

controversy. *See* 28 U.S.C.A. § 1441(a) (West 1994). Equitable also filed a counterclaim admitting that the pipeline was placed across Mullins' property in error and requesting an injunction preventing Mullins from interfering with the removal of the line. During the pendency of the case Mullins did allow Equitable to reroute the pipeline and remove the old line from his property.¹

Discovery having been completed in the case, Equitable filed the present motion for summary judgment, contending that Mullins can prove no damages for the trespass. The motion for summary judgment has been briefed and argued and is ripe for decision.

The facts underlying this controversy are largely undisputed.²

The real estate in question is a vacant tract of slightly less than two acres located in rural Dickenson County at a place called Bad Ridge. It once was the site of a school house and Mullins' great grandmother, Eva Mullins, purchased the tract from the school board in the 1950s and owned it until her death five years ago. In 1986 or 1987 Equitable (through a contractor) constructed an eight-inch buried

¹ Equitable thus agrees that its counterclaim is now moot and should be dismissed.

² Equitable has submitted in support of its motion transcripts of discovery depositions and answers to interrogatories and requests for admission by Mullins. Mullins has not submitted any additional evidence in opposition to the motion.

natural gas line through the area.³ Equitable obtained right-of-way agreements with the owners of the property adjoining the Mullins tract but for some reason the line as built crossed one edge of the Mullins tract, unknown to Mrs. Mullins.

At her death Mrs. Mullins left the tract to the plaintiff's parents and they in turn deeded it to him in 1998 as a gift. He began investigating the location of the pipeline and obtained a survey in October of 2002 that showed that sixty to seventy feet of the line was on his property. This suit then followed, in which the plaintiff in his motion for judgment in state court⁴ alleged the trespass and claimed that the pipeline "decreased the value of the property, has destroyed an existing well, deprived [him] of water on his property and deprived [him] of the use and enjoyment of his land." (Mot. for J. ¶ 5.)

In his discovery deposition in this case, Mullins testified that it was his understanding that when the pipeline had been put in 1986 or 1987 the "top casing" on a water well on the property had been knocked off by a bulldozer and dirt fell down in the well so that he cannot now get to any water. (Mullins Dep. 11, 17, 46-

³ Equitable is in the business of producing natural gas and this is a "gathering line" used to transmit natural gas from certain of Equitable's gas wells.

⁴ Under Virginia law, a motion for judgment is the equivalent of a civil complaint for damages. *See* Va. Code Ann. § 8.01-271 (Michie 2000); Rule 3.3 of the Rules of Virginia Supreme Court.

47.) However, he has not made any effort to reestablish the well (*id.* at 11) and believes that underground coal mining has affected any available water because adjacent property has lost water from such mining (*id.* at 13-14). Mullins further testified that in his opinion the property was now worth \$10,000 but would be worth \$15,000 with the well fixed. (*Id.* at 61-62.)

In his answers to interrogatories, made after his deposition, in response to the request that he itemize his claimed damages, Mullins stated: “Gas line under my property is inherently dangerous. I cannot build close to the line. I am asking for all royalties due me, damages for trespassing, destruction of top soil, damage to well, cost of reclaiming property, environmental damages, triple damages for trespassing if appropriate.” (Answers to Interrogs. ¶ 7.) In his deposition, Mullins also indicated that he was claiming “royalties” of “a million dollars” for “all the gas that has went through [the gas line].” (Mullins Dep. 60, 61.) No expert testimony as to damages has been disclosed by the plaintiff.

II

Summary judgment is appropriate when there is “no genuine issue of material fact,” given the parties’ burdens of proof at trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Rule 56 “mandates the entry of summary judgment, after

adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Summary judgment is not "a disfavored procedural shortcut," but an important mechanism for weeding out "claims and defenses [that] have no factual basis." *Id.* at 327.

