performance.

A single protest that delays a construction project for five hours on a single day, but does not precipitate a breach or non-performance of any contract, does not amount to tortious interference with a business relationship under West Virginia law. MVP's Complaint contains no facts suggesting or permitting 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. *See Boone*, 245 W. Va. at 481, 859 S.E.2d at 424 (quoting *Fass*, 177 W. Va. at 52, 350 S.E.2d at 563). As such, the Circuit Court was required to dismiss. *See Newton*, 242 W. Va. at 653, 838 S.E.2d at 737.

Petitioner's Complaint alleges that MVP was hindered in its construction project by Defendants, who are alleged to have obstructed construction of the pipeline for an unspecified number of hours (perhaps five, *see* JA 0032), and thus suffered expense due to that delay. MVP did not, and could not plausibly, allege that the minimal delay at issue in this case adversely impacted the federal regulation or permitting of the pipeline project (which has now been completed), or placed MVP's easement grants in any jeopardy.

MVP lacks any authority to support its expansive theory of liability, under which any party claiming increased expenses in the performance of any activity associated with a contract or business relationship can sue for tortious interference, even when no contract or relationship with a third party was actually affected. As a matter of law, this theory of liability cannot sustain a cause of action for tortious interference. *See Webb*, 515 F. Supp. 3d at 485.

In *Webb*, Judge Copenhaver carefully considered, and rejected, the plaintiff's argument that a claim for tortious interference in West Virginia can rest solely upon an action that makes "performance of the contract more burdensome or expensive." *Id.* Judge Copenhaver distinguished between liability based on a "theory of inducement" – i.e., where "the improper interference induce[s] or cause[s] the third party to not perform or to breach the contract with plaintiff" – from liability based on a "theory of hindrance" – i.e., where "the defendant hinders the plaintiff's performance of its obligations to the third party." *Id.* After noting that the hindrance theory was "predicated on a broad expansion of liability under West Virginia state law[,]" Judge Copenhaver declined to recognize the hindrance theory and consequently granted summary judgment against plaintiff's tortious interference claim. *Id.* at 486-87.

MVP's attempt to distinguish *Webb* on the grounds that the case involved "some theoretical amount of damage without actual out-of-pocket damages"— *see* Pet'r's Opening Brief, p. 14—is unsupported by a careful reading of *Webb* itself. In considering whether to recognize a "hindrance theory" of liability, Judge Copenhaver noted that, while some jurisdictions had adopted a hindrance theory of liability,

> In [*Price v. Sorell*, 784 P.2d 614, 616 (Wy. 1989)], the Wyoming Supreme Court declined to extend liability to hindrance torts as provided for in § 766A, even though the court had previously relied on §§ 766 and 766B, finding that the mere requirement to show performance became more "expensive or burdensome" would allow a plaintiff to recover where proof of damages is "too speculative and subject to abuse to provide a meaningful basis for a cause of action." 784 P.2d at 616. The court contrasted § 766A with §§ 766 and 766B, in which **"breach or non-performance of a contract, or the loss of a prospective contractual relation, is a reasonably bright line that reduces the potential for abuse of the causes of action."** *Id.*

Id. at 486-87 (emphasis added).

Similarly, Judge Copenhaver observed that the Third Circuit had declined to extend Pennsylvania law to encompass a hindrance theory of liability for similar reasons, characterizing it as an:

> "amorphous" expansion of liability that is "ill-conceived, threatening both fairness and efficiency." [*Windsor Securities, Inc. v. Hartford Life Ins. Co*, 986 F.2d 655, 663 (3d Cir. 1993)] (citing numerous commentators); *see also* [*CMI, Inc. v. Intoximeters, Inc.*, 918 F. Supp. 1068, 1079 (W.D. Ky. 1995)] ("The actual language of § 766A is so all encompassing and vague that to adopt it directly would cause tremendous confusion without creating a clear societal benefit.").

Id. at 486-87.

While Judge Copenhaver's opinion was grounded in part in the obligation of federal courts sitting in diversity to reject novel interpretations of state law that expand liability, *see id.* at 486-87, Ms. Zinn submits that it is nonetheless highly persuasive authority. Simply put, Judge Cophenhaver—like MVP—has found no West Virginia authority recognizing a cause of action for tortious interference under the circumstances of this case—i.e., where no breach, non-performance, or loss of contract has been alleged.[11] *Cf. Mountaineer Fire & Rescue Equipment, LLC*, 244 W. Va. at 524-25 (reversing trial court's dismissal of tortious interference claim when pleading alleged that "Mr. Beam's actions forced Mountaineer Fire *to materially breach a commission contract with a third party*") (emphasis added).

b. Petitioner has failed to state a claim for tortious even under the expansive "hindrance" theory of liability.

Even if this Court were to accept MVP's invitation to broadly the scope of tortious

[11] West Virginia is not alone in this regard. *See*, *e.g.*, *Mprove v. KLT Telecom, Inc.*, 135 S.W.3d 481, 495 (Mo. Ct. App. 2004) (noting that "no appellate court has ever recognized or adopted § 766A as a valid cause of action in tort in Missouri" and that "a fair number of other courts and respected legal commentators have expressed a contrary view on the merits of § 766A"); *Koehler v. Cty. of Grand Forks*, 2003 ND 44, ¶ 25, 658 N.W.2d 741, 748 ("Liability under § 766A has been questioned, however, and has not been universally accepted."); *Price*, 784 P.2d at 616.

interference claims cognizable under West Virginia, the Complaint here would still be insufficient to overcome Respondents' motions to dismiss. Petitioner defends its pleading as follows, at Pet'r's Brief, pp. 14-15:

> MVP has specifically pleaded MVP's ongoing operations to construct a pipeline pursuant to a specific federal statute authorizing 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. . . . 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.