Although the moving party must provide more than a conclusory statement that there are no genuine issues of material fact to support a motion for summary judgment, it "need not produce evidence, but simply can argue that there is an absence of evidence by which the nonmovant can prove his case." *Cray Communications, Inc. v. Novatel Computer Sys., Inc.*, 33 F.3d 390, 393-94 (4th Cir. 1994) (quoting 10A Charles Alan Wright, et al., *Federal Practice and Procedure* § 2720, at 10 (2d ed. Supp. 1994)); *see also Celotex*, 477 U.S. at 325 ("[T]he burden on the moving party may be discharged by 'showing'—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case."). Once the moving party has met its burden, "the nonmoving party must come forward with 'specific facts showing that there is a *genuine issue for trial*.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting Fed. R. Civ. P. 56(e)). The nonmoving party's evidence must be probative, not

merely colorable, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 256, cannot be “conclusory statements, without specific evidentiary support,” *Causey v. Balog*, 162 F.3d 795, 801-02 (4th Cir. 1998), cannot be hearsay, *Evans v. Techs. Applications & Serv. Co.*, 80 F.3d 954, 962 (4th Cir. 1996), and must “contain admissible evidence and be based on personal knowledge.” *Id.*

Equitable asserts in its motion for summary judgment that Mullins is unable to prove any actual damages as a result of the admitted trespass. At oral argument, counsel for Mullins set forth three types of damages that would be alleged at trial: (1) injury to the well on the property; (2) the benefit to Equitable from the trespass based on the quantity of gas flowing through the pipeline; and (3) disturbance to the property when Equitable removed the pipeline. Those categories of damages will be considered seriatim.

A

Mullins claims damages for the injury caused to the well on the property in 1986 or 1987 by Equitable when the pipeline was installed. He asserts a diminution in value of the property because of the lack of a functioning water well. However, I agree with Equitable that any such claim is barred by the applicable five-year statute of limitations under Virginia law. *See* Va. Code Ann. § 8.01-243(B) (Michie 2000) (providing period of limitations for actions for injury to property). The plaintiff has

suggested no defense to this statute of limitations and I find that any recovery for damages to the well is time-barred.

B

The normal measure of damages for the tort of trespass is the loss to the injured party. However, a claimant may under Virginia law⁵ waive the tort and seek recovery for the benefit to the trespasser on the theory of an implied contract or unjust enrichment. *See Raven Red Ash Coal Co. v. Ball*, 39 S.E.2d 231, 233-35 (Va. 1946).⁶ Mullins contends that he is entitled to such a recovery based on a portion of the value of the natural gas transmitted through the pipeline.

There are several obstacles to the plaintiff's theory of recovery. Mullins did not seek such damages in his original suit, but claimed only damages for trespass. *See Payne v. Consolidation Coal Co.*, 607 F. Supp. 378, 382 n.2 (W.D. Va. 1985) (holding that where plaintiffs brought a trespass action, they may seek only trespass damages and not damages based on the benefit to the trespasser). Following the defendant's motion for summary judgment, Mullins filed a motion to amend "to ask

⁵ The parties do not dispute that Virginia substantive law applies to this diversity action. *See Erie R.R. v. Tompkins*, 304 U.S. 64, 78-79 (1938).

⁶ Such a theory of recovery may be available only when the trespass was intentional or wilful, and not accidental. *See id.* at 239. Neither party here knows why the pipeline went across the Mullins property, but every trespass is presumed wilful and the burden is on the defendant to show that it was not. *See Wood v. Weaver*, 92 S.E. 1001, 1003 (1917). I will thus assume that the trespass here was intentional.

for unjust enrichment in his pleadings against defendant.” (Mot. to Amend Pleadings.) It would be unfair at this late date, where discovery has been closed and on the eve of trial, to expect the defendant to defend a theory of recovery not pleaded. Nevertheless, I do not rely on this procedural ground, since even were I to allow the motion to amend, the plaintiff is substantively precluded from this measure of damages and any amendment would be futile.

Where recovery is permitted under an implied promise to pay, it is deemed that there is an obligation “to pay the plaintiff the ‘fair value of the benefits received’ by him, the defendant, for the use and occupancy of the land.” *Preston Mining Corp. v. Matney*, 90 S.E.2d 155, 158 (Va. 1955) (quoting *Raven Red Ash Coal Co. v. Ball*, 39 S.E.2d at 238). The evidence in the record is that Equitable paid neighboring landowners one dollar per foot for right-of-way easements over their property for the pipeline. (Hall Dep. 38.) There is no evidence that Equitable paid other landowners on the basis of the quantity of gas transmitted. Equitable did not need Mullins’ land for the pipeline, evidenced by the fact that Equitable quickly relocated it once this suit was filed, so that any benefit to Equitable from the use and occupancy of Mullins’ property was either the reasonable price for the right-of-way or the cost of a substitute location—in other words, any extra cost to Equitable in avoiding the Mullins land

when it first installed the pipeline. Of course, those are not the amounts Mullins seeks in this action.

Mullins has apparently convinced himself (aided and abetted by his lawyer) that because of Equitable's trespass, he is entitled to a portion of the value of the gas that flowed through the pipeline, which he calls a "royalty," and which he estimates to be a million dollars. But there is no evidence that such royalty payments are the reasonable or normal cost of a gas pipeline right-of-way. This case is not like *Raven Red Ash Coal Co. v. Ball*, where the trespassing coal company had transported coal from other tracts across the plaintiff's land and the evidence showed that the prevailing rate of payment for a right-of-way for the transporting of coal was one cent per ton. *See* 39 S.E.2d at 239. That makes sense, because coal haul privileges for which wheelage is paid are normally needed only in restricted circumstances, unlike gas pipelines, which frequently cross others' property. *See United States v. 180.37 Acres of Land*, 254 F. Supp. 678, 684 (W.D. Va. 1966) (describing wheelage).

Moreover, this is not a situation where the use of the plaintiff's property produced the defendant's business profits. For example, in *Edwards v. Lee's Administrator*, 96 S.W.2d 1028, 1033 (Ky. 1936), the trespasser was required to give up profits made by selling admissions to an underground cave located on the plaintiff's property. Unlike the cave in *Edwards*, Mullins' property was not the

unique cause of any of Equitable's revenues. None of the gas transmitted came from Mullins' land and the evidence is that Equitable's business could have just as easily been conducted without the use of Mullins' property. See Daniel Freidmann, *Restitution for Wrongs: The Measure of Damages*, 79 Tex. L. Rev. 1879, 1892-94 (2001) (noting that where the trespasser would have made similar profits using another plot of land, restitution liability ought not to be based on profits).

C

Finally, Mullins claims damages because his property was injured when Equitable came back after this suit was filed and removed the pipeline. According to his attorney, Mullins will testify that the property was left in a "big mess." (Resp. to Mot. for Summ. J. 2.) However, the entry of Equitable on Mullins' property to remove the pipeline was not a trespass. It was by agreement of the parties. If Equitable has damaged the land in contravention of this agreement, Mullins may have a separate suit, but it is not part of the present trespass action.⁷

⁷ After the suit was filed, Equitable rerouted its gas line, but left the unused pipeline on Mullins' property. At his deposition, Mullins stated that he now had no objection to the removal of the pipeline and his attorney agreed, provided that a plan could be provided by Equitable to remove the line in a proper manner. (Mullins Dep. 52-53.)

III

For the foregoing reasons, Mullins is unable to prove, either legally, factually, or both, any of the actual damages claimed by him. It is thus appropriate to enter summary judgment for the defendant as to any such damages. *See Priebe v. Autobarn, Ltd.*, 240 F.3d 584, 589 (7th Cir. 2001) (holding that in the absence of proof of damages summary judgment is proper). There was an admitted trespass, however, and Mullins is entitled to nominal damages. *See Raven Red Ash Coal Co. v. Ball*, 39 S.E.2d at 233. The court will thus grant the motion for summary judgment as to any damages other than nominal damages and enter final judgment in favor of the plaintiff in the amount of one dollar.

A separate judgment consistent with this opinion is being entered herewith.

DATED: July 29, 2003

United States District Judge