The only *contracts* MVP identifies here are its easements and right of way agreements. *See* JA 0093-0112. Even applying the expansive hindrance theory of liability, rejected by Judge Copenhaver, MVP cannot explain, under any set of facts, how the protest at issue made performance of its obligations under these contracts more expensive, or otherwise affected its contractual relationships with landowners in any way. Moreover, MVP's assertion of a "business expectancy for the construction of the Project" is a legal conclusion, not a factual allegation. MVP's Complaint identifies no entities with whom this "business expectancy" exists. While MVP may have received permits from FERC and other governmental entities and Congressional authorization for the completion of the project, governmental authorization does not a business relationship make. Petitioner's bare-bones assertion of its "business expectancy" is unsupported by any particular factual allegations. While this Court should not recognize the novel hindrance theory of liability advanced by MVP, it can also sustain the trial court's order based on MVP's failure to allege facts that would warrant relief even under such a theory.

ii. **Petitioner never alleged any damage to "personal or real property"—as explicitly required by W. Va. Code §61-10-34 (d)—to support a cause of action for civil liability under the West Virginia Critical Infrastructure Protection Act.**

W. Va. Code §61-10-34(d), the so-called Critical Infrastructure Act, provides in subsection (1) as follows:

> 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.

WV Code 61-10-34(d)(1) (underscore and bold added).

Petitioner's argument that the Circuit Court erred in dismissing its cause of action under the Critical Infrastructure Act is a convoluted round robin of citations to cases and statutes, none of which contradict the plain language of WV Code 61-10-34(d)(1), which created civil liability for "damages to personal or real property"— and nothing else. *See State v. Finley*, 250 W. Va. 593, 906 S.E.2d 246, 252-53 (2023) (quoting Syl. Pt. 11, in part, *Brooke B. v. Ray C.*, 230 W. Va. 355, 738 S.E.2d 21 (2013)) (courts must "consider whether the language of the statute is plain" and "may not 'arbitrarily read into a statute that which it does not say.'").

Petitioner's Complaint does not allege any damage to its personal or real property. Failing that, Petitioner is reduced to concocting a totally speculative theory of damage from purported damage to a fence that is not mentioned in the Complaint and that, even in its current brief to this Court, it does not claim to own, damage which it claims that photographs suggest was not there before the pipeline. This is a text book model of pure speculation—in an appellate brief, no less—and is no substitute for submission of a well-pled Complaint.

iii. **Civil Conspiracy has never constituted a separate cause of action in this jurisdiction.**

Petitioner cites no authority to contradict the Circuit Court's holding that civil conspiracy does not constitute a separate cause of action. *Dunn v. Rockwell,* 255 W. Va. 43, 57, 689 S.E.2d

255, 269 (2000) ("A civil conspiracy is not a *per se*, stand-alone cause of action; it is instead a legal doctrine under which liability for a tort may be imposed on people who did not actually commit a tort themselves but who shared a common plan for its commission with the actual perpetrator(s)"). JA 0248.

Instead, Petitioner merely argues that if its other causes of action (which constitute stand-alone torts) had not been dismissed, it could have proceeded with conspiracy claims. Pet'r's Brief at 16-17. That is an argument with which the Circuit Court (JA 0248) and Respondents concur; unfortunately for Petitioner the argument in no way advances Petitioner's appeal, absent a finding of error elsewhere in the Circuit Court's orders of dismissal. No such error has been documented in Petitioner's brief.

E. The Court properly granted Respondents' Rule 12(b)(6) motion to dismiss and properly entered the October 10, 2024 and October 29, 2024 orders of dismissal.

[Response to Assignment of Error No. 4]

Petitioner's argument at p. 17-18 of its Brief is nothing more than a repetition, in one section, of all of its arguments on the individual causes of action and the Circuit Court's purported error in dismissing them. *See* Pet'r's Brief at 17-18 ("As further outlined in each of the sections above, MVP adequately pleaded the above causes of action[.]"). No new theory of error is asserted with respect to the Circuit Court's decisions recited herein by Petitioner. No further discussion by Respondent is required here.

IV. CONCLUSION

Petitioner had a full opportunity to state its claims below, and failed to do so within the controlling decisions of this jurisdiction. The Circuit Court accorded Petitioner's factual assertions, and all reasonable inferences to be drawn therefrom, the weight to which they are entitled, and nonetheless found that Petitioner failed to state a claim as a matter of law. The Circuit

Court's decisions are fully supported by the record and precedent, and should be affirmed.

Respectfully submitted for Respondents,

MARTHA ANN ZINN
MARY BETH NAIM
JUDY KAY SMUCKER
JESSICA GRIM

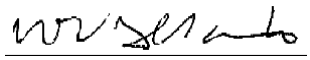
By Counsel[12]

William V. DePaulo, Esq. #995
P. O. Box 1711
Lewisburg, WV 24901
Tel: 304-342-5588
Fax: 866-850-1501
william.depaulo@gmail.com

V. CERTIFICATE OF SERVICE

I hereby certify that on March 18, 2025, I filed the foregoing Respondent's Brief with the Clerk of this Court *via* FileAndServeXpress, and thereby served a copy thereof on Petitioner's counsel as follows:

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



[12] Counsel of record wishes to acknowledge the significant contribution to this Brief by Jonathan Sidney, Esq., Pro Hac Vice Counsel below.